CBP Enforcement Law Course



U.S. Customs and Border Protection

Fifteenth Edition – 2012

Office of Chief Counsel
U.S. Customs and Border Protection

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FOREWORD TO THE FIFTEENTH EDITION - 2012

The *CBP Enforcement Law Course* is designed to address the major areas of law relevant to CBP's law enforcement mission. U.S. Customs and Border Protection (CBP) was created as a result of the Homeland Security Act of 2002, supplemented by the President's Modified Reorganization Plan in 2003. As of March 1, 2003 this reorganization transferred the U.S. Customs Service, components of the Immigration and Naturalization Service, and the agricultural import and entry inspection functions of the U.S. Department of Agriculture to the Department of Homeland Security (DHS), then renamed the U.S. Customs Service as U.S. Customs and Border Protection, moved Customs Investigations to U.S. Immigration and Customs Enforcement, and added Immigration Inspections, the Border Patrol, and Agriculture Inspections to CBP. CBP combines personnel from three separate departments of government (Treasury, Justice, and Agriculture) into a single agency charged with securing, managing, and controlling the borders of the United States.

The *CBP Enforcement Law Course* serves as a framework for the legal training provided by CBP Office of Chief Counsel attorney-instructors and as a legal resource for CBP enforcement personnel. Prior editions of this text were titled "*Law Course for Customs Officers"* and "*Law Course for Customs and Border Protection Officers."* This Fifteenth Edition has been renamed to reflect the expanded size and scope of CBP's law enforcement cadre.

The 2012 edition of the *CBP Enforcement Law Course* incorporates recent changes in the law that directly impact the agency's enforcement mission and includes new chapters addressing Border Patrol enforcement operations, agriculture enforcement operations, and immigration crimes. The chapters addressing forfeiture law and trade enforcement have been substantially revised. New sections addressing emergency search authority, material witness/Confrontation

Clause issues, and border search of electronic devices are also part of the 2012 edition.

The Office of Assistant Chief Counsel (Training), under the supervision of Associate Chief Counsel (Enforcement) Steven Basha, is responsible for researching, writing and publishing the *CBP Enforcement Law Course.* For more than thirty years, the Office of Chief Counsel has delivered legal training at the Glynco campus of the Federal Law Enforcement Training Center in Georgia. A satellite Chief Counsel legal training office was established at the Border Patrol Academy in Artesia, New Mexico in 2005.

While the *CBP Enforcement Law Course* provides an excellent overview of the major areas of law that govern CBP's enforcement operations, every case turns on its own facts. As always, CBP officers and agents are encouraged to consult their servicing Associate or Assistant Chief Counsel office for legal advice on individual cases.

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Chief Counsel
U.S. Customs and Border Protection

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Chapter One

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THE DECLARATION OF INDEPENDENCE

Action of Second Continental Congress, July 4, 1776

The Unanimous Declaration of the Thirteen United States of America

WHEN in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature's God entitle them, a decent Respect to the Opinions of Mankind requires that they should declare the causes which impel them to the Separation.

WE hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient Causes; and accordingly all Experience hath shewn, that Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the Forms to which they are accustomed. But when a long Train of Abuses and Usurpations, pursuing invariably the same Object, evinces a Design to reduce them under absolute Despotism, it is their Right, it is their Duty, to throw off such Government, and to provide new Guards for their future Security. Such has been the patient Sufferance of these Colonies; and such is now the Necessity which constrains them to alter their former Systems of Government. The History of the present King of Great Britain is a History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid World.

HE has refused his Assent to Laws, the most wholesome and necessary for the public Good.

HE has forbidden his Governors to pass Laws of immediate and pressing Importance, unless suspended in their Operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

HE has refused to pass other Laws for the Accommodation of large Districts of People, unless those People would relinquish the Right of Representation in the Legislature, a Right inestimable to them, and formidable to Tyrants only.

HE has called together Legislative Bodies at Places unusual, uncomfortable, and distant from the Depository of their public Records,

for the sole Purpose of fatiguing them into Compliance with his Measures.

HE has dissolved Representative Houses repeatedly, for opposing with manly Firmness his Invasions on the Rights of the People.

HE has refused for a long Time, after such Dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of the Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the Dangers of Invasion from without, and the Convulsions within.

HE has endeavoured to prevent the Population of these States; for that Purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their Migrations hither, and raising the Conditions of new Appropriations of Lands.

HE has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

HE has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries.
HE has erected a Multitude of new Offices, and sent hither Swarms of Officers to harrass our People, and eat out their Substance.

HE has kept among us, in Times of Peace, Standing Armies, without the consent of our Legislatures.

HE has affected to render the Military independent of and superior to the Civil Power.

HE has combined with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation:

FOR quartering large Bodies of Armed Troops among us;

FOR protecting them, by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States:

FOR cutting off our Trade with all Parts of the World:

FOR imposing Taxes on us without our Consent:

FOR depriving us, in many Cases, of the Benefits of Trial by Jury:

FOR transporting us beyond Seas to be tried for pretended Offences:

FOR abolishing the free System of English Laws in a neighbouring Province, establishing therein an arbitrary Government, and enlarging its Boundaries, so as to render it at once an Example and fit Instrument for introducing the same absolute Rules into these Colonies:

FOR taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

FOR suspending our own Legislatures, and declaring themselves invested with Power to

legislate for us in all Cases whatsoever.

HE has abdicated Government here, by declaring us out of his Protection and waging War against us.

HE has plundered our Seas, ravaged our Coasts, burnt our Towns, and destroyed the Lives of our People.

HE is, at this Time, transporting large Armies of foreign Mercenaries to compleat the Works of Death, Desolation, and Tyranny, already begun with circumstances of Cruelty and Perfidy, scarcely paralleled in the most barbarous Ages, and totally unworthy the Head of a civilized Nation.

HE has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the Executioners of their Friends and Brethren, or to fall themselves by their Hands.

HE has excited domestic Insurrections amongst us, and has endeavoured to bring on the Inhabitants of our Frontiers, the merciless Indian Savages, whose known Rule of Warfare, is an undistinguished Destruction, of all Ages, Sexes and Conditions.

IN every stage of these Oppressions we have Petitioned for Redress in the most humble Terms: Our repeated Petitions have been answered only by repeated Injury. A Prince, whose Character is thus marked by every act which may define a Tyrant, is unfit to be the Ruler of a free People.

NOR have we been wanting in Attentions to our British Brethren. We have warned them from Time to Time of Attempts by their Legislature to extend an unwarrantable Jurisdiction over us. We have reminded them of the Circumstances of our Emigration and Settlement here. We have appealed to their native Justice and Magnanimity, and we have conjured them by the Ties of our common Kindred to disavow these Usurpations, which, would inevitably interrupt our Connections and Correspondence. They too have been deaf to the Voice of Justice and of Consanguinity. We must, therefore, acquiesce in the Necessity, which denounces our Separation, and hold them, as we hold the rest of Mankind, Enemies in War, in Peace, Friends.

WE, therefore, the Representatives of the UNITED STATES OF AMERICA, in GENERAL CONGRESS, Assembled, appealing to the Supreme Judge of the World for the Rectitude of our Intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly Publish and Declare, That these United Colonies are, and of Right ought to be, FREE AND INDEPENDENT STATES; that they are absolved from all Allegiance to the British Crown, and that all political Connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as FREE AND INDEPENDENT STATES, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which INDEPENDENT STATES may of right do. And for the support of this Declaration, with a

firm Reliance on the Protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.

John Hancock.
GEORGIA, *Button Gwinnett, Lyman Hall, Geo. Walton.*
NORTH CAROLINA, *Wm. Hooper, Joseph Hewes, John Penn.*
SOUTH CAROLINA, *Edward Rutledge, Thos Heyward, junr., Thomas Lynch, junr., Arthur Middleton.*
MARYLAND, *Samuel Chase, Wm. Paca, Thos. Stone, Charles Carroll, of Carrollton*.
VIRGINIA*, George Wythe, Richard Henry Lee, Ths. Jefferson, Benja. Harrison, Thos. Nelson, jr., Francis Lightfoot Lee, Carter Braxton.*
PENNSYLVANIA, *Robt. Morris, Benjamin Rush, Benja. Franklin, John Morton, Geo. Clymer, Jas. Smith, Geo. Taylor, James Wilson, Geo. Ross.*
DELAWARE*, Caesar Rodney, Geo. Read.*
NEW YORK, *Wm. Floyd, Phil. Livingston, Frank Lewis, Lewis Morris*.
NEW JERSEY, *Richd. Stockton, Jno. Witherspoon, Fras. Hopkinson, John Hart, Abra. Clark.*
NEW HAMPSHIRE, *Josiah Bartlett, Wm. Whipple, Matthew Thornton.*
MASSACHUSETTS-BAY, *Saml. Adams, John Adams, Robt. Treat Paine, Elbridge Gerry.*
RHODE ISLAND AND PROVIDENCE, C. *Step. Hopkins, William Ellery.*
CONNECTICUT*, Roger Sherman, Saml. Huntington, Wm. Williams, Oliver Wolcott*.

The Constitution of the United States

PREAMBLE

WE THE PEOPLE of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this CONSTITUTION for the United States of America.

ARTICLE I

Section 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a Representative who shall not have attained to the age of twenty five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other Persons [see Amendment XIV]. The actual Enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each state shall have at least one Representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to chose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof [*see Amendment XVII*], for six years; and each Senator shall have one vote. Immediately after they shall be assembled in consequence of the

first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation [*see Amendment XVII*], or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be convicted without the concurrence of two thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

Section 4. The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators [*see Amendment XVII*].

The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

Section 5. Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and

nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal.

Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

Section 6. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time: and no person holding any office under the United States, shall be a member of either House during his continuance in office.

Section 7. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills. Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Section 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay

the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;—And

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Section 9. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or ex post facto Law shall be passed.
No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken [*see Amendment XVI*].

No tax or duty shall be laid on articles exported from any state.

No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from, one state, be obliged to enter, clear or pay duties in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

Section 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing it's inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II

Section 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

The electors [*see Amendment XII*] shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each state having one vote; A quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.

The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty five years, and been fourteen Years a resident within the United States.

In case of the removal of the President from office [*see Amendment XXV*], or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.
The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have

been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

Section 3. He shall from time to time give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Section 4. The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation,

which shall not be diminished during their continuance in office.

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state [*see Amendment XI*];—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Section 3. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

ARTICLE IV

Section 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Section 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

No person held to service or labor [*see Amendment XIII*] in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or

labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Section 3. New states may be admitted by the Congress into this union; but no new states shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

Section 4. The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine states, shall be sufficient for the establishment of this Constitution between the states so ratifying the same.

Done in convention by the unanimous consent of the states present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty seven and of the independence of the United States of America the twelfth.
Signers

In witness whereof We have hereunto subscribed our Names,

G. Washington - Presidt. and deputy from Virginia
NEW HAMPSHIRE: *John Langdon, Nicholas Gilman*
MASSACHUSETTS: *Nathaniel Gorham, Rufus King*
CONNECTICUT: *Wm. Saml. Johnson, Roger Sherman*
NEW YORK: *Alexander Hamilton*
NEW JERSEY: *William Livingston, David Brearly, Wm. Paterson, Jonah Dayton*
PENNSYLVANIA: *B. Franklin, Thomas Mifflin, Robt. Morris, Geo. Clymer, Thos. FitzSimons, Jared Ingersoll, James Wilson, Gouv Morris*
DELAWARE: *Geo: Read, Gunning Bedford jun, John Dickinson, Richard Bassett, Jaco: Broom*
MARYLAND: *James McHenry, Dan of St Thos. Jenifer, Danl Carroll*
VIRGINIA: *John Blair, James Madison Jr.*
NORTH CAROLINA: *Wm. Blount, Richd. Dobbs Spaight, Hu Williamson*
SOUTH CAROLINA: *J. Rutledge, Charles Cotesworth Pinckney, Charles Pinckney, Pierce Butler*
GEORGIA: *William Few, Abr Baldwin*

May 25, 1787 – Constitutional Convention opens in Philadelphia to discuss revising the Articles of Confederation.

September 17, 1787 – Constitutional Convention approves the Constitution and transmits it to the Confederation Congress for consideration.

September 28, 1787 – The Confederation Congress submits the Constitution to the states for ratification.

June 21, 1788 – The Constitution became effective for the ratifying states when New Hampshire ratified it on this date.

March 4, 1789 – The first Congress under the Constitution convenes in New York City.

AMENDMENTS

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment II

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

Amendment III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

September 25, 1789 – The First Congress submits the first ten amendments - the Bill of Rights - to the states for their consideration.

December 15, 1791 – Virginia ratifies the Bill of Rights and the first ten amendments become part of the United States Constitution.

Amendment XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

February 7, 1795 – Date of ratification.

Amendment XII

The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice [*see Amendment XX*]. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number

be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

June 15, 1804 – Date of ratification.

Amendment XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

December 6, 1865 – Date of ratification.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state [*see Amendment XIX*], being twenty-one years of age [*see Amendment XXVI*], and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

July 9, 1868 – Date of ratification.

Amendment XV

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

February 3, 1870 – Date of ratification.

Amendment XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

February 3, 1913 – Date of ratification.

Amendment XVII

The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

April 8, 1913 – Date of ratification.

Amendment XVIII
[*see Amendment XXI*]

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.

January 16, 1919 – Date of ratification.

Amendment XIX

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

August 18, 1920 – Date of ratification.

Amendment XX

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President [*see Amendment XXV*]. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several states

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within seven years from the date of its submission.

January 23, 1933 – Date of ratification.

Amendment XXI

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.

December 5, 1933 – Date of ratification.

Amendment XXII

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this article shall not apply to any person holding the office of President when this article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several states within seven years from the date of its submission to the states by the Congress.

February 27, 1951 – Date of ratification.

Amendment XXIII

Section 1. The District constituting the seat of government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a state, but in no event more than the least populous state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

March 29, 1961 – Date of ratification.

Amendment XXIV

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

January 23, 1964 – Date of ratification.

Amendment XXV

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the

President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

February 10, 1967 – Date of ratification.

Amendment XXVI

Section 1. The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age.

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

July 1, 1971 – Date of ratification.

Amendment XXVII

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

May 7, 1992 – Date of ratification.

1.100 The United States Government

This nation's founding fathers believed "that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness" The Declaration of Independence signed by the founders in 1776 eloquently set forth a new political philosophy based on the revolutionary ideals of equality, democracy, and human rights.

The American Revolution was fought and won by patriots committed to these noble ideals. The military victory over the English Crown brought with it an opportunity to create a new form of government that would give life to the beliefs expressed in the Declaration of Independence. The new government that was born of that effort came twelve years later, in 1788, when the United States Constitution was ratified and took effect.

The U.S. Constitution defines the structure and function of the United States government. It is based on the founders' firm belief in the importance of limited government. Unlimited government power, they believed, would lead inevitably to tyranny. Instead, they reasoned, to safeguard the "unalienable Rights" of all Americans, the power exercised by *all* government officials must be subject to meaningful limits imposed by the rule of law.

Every officer, agent and employee of the United States government today lives with the legacy of these founding principals. In law enforcement particularly, officers and agents must strive to accomplish their mission of serving and protecting the public, but always in a way that respects the "unalienable Rights" of the people and the restraints on government power written into our laws more than two centuries ago.

1.200 U.S. Customs and Border Protection

The government created by the U.S. Constitution is comprised of three branches: the legislative branch, the executive branch, and the judicial branch. The Constitution vests the President with the "executive power" to implement and enforce the laws enacted by the Congress. The President does so through the thousands of people employed by the fifteen Departments of the Executive Branch.

The Department of Homeland Security (DHS) was created in 2003 and is responsible for keeping America safe from a variety of threats, including those posed by terrorist attacks. DHS is comprised of many subcomponents and agencies, including U.S. Customs and Border Protection (CBP).

The priority mission of CBP is keeping terrorists and their weapons out of the U.S. In addition, CBP is responsible for securing and facilitating trade and travel while enforcing hundreds of U.S. statutes and regulations, including immigration and drug laws.

Agency personnel, including thousands of CBP officers and agents, carry out their mission by exercising basic law enforcement authority conferred by a wide range of statutes and agency regulations. The core enforcement activities of CBP are based on the statutory grants of authority found in the U.S. Code. The way in which each individual officer or agent exercises his or her authority in any given enforcement action, however, is subject to the rules and limits set forth in the U.S. Constitution. The officer or agent's enforcement conduct, therefore, is defined by two important sources of law: the statutes that confer basic law enforcement authority, and the Constitutional provisions that set limits on the proper use of that authority.

The information presented in this chapter and throughout this book is intended to help officers and agents understand the nature of their law enforcement authority and the various laws that define the scope of its proper use.

1.300 Civil and Criminal Law Enforcement

Criminal law is intended to prevent harm to society by defining certain offenses as "crimes" and prescribing the punishment to be imposed for such conduct. Criminal law is enforced by government officers and offenders are tried in a judicial forum (court).

Civil law is concerned with private rights and remedies. A civil wrong (a wrong against a private individual or entity) may be enforced by either government officers or private parties and may be addressed in either a judicial or administrative forum. The remedies ordered when a civil wrong is proven normally include only the payment of money damages, rather than the imposition of punishment. However, the law sometimes makes certain conduct both a criminal act and a civil wrong. An assault and battery, for example, may give rise to both a criminal prosecution and civil lawsuit. Neither the civil nor the criminal action bars the other.

Moreover, the same act may be punishable by both a state and the federal government. This is not double jeopardy, because two separate offenses are involved against two different sovereigns, even though only one act is committed.

CBP is involved in both criminal and civil law enforcement activities.

1.400 Criminal Law Generally

1.410 Attempted Crimes

It is helpful to view the commission of a crime as consisting of three phases: the preparation phase; the attempt phase; the accomplishment phase. United States law does not punish conduct in the "preparation" phase, nor, in many cases, in the attempt phase, either. For an attempt to be criminal, there must be a specific statutory provision for such. The

accomplishment phase, or the completed crime, of course, is always punishable.

In those cases where the law punishes conduct short of the actual accomplishment of the criminal objective, the question is always at what point did the conduct cross the line from "mere preparation" into "attempt" so as to be punishable.

Universally, the courts hold that there is no criminal attempt until there is a "substantial step" toward completion of the criminal act. This means that the conduct had progressed to the point where the crime was all but complete when an event, over which the defendant had no control and which was unforeseen by him, intervened and prevented him from completing the act. For example, a bank robber who passes the demand note and points a gun at the teller, but is jumped by a plain-clothes policeman may properly be convicted of attempted bank robbery. The observable conduct is such that it is *objectively* clear that "but for" the intervention of the unforeseen independent event, the crime would have been completed. Therefore, an attempt occurred.

Two points need to be understood: first, the intervening event must impact the defendant's *conduct*, not his intent. If circumstances cause him to simply change his mind, no attempt occurs since he now lacks the required intent. Second, the conduct must be objectively clear beyond a reasonable doubt.

A solid rule of thumb to measure whether a case has developed to the level of an attempt is this: if the objective facts establish beyond a reasonable doubt that the crime would have been completed, but for the intervention of an unforeseen physical event, then an attempt has occurred.

For example, two pilots for an El Salvadoran airline decided to purchase several firearms in California and take them back to El Salvador without obtaining the necessary export license. The weapons were purchased, stowed in the pilot's luggage and brought to the airport when the pilots reported for their scheduled flight. Upon hearing that Customs was intensifying its searches of outbound flights, the pilots decided not to take the weapons and called a friend to come to the airport and pick up the luggage containing the guns. The luggage was thereafter picked up and taken from the airport by the friend. The pilots, in the meantime, proceeded to their aircraft, but were intercepted on the jetway by Customs agents and eventually arrested for conspiracy to export the weapons without a license and for attempted unlawful exportation. Here the events caused the suspects to change their minds, i.e., the intent dissipated, therefore their conduct never progressed beyond mere preparation. If, however, the pilots had stowed the luggage on the aircraft, or had it in hand when stopped on the jetway by the agents, then the objective conduct, beyond a reasonable doubt, would be such that but for the agents' intervention, the guns would have been illegally exported.[1]

[1] *United States v. Jerez*, U.S. App. LEXIS 12798 (9th Cir. 1990).

1.420 Classification of Crimes

At common law, all crimes were divided into three classes: treason, felonies, and misdemeanors. Treason against the United States is defined in the Constitution as levying war against the United States, or adhering to its enemies by giving them aid and comfort. Treason is the highest category of crime.

The federal government and many states classify felonies as all crimes punishable by death or imprisonment for more than one year. Misdemeanors are crimes punishable by imprisonment for one year or less. A petty offense is a misdemeanor, the maximum penalty for which does not exceed imprisonment for a period of six months or a fine of $5,000 for an individual and $10,000 for a person other than an individual. The term "infamous crime" as referred to in the Constitution has been interpreted to mean a felony.

The maximum fine level for all federal criminal offenses for an individual defendant is the greatest of: (a) the amount specified in the law setting forth the offense; (b) if the defendant derives pecuniary gain from the offense or if the offense causes pecuniary loss to another, twice the gross gain or twice the gross loss; (c) in the case of a felony, $250,000; (d) in case of a misdemeanor resulting in death, $250,000; or (d) for a misdemeanor punishable by imprisonment for over six months, $100,000.[2]

1.430 Elements

In a criminal case, the government has the burden of proving each and every element of a charged crime beyond a reasonable doubt. The *elements* define the specific component parts of a crime and, thus, differ with each crime. The required elements of a crime are normally contained in the definition of the crime in the criminal statute.

For example, the elements of the misdemeanor offense of simple possession of a controlled substance are:

- ✓ knowing or intentional,
- ✓ possession,
- ✓ of a controlled substance.

1.440 Merger of Crimes

Lesser included offenses "merge" into greater offenses, in the sense that one who is placed in jeopardy for the greater offense may not later be retried for that offense or for any lesser included offense. For example, a person convicted of murder cannot subsequently be convicted of attempted murder based on the

[2] 18 U.S.C. § 3571.

same incident. Nor may one be convicted of both the greater offense and a lesser included offense. A lesser included offense is one for which all of the elements are included as part of the elements of another, greater, offense.

For example, the misdemeanor offense described above is a lesser included offense of felony possession of a controlled substance with the intent to distribute, the elements of which are:

- ✓ knowing or intentional,
- ✓ possession,
- ✓ of a controlled substance,
- ✓ with the intent to distribute.

1.450 Sources of Criminal Law

The term "common law" refers to unwritten rules of law derived from custom and usage. It has its origins in the ancient, unwritten law of England, the purpose of which was to punish any conduct tending to "outrage decency" or "corrupt public morals." Each court decision established a precedent that was to be followed by other courts in later decisions involving similar facts and issues under the principle of *stare decisis*, which means to follow the former decisions. Some examples of common law crimes are: murder, manslaughter, burglary, arson, robbery, larceny, rape, sodomy, mayhem, assault, battery, false imprisonment, libel, perjury, intimidation of jurors, blasphemy, conspiracy, sedition, forgery, attempt, and solicitation. There are no federal common law crimes. No act can constitute a federal crime unless it is prohibited by and punishable under a federal statute. Many states, however, do continue to recognize certain common law crimes.

Statutory law is written law enacted by legislative bodies. All federal statutory law has its foundation in the Constitution of the United States. The Constitution grants authority to the Judiciary, the Congress and the President. It reserves certain power for the states and the people. It establishes rights for the people and declares federal statutes and treaties to be the supreme law of the land.

Statutes start as bills being introduced in the Senate or the House of Representatives. They are sent to committee, reported out, debated and passage is decided by vote. If passed by one house, they are sent to the other. If passed in the same form by both houses, they are enrolled and engrossed and sent to the President for signature. If passed by both houses, but in different forms, they are sent to a committee to work out the differences (conference). If the President signs the bill, it becomes law. If vetoed by the President, the bill is sent to both houses for possible override of the veto. A two-thirds majority vote is required in each house to override the veto. If the President fails to veto in 10 days, the bill becomes law without his signature unless Congress adjourns first, in which case it dies (pocket veto).

Public Laws are the form in which statutes are first written. They appear first as slip laws (individual chapters), then in Statutes at Large.

All Statutes at Large which were in force in 1874 were reenacted by subject in the Revised Statutes (Rev. Stat. 615 or R.S.). To correct errors, a second edition was enacted in 1878. After 1878, some of the revised statutes were amended; in other cases public laws were enacted without reference to the revised statutes.

In 1925, Congress asked publishers to arrange all laws by subject. That project became officially known as the Code of Laws for the U.S. (also the U.S. CODE or U.S.C.). Eventually, each title is reenacted into codified laws so that there becomes no further need to refer to the old Statutes at Large. Some have already been so enacted, e.g., Titles 1, 3, 4, 5, 6, 9, 10, 13, 14, 17, 23, 25, 27, 28, 29, 31, and 32 are now "law." All others are only prima facie evidence of the law and if the code and Statute at Large or Revised Statute version differs, the Statute at Large or the Revised Statute (and not the code) are controlling.

Regulations are another source of law and refer to rules written by executive branch departments and agencies. If regulations are to be binding on the public, they must conform to the *Federal Register Act*. Usually regulations must be published in the *Federal Register* as a Notice of Proposed Rulemaking. The public is then given time to comment. If adopted, they are published as a Regulation in the *Federal Register*. All regulations adopted by a given agency are arranged in a title of the *Code of Federal Regulations* (C.F.R.), which is a special edition of the *Federal Register*.

Internal policies and directives of an agency are binding only on employees of that agency and are not a source of criminal law.

Court decisions are a final important source of criminal law. The Supreme Court is the only court specifically provided for in our Constitution. Its decisions apply to the entire federal judicial system and it is the final arbiter of all cases on appeal. The other courts in the federal system are those established by Congressional action under the authority of the Constitution. Federal criminal cases originate in U.S. district courts. Appeals are heard in the circuit courts of appeals, the decisions of which are binding precedent only within a single circuit, unless overturned by the Supreme Court. If there is disagreement among the circuits on the proper interpretation of a law, the matter may eventually be resolved by the Supreme Court. Though appellate decisions are binding only within their own circuits, they normally are weighed heavily by other circuits when confronted with the same issue. Thus, it is desirable for CBP officers and agents to be aware generally of important cases in other circuits because they may become the basis for future decisions of other circuits or of the Supreme Court itself.

There are 13 federal appellate circuits, eleven enumerated circuits plus the District of Columbia and Federal Circuit Court of Appeals. Within these circuits, the CBP officer or agent might appear and testify at the U.S. District Court level

or before the Court of International Trade. There are 94 federal judicial districts, including the District of Columbia, Puerto Rico, the Virgin Islands, and Guam. District courts in the Virgin Islands and Guam hear local as well as federal cases.

A state may have more than one district, but no district crosses state lines. Some districts are divided into "divisions," but these divisions have no legal significance and exist for convenience only. Federal judges who sit on these district courts are appointed for life or during good behavior. This applies to judges of the circuit courts and the U.S. Supreme Court as well.

The Court of International Trade generally decides technical classification questions, but now has jurisdiction over certain civil trade cases. The Court hears customs penalty cases under 19 U.S.C. § 1592, to resolve disputes about penalties for fraud, gross negligence, and negligence on entries of merchandise, claims for refunds, suits for liquidated damages, and civil actions under the North American Free Trade Agreement (NAFTA).

Collectively, the precedential decisions of the federal courts are an important source of criminal law in the United States.

1.500 The Federal Rules of Criminal Procedure (FED. R. CRIM. P.)

The Supreme Court promulgates the Federal Rules of Criminal Procedure (FED. R. CRIM. P.) for federal courts pursuant to two sections of Title 18 of the U.S. Code. The first of these, § 3771, authorizes the Supreme Court to prescribe rules for all criminal proceedings prior to and including verdict. The second, § 3772, empowers the Supreme Court to prescribe rules for all proceedings after the verdict. From time to time the Supreme Court has amended these rules.

As stated in Rule 1, the Federal Rules of Criminal Procedure apply to all criminal procedures in the U.S. district courts, U.S. courts of appeal, and the Supreme Court of the United States. The rules also apply to proceedings before federal magistrate judges and proceedings before state and local judicial officers when acting on federal cases in place of federal magistrate judges.

The purpose of the rules is to secure simplicity in procedures, fairness in administration, and the elimination of unjustifiable expenses and delay.[3]

1.510 Preliminary Proceedings

Federal magistrate judges are appointed by United States district court judges. If a district has more than one judge, appointment will be made by the concurrence of the majority of the judges. The full-time magistrate judge is appointed for a term of eight years.

[3] FED. R. CRIM. P. 2.

In the event the workload does not justify the appointment of a qualified person for a full-time magistrate judge, the district judge may appoint a part-time magistrate judge whose term is four years. Magistrate judges usually work only in the district in which they are appointed. To be appointed as a federal magistrate judge, a person must be a member in good standing of the bar of the highest court of the state in which service will be rendered. Nonlawyers may serve as part-time magistrate judges if the appointing court is unable to find a qualified member of the bar at a specific location.

The federal magistrate judge in all likelihood will be the first judicial officer with whom a CBP officer or agent will come in contact. In the investigation process, the first contact with a federal magistrate judge generally will be to obtain either a search warrant or an arrest warrant. To obtain an arrest warrant from the magistrate judge, the officer or agent must file a complaint, which is defined as a written statement of the essential facts constituting the offense charged made under oath before a magistrate judge. The officer or agent must prepare the complaint prior to appearing before the magistrate judge to obtain an arrest warrant or, should an arrest be made without warrant, to present the complaint prior to the time the suspect is brought to the magistrate judge for the initial appearance. In most areas the complaint is prepared with the cooperation of, or with review by, the U.S. attorney's office before it is presented to the magistrate judge.

Upon the receipt of the complaint, the magistrate judge will review the accompanying affidavit, which is submitted on oath or affirmation, and determine if probable cause exists to issue an arrest warrant or a summons. Upon finding probable cause that the offense has been committed and that the person named in the complaint has committed it, the magistrate judge may issue an arrest warrant or summons. The magistrate judge will generally issue an arrest warrant unless the U.S. attorney requests a summons.[4]

An arrested person must be taken before a committing officer for the initial appearance "without unnecessary delay." This is in compliance with FED. R. CRIM. P. 5(a). In the case of an arrest on a complaint issued under 18 U.S.C. § 1073, concerning unlawful flight to avoid prosecution (UFAP), compliance with Rule 5(a) is not required if the arrestee is transferred without unnecessary delay to the custody of state authorities in the district of arrest, and the United States attorney in the district issuing the warrant moves promptly to dismiss the complaint. For a further discussion of UFAP, see Chapter Five, Arrest Authority.

Generally, the committing officer is the U.S. magistrate judge; however, it may be a U.S. district court judge or a state or local judicial officer.[5] As noted above, if the person has been arrested without a warrant, Rule 5(a) provides that a complaint shall be filed when the prisoner is brought in for an initial

[4] FED. R. CRIM. P. 4.
[5] 18 U.S.C. § 3041.

appearance. The procedure for filing a complaint under these circumstances is the same as previously stated.[6]

A defendant has a right to trial, judgment and sentencing before a judge of the district court. A U.S. magistrate judge, however, may try any misdemeanor if the defendant signs a written consent to be tried before the magistrate judge, which consent specifically waives trial before a judge of the district court.

At the initial appearance for an offense not triable by the U.S. magistrate judge, the magistrate judge will inform the defendant of the complaint which has been filed against him and advise the defendant of his right to retain counsel or request assignment of counsel if counsel cannot be obtained. The magistrate judge will announce the general procedures by which pretrial release can be secured. The right of the defendant to a preliminary examination and the right to remain silent will also be announced. The defendant is also told that any statements he makes can be used against him at trial. The magistrate judge shall not call on the defendant to enter a plea. The magistrate judge may release the defendant on bail as provided by the *Bail Reform Act of 1984* and the rules of criminal procedure. Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be:

1. released on personal recognizance or upon execution of an unsecured appearance bond;

2. released on a condition or combination of conditions under (e.g., maintain employment; abide by restrictions on personal associations or travel);[7]

3. temporarily detained (in certain unusual cases which involve revocation of a conditional release or deportation or exclusion); or

4. detained.

If, after hearing, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person and the safety of any other person or the community, the judicial officer shall order the detention of the person. Certain categories of crimes and circumstances give rise to a rebuttable presumption that no conditions of release will assure the defendant's appearance or the safety of the public (e.g., a crime of violence; the crime was committed while the person was on release pending trial for another offense).

Any defendant who fails to make bail, will be placed in the custody of the U.S. Marshal Service by the magistrate judge. If there is no deputy marshal present, then the officer or agent who is present shall place the defendant in jail.

6 FED. R. CRIM. P. 4.
7 18 U.S.C. § 3142.

A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. The purpose is to determine if there is probable cause to hold the defendant to answer the charges in district court. At the hearing, the magistrate judge receives evidence in accordance with Rule 5.1 to determine if there is probable cause to believe that the offense was committed and that the defendant committed it. A preliminary examination must be held within ten days following initial appearance if the defendant is in custody and cannot make bail. If the defendant is not in custody, the hearing must be held no later than twenty days following the initial appearance. With the consent of the defendant and upon showing good cause, time limits may be extended by the U.S. magistrate judge. The preliminary examination will not be held, however, if the defendant is indicted or if "an information" against the defendant is filed in district court before the date set for the preliminary examination.

If a determination is made at the preliminary examination that there is probable cause to believe that the crime has been committed and that the defendant committed it, the magistrate judge will hold the defendant to answer in district court. If a determination is made that there is no probable cause to believe that the offense has been committed or that the defendant has not committed it, the magistrate judge will dismiss the complaint and discharge the defendant. This, however, does not stop the government from instituting a subsequent prosecution for the same offense by obtaining an indictment or filing an information.

Probable cause may be based upon hearsay evidence in whole or in part. At the preliminary examination the defendants and their attorneys may cross-examine witnesses against them and may introduce evidence on their own behalf. Defense counsels may be given an opportunity to have a recording of the hearing made available for their information in connection with further hearings or preparation for trial. Objections to evidence on grounds that it was acquired by unlawful means will not be heard at the preliminary examination. Upon motion to the district court either by the government or defense, the court may order that a copy of the transcript be made available to either party.
All proceedings before a U.S. magistrate judge are subject to review by the district court.

1.511 Grand Juries, Indictments, and Information

A United States district court is empowered to summon one or more grand juries at such time as the public interest requires.[8] This rule is based on the clause of the Fifth Amendment that states, "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury."

[8] FED. R. CRIM. P. 6.

The purpose for creating grand juries is to safeguard the rights of innocent citizens against hasty, malicious, and oppressive prosecution by the government. The government cannot bring a person to trial for a felony unless a grand jury first returns an indictment, or the right to indictment is waived.

A grand jury will hear testimony to determine whether or not there is probable cause to believe that the person to be indicted committed the crime in question. This is known as the "accusatory function" of the grand jury. If the grand jury determines that there is sufficient probable cause to indict, the indictment will be returned as a "True Bill."

The grand jury also has broad investigative power to determine whether a crime has been committed and who committed it. This "investigative function" is coordinated by the U.S. attorney. The scope of a grand jury investigation is limited to investigations of federal criminal law only.

In fulfilling both functions, the grand jury is generally unrestricted by technical, procedural, or evidentiary rules. To assist the grand jury in carrying out its public duty, every person is obliged to appear and give testimony when subpoenaed.

Grand juries consist of 16 to 23 members. A grand jury generally will stay in session for a period of 18 months, but may be extended for a maximum of six more months.

A member of a grand jury must be a citizen of the United States who is at least 18 years of age and who has resided in the judicial district for a period of one year or more.

A person may not serve on a grand jury if:

- ✓ He has a felony charge pending against him or has been convicted of a felony, and his civil rights have not been restored by pardon or amnesty;
- ✓ He cannot understand, read, or write the English language; or
- ✓ He is incapable of serving due to mental or physical infirmities

Petit jurors (often called "trial jurors") determine the guilt or innocence of the defendant at the trial itself and are selected in the same manner. Petit jurors and grand jurors must have the same qualifications.

Challenges to prospective members of a grand jury must be made prior to the time they are sworn in. The challenge, which will be heard by the court, may be made either by the government or by a defendant who has been held to answer in the U.S. district court. The challenge may be based on the array of the jurors, i.e., that the whole body of grand jurors was not selected, drawn, or summoned in accordance with the law. Individual jurors may be challenged on the ground that they do not meet the legal qualifications.

If not challenged prior to the swearing in of the grand jury, a defendant's recourse is a motion to dismiss the indictment based on the array or the qualifications of individual jurors.

Generally, officers transmit their reports of investigations to assistant U.S. attorneys who in turn present the cases to the grand jury. Upon indictment, if the defendants in the cases have not already been arrested, the court will issue arrest warrants for the defendants or summon them to appear in court.

Alternatively, a grand jury may institute an inquiry on its own. In this instance, the grand jury, under the direction of an assistant U.S. attorney, conducts its own investigation. Upon completion of the grand jury's investigation, an indictment may result.

Attorneys for the government, interpreters, stenographers or operators of recording devices may be present when the grand jury is listening to testimony. When the grand jury is deliberating or voting, however, no one may be present except the grand jurors themselves.[9]

No obligation of secrecy may be imposed upon any person not specifically listed in Rule 6(e) with respect to grand jury proceedings. However, officers and other government personnel who participate in grand jury proceedings generally must maintain the secrecy of any information related thereto. Jurors may disclose matters (other than the grand jury's deliberations or the vote of any juror) to the attorneys for the government for use in the performance of their duties. These same matters may also be disclosed to those personnel deemed necessary by attorneys for the government to assist the attorneys in the performance of their duty to enforce federal criminal law, or for use in connection with any civil forfeiture provision of Federal law.[10] Otherwise jurors, officers and employees of the court may not disclose matters except on order of the court. The rule does not impose secrecy requirements on witnesses.

An indictment may be found only upon the concurrence of 12 or more qualified jurors, regardless of the number of persons comprising the grand jury (16 to 23). The grand jury foreman keeps a record of the number of grand jurors concurring in the finding of every indictment and files this record with the clerk of the court. If the grand jury fails to indict, they shall report this to the court forthwith by writing NO BILL on the proposed indictment.[11] This does not necessarily mean that this is the end of the case. The U.S. attorney may, although rarely due to very strict Department of Justice guidelines, present the same case to another grand jury or, with additional information, go before the same grand jury again.

9 FED. R. CRIM. P. 6(d).
10 18 U.S.C. § 3322.
11 FED. R. CRIM. P. 6(f).

Proceedings have been established for summoning a *special grand jury* to inquire into organized criminal activity.[12] A special grand jury is empaneled for 18 months, but may be granted up to three extensions of six months each. By law, it cannot sit for more than 36 months.

An indictment is a formal accusation by a grand jury. This accusation must be concise as to the charges against the defendant and as to when the crime allegedly occurred. In some cases, where the risk of flight is high, or another similar threat to the integrity of the prosecution exists, the court may direct that the indictment be kept secret until all defendants are in custody or some other "trigger" event has occurred. In this instance, the clerk of the court seals the indictment, and no person may disclose its existence or contents. This is commonly known as a sealed indictment.

An information is a formal accusation by the U.S. attorney. This is similar to an indictment except that the case is not presented to a grand jury. It must have the same information in it as does an indictment.

An indictment or an information may have two or more related offenses charged in it.[13] These are called counts of the indictment. Two or more defendants also may be charged in the same indictment as long as the charges evolve from the same action or are connected by a common scheme or plan. In the event that there is property subject to criminal forfeiture, the indictment must allege the nature and extent of the interest subject to forfeiture.

For a capital crime, a person can be prosecuted only by indictment. In all other felony cases, a person must be prosecuted by an indictment unless he waives the right to an indictment. If the right is waived, the case may be prosecuted by an information. The trial of a misdemeanor may be prosecuted upon either an indictment or an information.[14]

The role of a law enforcement officer in appearing before a grand jury is to give testimony to establish probable cause that the crime has been committed and that the defendant committed the crime. An officer who goes into the grand jury room will generally be accompanied by an assistant U.S. attorney, who will introduce the officer to the grand jurors. The officer will be sworn by the foreman and then will testify. The officer's testimony does not have to be based on personal knowledge, but may consist of hearsay. Any and all members of the grand jury may question the officer regarding the case. All grand jury proceedings are *ex parte* proceedings, which means that the grand jury only hears *one side* of the case, that of the government.

The court shall issue a warrant for each defendant named in the information or indictment upon request of the attorney for the government. The clerk shall

12 *Organized Crime Control Act* of 1970, Title I.
13 FED. R. CRIM. P. 8.
14 FED. R. CRIM. P. 7(a).

issue a summons instead of a warrant upon request of the government or by direction of the court. If a defendant fails to appear in response to a summons, an arrest warrant will be issued. These warrants or summonses are returnable to a U.S. magistrate judge or to any other judge as defined in Rule 54.

1.513 Arraignment (Rule 10)

The arraignment is founded on the Sixth Amendment's provision that the accused shall enjoy the right "to be informed of the nature and cause of the accusation" in all criminal proceedings. An arraignment is conducted in open court before a U.S. magistrate judge after an indictment has been returned or an information has been filed against the defendant.

The arraignment consists of:

- ✓ calling the defendant to the bar,
- ✓ reading the indictment or information to the defendant unless the reading is waived (the reading is never waived in a capital case),
- ✓ requiring the defendant to enter a plea (generally, only a "not guilty" plea will be received by the court at this time).

If a defendant refuses to plead, the magistrate judge will enter a plea of "not guilty" for him. If a defendant wishes to enter any plea other than "not guilty," a separate hearing, called a "Rule 22 proceeding," is set before the United States district judge. Magistrate judges may not accept guilty or *nolo* pleas for offenses that are not triable by them.

Before accepting any plea other than "not guilty," a judge must be satisfied that the defendant has had the opportunity to consult with counsel; has been properly apprised of charges against him and is competent to plead. Under Rule 11 a defendant may plead "not guilty," "guilty," or, with the consent of the court, "*nolo contendere*." A *nolo contendere* plea is sometimes referred to as a "nolo" or "no contest" plea.

The meanings of the pleas are as follow:

- ✓ Guilty: An admission of guilt to the charges and has the same effect as a verdict of guilt after trial. If the court determines there is a factual basis for the plea and is satisfied the plea was made voluntarily with a full understanding of the charge, the court will accept a plea of guilty.
- ✓ Not guilty: A plea of not guilty is a denial of guilt by the defendant. This plea maintains all rights and requires the government to prove guilt beyond a reasonable doubt.
- ✓ Nolo contendere: This plea does not contest the facts as charged in the indictment and for the purposes of punishment, is the same as a plea of

guilty. It is not, however, an admission of guilt, and thus cannot be used against a defendant as an admission in a subsequent criminal or civil case. It is the policy of the Department of Justice to strenuously oppose any attempt by a defendant to plead "nolo," especially in cases where there may be civil actions pending, such as tax cases and Customs fraud cases.

The assistant U.S. attorney and the attorney for the defendant are permitted to plea bargain.[15] In exchange for a plea of guilty by the defendant to the charged offense or to a lesser or related offense, the government may agree: (1) to move for dismissal of other charges; (2) to recommend or not oppose a defense request for a specific sentence; or, that a specific sentence is the appropriate disposition of the case. Judges are not bound by such agreements, but may permit defendants to withdraw their pleas unless it is type (2) above where the defendant will be advised that he has no right to withdraw the plea.

Defendants may change their plea any time before sentencing. A plea of guilty, later withdrawn; a plea of *nolo contendere*; or an offer to plead guilty or *nolo contendere* to the crime charged or any other crime, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

1.514 Motions and Pleadings (Rule 12)

Defenses, objections, or requests that are capable of determination without the trial of the general issue may be raised by motion before trial. These pretrial motions may be written or oral at the discretion of the judge and the local rules of the court.

A motion to suppress evidence is the legal process to exclude the use of certain evidence and will be made at a time specified by the judge. Motions to suppress, motions for the return of property, motions to dismiss the indictment, and other motions are heard by judges and (to the extent possible) out of the hearing of the jury.

1.520 Discovery and Inspection (Rule 16)

Discovery is the required disclosure of information between the parties to litigation. Rule 16 covers pretrial discovery between the government and the defense.

Upon granting a defense motion for discovery, the court may order the government to permit the defense to inspect, copy, or photograph any of the following items which are in the possession, custody, or control of the government and are known, or by due diligence could become known to the attorney for the government and relevant to the case.

[15] FED. R. CRIM. P. 11(e).

Such discoverable items include:

- ✓ statements of the defendant;
- ✓ prior criminal record of the defendant;
- ✓ documents, reports of examinations and tangible objects which are intended to be used as evidence; or were obtained from or belonged to the defendant; or are necessary to the preparation of the defense.

In cases where a CBP officer relies on a detector dog "hit" to establish reasonable suspicion of criminal activity, the reliability of the dog may be a relevant issue and therefore the court may determine that the dog's training and certification records are "necessary to the preparation of the defense" and thus discoverable under Rule 16(a)(1)(E). At this time, the only court that has required the government to produce a detector dog's training and certification records is the Ninth Circuit Court of Appeals.[16]

1.521 The *Brady* and *Giglio* Doctrines

In 1963, the Supreme Court announced a general principle that "the [government's] suppression of evidence favorable to an accused *upon request* violates Due Process where the evidence is material either to guilt or to

16 *United States v. Cedano-Arellano*, 332 F.3d 568 (9th Cir. 2003). At the time this case was decided, CBP Officers in the Ninth Circuit were required to establish reasonable suspicion to justify removing a vehicle's fuel tank during a border search. Because a detector dog alert was used to establish the officer's reasonable suspicion that Cedano-Arellano was hiding narcotics in his vehicle's fuel tank, the court held that the detector dog's training and certification records were subject to Rule 16 discovery as items "necessary to the preparation of the defense." The court reasoned that the records were needed by the defendant to cross-examine the dog's handler and challenge whether the search was supported by reasonable suspicion. After the *Cedano-Arellano* case was decided, however, the Supreme Court reversed the Ninth Circuit rule requiring reasonable suspicion to justify removing a vehicle's fuel tank during a border search in *United States v. Flores-Montano*, 541 U.S. 149 (2004). Thus, although CBP Officers in the Ninth Circuit are no longer required to establish reasonable suspicion to justify a fuel tank border search, the *Cedano-Arellano* rule regarding discovery of a detector dog's training and certification records remains in force in other Ninth Circuit cases where a detector dog may be used to establish reasonable suspicion (for example, when performing an extended border search or conducting a destructive border search). The Agency has consistently opposed all efforts to compel the production of detector dog training and certification documents, and any CBP personnel who become involved in a case where these issues arise should contact their local Associate or Assistant Chief Counsel for further guidance.

punishment."[17] The suppressed evidence at issue in *Brady v. Maryland* was a codefendant's admission to being the triggerman in a homicide. Thus, the early rule was that the defense, upon request, is entitled to the production of any information which is material to the defense on the issue of guilt or punishment and which is in the possession of the government. The obligation to disclose is an affirmative one, a failure to disclose being excused only if the information could not have been discovered by due diligence. The term "*Brady* material" refers to any such potentially exculpatory evidence in the government's possession.

Several years later, in *Giglio v. United States*[18] the Court recognized that witness impeachment evidence can qualify as *Brady* material. In such cases the *Brady* rule is extended to impose an *affirmative duty* upon the government, independent of any defense request, to disclose such evidence. At issue in *Giglio* was the existence of any promise of leniency to a witness in exchange for his testimony.

The sum of these two cases is that nondisclosure by the prosecution of information favorable to the accused violates Due Process where the evidence is material either to guilt *or* punishment. The prosecutor, therefore, must make timely disclosure of any information known to the government, or discoverable by due diligence, that is material (favorable) to the defense on the issue of guilt *or* punishment. Examples of *Brady* material include the existence of alibi witnesses, or evidence bearing on the truthfulness of a witness' testimony such as prior false statements or a financial or other personal benefit for testifying, or other interest in the outcome of the trial. Such disclosures should be made to the defense at a reasonable time before trial.

As noted, the duty of the government under *Brady* and *Giglio* is an affirmative one, independent of a defense request for *Brady* material. In the absence of a request, a court reviewing an allegation of a violation of *Brady* must consider whether the suppressed evidence was material, i.e., whether there was a reasonable likelihood that the jury would have come to a different conclusion had the evidence not been suppressed. Where a specified request for material is made and not honored, the test for the appellate court is whether the jury could have come to a different conclusion in light of the evidence. If so, the case is reversed.

1.522 *Henthorn* Requests

In *United States v. Henthorn*,[19] the Ninth Circuit applied the *Brady/Giglio* requirement to disclose "evidence affecting credibility" to information in the personnel files of a government employee-witness. In *Henthorn*, the defendant's request was limited to evidence of "perjurious conduct or other like

17 *Brady v. Maryland*, 373 U.S. 83 (1963).
18 *Giglio v. United States*, 405 U.S. 150 (1972).
19 *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991).

dishonesty."[20] The Ninth Circuit did not require the AUSA to personally review the personnel file, but held that the government fulfills its duty if the agency reviews the file of its employee, notifies the prosecutor of the results of the search, and the prosecutor makes the final decision on disclosure.[21] Moreover, *Henthorn* did not require the examination of personnel files that the agency does not possess, i.e., the files of state and local police officers, nor does it require the agency to examine the files of federal agents who do not testify.

Further, *Henthorn* does not require the agency to review the background security investigation file that was compiled prior to the employee's employment. Although the background check may have disclosed some derogatory information, the employee probably would not have been hired if the information rose to the level of perjurious conduct or was otherwise "material" under *Brady*. In essence, the agency has conducted a *Henthorn* search as a condition of employment for each employee and there is no need to repeat the search each time that employee testifies.

Information that is evidence of perjurious conduct or that is otherwise "material" under *Brady* may vary with the facts of the criminal case. With this in mind, information concerning the following situations will be forwarded by CBP Chief Counsel to the AUSA for *Henthorn* determinations:

- ✓ Disciplinary investigations, actions or proposed actions that pertain to dishonesty or perjurious conduct (e.g., falsification of travel vouchers, lying to a supervisor, etc.);

- ✓ Disciplinary investigations, actions or proposed actions which do not pertain to dishonesty or perjurious conduct, but which may be material to the defense, (e.g., incidents involving intoxication, repetitive misconduct, misuse of TECS, etc.);

- ✓ Allegations of misconduct that are still in the investigative stage or that have not resulted in a final action, and that pertain to dishonesty or perjurious conduct or which may be material to the defense may also be considered *Henthorn* or *Brady* material.

Allegations of misconduct found to be unsubstantiated generally are not reported to the AUSA. However, the Chief Counsel will discuss the matter with the concerned AUSA in specific cases involving serious yet unsubstantiated allegations that pertain to dishonesty or perjurious conduct, to see if the material should be furnished as potential *Brady* material.

20 *Id.* at 30.
21 See *United States v. Jennings*, 960 F.2d 1488 (9th Cir. 1992).

1.523 *Giglio* Policy

To comply with the *Brady* and *Giglio* rules, CBP has adopted a former Treasury/Customs policy statement ("*Giglio* Policy") regarding the disclosure of information concerning agency employees that could impact their credibility as witnesses (i.e., could "impeach" the witness).[22]

Basically, the *Giglio* policy ensures that prosecutors receive sufficient information to meet their obligations to disclose information to the defense that is material to either guilt or punishment. The policy sets forth guidelines to ensure that prosecutors receive potential impeachment information regarding employees who will testify in criminal prosecutions.

Pursuant to this policy, a search of an employee/witness' personnel files will occur upon a request from the United States attorney's office. The search will be for evidence of any

- ✓ Finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during an administrative inquiry;
- ✓ Past or pending criminal charges brought against the employee; and
- ✓ Credible allegations of misconduct that reflects upon the truthfulness or possible bias of the employee made during a pending investigation.

Allegations that cannot be substantiated, or are not credible, or have resulted in the exoneration of an employee generally are not considered to be potential impeachment information and would not be disclosed. Categories of files that are relevant to a *Giglio* request are:

- ✓ Official personnel files;
- ✓ Employee performance files located in the appropriate field office;
- ✓ Misconduct and disciplinary files located in the local Labor and Employee Relations Office;
- ✓ Criminal and administrative integrity investigative files accessed through the Office of Internal Affairs.
- ✓

The *Giglio* policy is much broader than the related *Henthorn* process, discussed above, because it calls for reviews of affiants for warrants as well as trial

22 See Treasury Order 105-13 (February 19, 1997); Customs Service "Giglio Policy" Memorandum (June 26, 1997); CBP "Giglio Processing Update" Memorandum from Associate Chief Counsel (Enforcement) (December 22, 2003).

witnesses. Agency personnel should contact their Associate/Assistant Chief Counsel with questions regarding the implementation of the *Giglio* policy.

1.524 Production of Statements of Witnesses (Rule 26.2)

Frequently witnesses will make statements about a case at times other than while testifying on the witness stand. For example, reports about cases are made either in writing or in a computer. Also, officers may testify in preliminary proceedings. Rule 26.2 governs the production and disclosure of those statements and applies to statements of both government and defense witnesses.

Originally codified as the *Jencks Act* (18 U.S.C. § 3500), Rule 26.2 provides for the examination and use of any statement of any witness, other than the defendant, that is in the possession of either the government or the defense attorney if it relates to the subject matter about which the witness has testified. The Rule provides, however, that no statement or report in the possession of the parties that was made by a witness is subject to subpoena, discovery, or inspection until the witness has testified on direct examination in the trial of the case.

1.525 Investigative Notes

Traditionally, most federal officers destroyed their handwritten notes of investigation after they had prepared their official reports of investigation. In recent years, however, defense attorneys have successfully argued that investigative notes contain potentially discoverable material. Several circuit courts of appeal have held that the decision as to whether investigative notes are discoverable should be left up to the courts and not to the officer. An officer's or agent's rough notes should, therefore, be kept. In that way, they can be produced upon challenge and the trial court can determine whether or not the notes should be made available to the defendant.

1.526 Subpoenas (Rule 17)

A subpoena is a court order commanding a person to appear before a court at the time and place designated.

The clerk of the court shall issue a subpoena, signed and sealed but otherwise blank, to the party requesting it, who shall fill in the blanks before serving it. Indigent defendants may have witnesses subpoenaed at government cost if the defendant swears that the testimony of the witness to be subpoenaed is relevant to his defense and he is unable to pay the fees of the witness.

Subpoenas may be issued by U.S. magistrate judges in proceedings before them.

A subpoena may command the person to whom it is directed to produce specific tangible objects designated in the subpoena.[23] This is known as a "subpoena *duces tecum*." The subpoena *duces tecum* may be quashed (i.e., voided) or modified upon motion of the party served if there is a showing that compliance would be unreasonable or oppressive. The court may order that the items listed be produced before the court prior to trial and the time of their introduction into evidence in order to permit examination by both sides.

A subpoena may be served any place within the United States, and may be served by a U.S. marshal, or deputy, or any other nonparty 18 years of age or older. Service of the subpoena is accomplished by delivering a copy to the person named.

Failure, without adequate excuse, by any person to obey a properly served subpoena may result in a contempt citation from the court that issued the subpoena.

1.530 Jurisdiction and Venue

1.531 Jurisdiction

There are two types of jurisdiction that must be established in a court cases: personal jurisdiction and subject matter jurisdiction. Personal jurisdiction refers to the power of a court over a particular person. Subject matter jurisdiction refers to the power of a court to hear and determine cases on the general subject of a particular case.

Because subject matter jurisdiction forms the basis of the inherent power of a court to decide a case, federal courts must look to both the Constitution (Article III) and to statutory enactments to determine subject matter jurisdiction in federal cases. All U.S. district courts have jurisdiction over federal offenses committed within the territory of the United States and certain offenses committed outside its territory. See Chapter Eighteen, Extraterritorial Law Enforcement, for a full discussion of extraterritorial (i.e. beyond the United States) jurisdiction.

1.532 Venue (Rules 20 and 21)

Venue refers to the particular geographical area in which a court with jurisdiction may hear and decide a case. In other words, a certain district court may have jurisdiction to decide a case, but may not be the proper venue for the trial. Whether a court has the power or authority to try a case is an issue of jurisdiction. Whether a particular court is the appropriate court to exercise that authority is an issue of venue.

[23] FED. R. CRIM. P. 17(c).

The Constitution requires that the trial of all crimes shall be held in the state and district where the crime was committed, or, if not committed in any state, where Congress shall direct. Prosecution will generally be in the district in which the offense was committed.[24]

In determining where the offense was committed, consideration is given to whether a single act was involved, or whether the offense was a continuing one or one that involved more than one act. In the latter cases, venue could lie at any point where a criminal act had occurred. In cases involving offenses against the United States committed on the high seas, in a foreign country, or when more than one person has been involved, venue is determined by the place in which the offender was first arrested or first brought. See Chapter Eighteen, Extraterritorial Law Enforcement, for a further discussion of venue in extraterritorial offenses.

Upon motion of the defendant, the court may also transfer the proceedings to another district if:

- There exists in the district where the prosecution is pending so great a prejudice that the defendant cannot obtain a fair or impartial trial; or

- It appears that the transfer of proceedings against the defendant, or any one or more of the counts against him, would be more convenient for the parties and witnesses, and in the interest of justice.[25]

If a person is arrested or held pursuant to indictment or information in a district other than the one in which the indictment or information is pending, he may state in writing that he wishes to plead "guilty" or "nolo contendere," to waive trial in the district of indictment or information, and to consent to disposition of the case in the district where he was arrested or held.

1.540 Trial

If the defendant has previously entered a plea of not guilty, the question of guilt will be determined at a trial of the defendant. At the trial, the government will attempt to offer evidence to support a finding of guilt. The defendant may offer a defense to disprove the allegation of guilt, but is not obliged to do anything at all since the burden of proof is on the government.

24 FED. R. CRIM. P. 18.
25 FED. R. CRIM. P. 21.

1.541 Burdens of Proof

In order to establish guilt at trial, the government must introduce sufficient evidence to prove the each element of the charged offense. In a criminal case, the government must prove guilt "beyond a reasonable doubt."

The criminal burden of proof ("beyond a reasonable doubt") is met when the evidence introduced by the government establishes that the alleged criminal violation almost certainly was committed by the defendant, although some highly unlikely possibilities that would not raise any reasonable doubt as to the guilt of the defendant may remain. Specifically, the test is whether a reasonable juror would have a valid reason to doubt the defendant's guilt.

In a civil case the burden of proof is different. The civil burden of proof is a "preponderance of the evidence," and is met when the weight of the evidence "tips the scales" in favor of one party or the other, no matter how slightly. In a Customs civil fraud case, the government's burden of proof is "clear and convincing" evidence. For a discussion of this standard, see Chapter Eight.

1.542 Functions of the Judge and Jury

In general, the judge decides questions of law, and the jury decides questions of fact. A defendant may waive his right to a trial by jury by making a request in writing if the request is approved by the court and the government. In such cases, the judge will decide questions of both law and fact.

1.543 Trial by Jury (Rule 23)

In a trial by jury, the jury will consist of 12 jurors, except in those cases where both the prosecution and the defense stipulate in writing, with the approval of the court, that the jury may consist of a number of jurors less than 12. This allows a verdict to be reached in the event a juror becomes incapacitated after retiring to consider the verdict. This trial jury is known as a petit jury (as opposed to a grand jury), but is selected and impaneled in the same manner as a grand jury.

1.544 Alternate Jurors (Rule 24(c))

The court may direct that up to six alternate jurors be selected in addition to the regular jurors. The alternates, in the order in which they are called, will replace regular jurors who become ill or are otherwise disqualified during the trial. These alternate jurors will sit through the entire case, and those remaining alternates who have not replaced a regular juror will be discharged after the jury has retired to consider the verdict.

1.545 Sequestration of Jurors

When the jury is "sequestered," members are segregated and protected from outside influences for the duration of the trial. This is done at the discretion of the court. When sequestered, both regular and alternate jurors are included.

1.550 Defenses

Most legal defenses to criminal charges can be characterized as "true defenses." That is, they are circumstances that the law recognizes as *negating* guilt, rather than *excusing* it—for example, self-defense, defense of others, necessity, accident and misfortune, and insanity.

Other defense theories fall into a category of "technical defenses." These are legal defenses that are created on public policy grounds that have nothing to do with the guilt or innocence of an accused, but simply represent the legislative or judicial view of procedural standards for criminal proceedings. This category includes, for example, defenses based on double jeopardy, statutes of limitations, and lack of independent proof or *corpus delicti* for a confessed crime. A defendant who asserts a "technical defense" is not necessarily claiming to be innocent of the charges—he is merely saying that some other factor prevents trial or conviction on the charges, even though he or she may actually be guilty.

1.551 Entrapment

The entrapment defense falls into this latter category. Entrapment is a legal defense raised by the defendant when he claims that, but for the inducement of government agents, he would not have committed the charged crime. The defense is most apt to be raised in situations involving informants and agents working undercover. It is essential that officers understand the concept of entrapment as it relates to their actions and those of any informants involved in a case.

Entrapment is defined as the inducement of a person by officers of the government to commit a crime not otherwise contemplated by him in order to initiate a criminal prosecution.

The inducement may consist of:

- ✓ appeals to sympathy;
- ✓ playing on the emotions;
- ✓ overzealous persuasion;
- ✓ persistence (wearing down resistance);
- ✓ pressure, coercion, and threats.

Government agents may, however, properly afford the defendant the *opportunity* to commit a crime or *facilities* for the commission of a crime.[26] This is not entrapment. Moreover, the courts have placed few limitations on the roles that agents and informants can play in the crime itself. For example, the mere fact that an informant provided the contraband in a drug sale was held not to constitute entrapment. It is only when the criminal design *originates* with a government agent, who then implants in an innocent person's mind the disposition to commit a criminal act, and then induces the person to commit the crime, that the issue of entrapment arises.[27]

The term "government agent" includes not only regular government employees and officers, but government informants as well. An agent cannot do through an informant what he cannot do himself. If an informant for CBP induces an otherwise innocent person to commit a crime, the defense of entrapment properly may be made. On the other hand, the concept of private entrapment, i.e., inducement by a private person unconnected with government activity, has been rejected by the courts.[28]

Once government inducement is shown, the burden shifts to the government to prove beyond a reasonable doubt that the defendant was disposed toward committing the offense independently of the government inducement. To establish this independence, it is incumbent upon the government to show that the defendant's disposition *preexisted* the government's inducement.[29] Where there is sufficient evidence to show that a defendant was disposed prior to inducement, such predisposition defeats the defense. In short, government inducement can serve as either the catalyst for criminal activity and or the cause. If government inducement is the cause, then the defendant lacks criminal intent and thus no crime was committed. Whether the inducement is the cause or the catalyst in a given case is determined by the issue of predisposition. If predisposed, the inducement was merely a catalyst and there was no entrapment. If not predisposed, then the inducement was the cause and such entrapment precludes conviction.

The question of "predisposition" raises the further question of what constitutes being "disposed" to criminal activity. Is it merely the raw desire or "willingness" to commit a particular crime or must there be some indication of intrinsic capacity to commit the crime, as well? Put another way, does criminal intent require more than just willingness? Leaving desire or willingness aside, does "predisposition" require evidence that the defendant would have attempted the crime in the absence of the *government's* inducement? Several cases in the Supreme Court point in this direction by saying that "the government [may not] play on the weakness of an innocent party and beguile him into committing

26 *United States v. Jacobson*, 503 U.S. 540 (1992); *United States v. Russell*, 411 U.S. 423 (1973); *Sorrells v. United States*, 287 U.S. 435 (1932).
27 *Sorrells v. United States*, 287 U.S. 435 (1932).
28 See, e.g., *United States v. Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994).
29 *United States v. Jacobson*, 503 U.S. 540 (1992).

crimes which he otherwise would not have attempted,"[30] and when "an otherwise law-abiding citizen who, if left to his own device, likely would have never run afoul of the law [is apprehended], the Courts should intervene."[31]

These suggestions were applied by the Seventh Circuit (*en banc*) in a Customs case where an orthodontist and a farmer/businessman were targeted as a result of their placing a newspaper ad to sell an offshore banking license.[32] Pickard and Hollingsworth were partners in various business enterprises all of which failed and none of which were illegal. Their final failure was an attempt at international banking. Capitalized by family members and themselves, the two formed an offshore corporation and obtained two foreign banking licenses. When no customers were obtained, it was decided to recoup some of the costs by selling one of the licenses, and an ad to do such was placed in *USA Today*. Seeing the ad and assuming that the sellers might be money launderers, an agent answered the ad and told Pickard that he had money he wanted to deposit off-shore. Pickard proposed several mechanisms, all legal, for achieving that purpose and which he said would be less expensive than buying a bank. Although at one point Pickard remarked that deposits less than $10,000 required no report and that large amounts could be separately deposited in amounts less than $10,000, he later retracted that suggestion noting that such structuring would be illegal. In following discussions, Pickard asked the undercover agent (UCA) for, and received, assurances that the money was not drug money and that the UCA was not a government agent or informer. Finally, Pickard told the UCA that his only interest was a long-term banking relationship and contact was suspended.

Six months later, the UCA, claiming possession of $200,000 needing Pickard's services, arranged to meet Pickard. At the meeting the UCA offered Pickard $2,405 to wire transfer $20,000 of Pickard's own money to an undercover account. The UCA advised that upon receipt of the $20,000 in the account, he would then give Pickard $20,000 in cash plus the fee. Pickard agreed, having been told that the money came from smuggling guns to South Africa. The wire transfer was accomplished and similar transactions were subsequently conducted. Pickard ultimately was arrested for money laundering.

The Seventh Circuit, in holding that Pickard had been entrapped, noted that there was no evidence of any penchant for criminal activity on the part of Pickard before the government arrived on the scene, nor was there any evidence that "left to their own devices" Pickard and Hollingsworth would engage in money laundering without the government inducement. The question in the case, and the only question, was whether Pickard, having become disposed to transfer money believed to have come from smuggling arms to South Africa was *pre*-disposed, i.e., disposed to do so before the government responded to the ad,

30 *Sherman v. United States*, 356 U.S. 369, 376 (1958).
31 *United States v. Jacobson*, 503 U.S. 540, 553 (1992). See, also, *Sorrells v. United States*, 287 U.S. 435, 448 (1932).
32 *United States v. Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994).

as the Supreme Court in *Jacobson* requires. Finding no evidence from which a jury could find predisposition beyond a reasonable doubt, the convictions were reversed.[33] The First Circuit has adopted a variant, requiring proof that the government solicitation is no different than what would be offered by a real criminal.[34] The Ninth Circuit, however, has rejected the "left to his own devices" analysis and would find predisposition on willingness alone.[35]

In "sting" operations, officers and agents must be cognizant of this issue and recognize that under *Jacobson*, if it is the government rather than the defendant who suggests the criminal activity, the burden is upon the government to present sufficient evidence that the defendant's disposition existed independently of and prior to the government's acts.

Predisposition can be shown by:

- ✓ An existing course of similar conduct; Example: The defendants have been selling cocaine for some time when an undercover agent makes a purchase from them. The criminal intent here was not created by the government.

- ✓ Previously formed intent; Example: The defendant had purchased paper and ink and was trying to get a counterfeit operation underway when government agents heard of his effort and provided additional materials and expertise. The criminal intent in this instance was again not the creation of the government.

- ✓ A ready response to a criminal offer. Example: An undercover agent asks a bootlegger, "How much for a bottle?" The bootlegger promptly replies, "$5.00." Here, obviously, it is not necessary for the government agent to "lure, inspire, or persuade" the bootlegger, who was clearly ready and willing to commit the crime as soon as an opportunity arose.

Entrapment as a defense is generally a question of fact for the jury to decide. It will make this decision based on evidence of the behavior of the government agent and of the defendant. If, however, there is government inducement and no evidence of predisposition, a judge can find that there is entrapment as a matter of law. [36]

33 This case has been criticized by the Ninth Circuit in *United States v. Thickstun*, 110 F.3d 1394 (9th Cir. 1997), not for its holding, but upon its dicta that, if misread, would suggest that lacking the present means to commit a crime is enough to establish entrapment. The Seventh Circuit cautioned against understanding its holding in such a way. *Hollingsworth*, 27 F.3d at 1202.
34 *United States v. Gendron*, 18 F.3d 955 (1st Cir. 1994).
35 *United States v. Thickstun*, 110 F.3d 1394 (9th Cir. 1997); *United States v. Poehlman*, 217 F.3d 692 (9th Cir. 2000).
36 *United States v. Brooks*, 215 F.3d 842

An officer or agent needs to have the evidence, should the defense of entrapment arise, to show the defendant's predisposition. Such evidence could come from conversations with the defendant indicating his present and previous dealings, interviews with third parties familiar with his past, or court or other records showing past connection with the subject matter.[37]

Even though entrapment is not a valid defense when predisposition is present, the U.S. Supreme Court has stated that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that Due Process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." The U.S. Court of Appeals for the Third Circuit found such a situation when a defendant was convicted of joining a drug manufacturing operation for which DEA provided glassware, an indispensable ingredient, all the supplies, the expertise, location for the lab, and even the purchasers of the finished product.[38]

Subsequently, the Second and Third Circuits have held that a sexual relationship between a government agent and a person under investigation will constitute such a violation when three factors accompany the relationship:[39]

- ✓ that the government chose to use sex as an investigatory tool, or acquiesced in such conduct once it knew or should have known of its existence;
- ✓ that the agent initiated a sexual relationship, or allowed it to continue, to achieve governmental ends; and
- ✓ that the sexual relationship took place during or close to the period covered by the indictment and was entwined with the events charged.

1.552 The Defense of Double Jeopardy

The Fifth Amendment to the Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The protection against double jeopardy prohibits two situations: (1) a second prosecution for the same offense after acquittal or conviction and (2) multiple punishments for the same offense.

1.560 Verdict (Rule 31)

The verdict must be unanimous in a federal criminal trial. All 12 of the jurors must concur in the verdict. The jury may find a defendant guilty of a lesser included offense, but never of an offense more serious than the offense charged.

[37] *United States v. Poehlman*, 217 F.3d 692, (9th Cir. 2000)
[38] *United States v. Twigg*, 588 F.2d 373 (3rd Cir. 1978).
[39] *United States v. Cuervelo*, 949 F.2d 559 (2d Cir. 1991); *United States v. Nolan-Cooper*, 155 F.3d. 221 (3rd Cir. 1998).

For instance, a jury may find a defendant guilty of the lesser offense of larceny despite an indictment for the greater offense of robbery or even find the defendant guilty of *attempted* robbery. However, if the initial charge is only attempted larceny, there can be no finding of guilt for the more serious charge of larceny or robbery.

When the verdict is returned, but before it is recorded, the jury may be polled at the request of either party or upon the court's own motion to determine if all jurors concur in the verdict. If the poll reveals there is no unanimous concurrence, the jury may be directed to retire for further considerations or may be discharged and a mistrial declared.

1.570 Presence of the Defendant at Trial (Rule 43)

The defendant's presence is required at the arraignment, at the time of plea, at every stage of trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence. However, the defendant's continued presence is not required after the trial has commenced if he was personally present initially and thereafter became absent voluntarily through personal conduct; or, if having been warned by the court, the defendant persists in disruptive conduct that justifies being excluded from the courtroom. In such cases, the defendant is deemed to have waived the right to be present. The defendant's right to be present during trial on a capital offense, however, has been said to be so fundamental that it may not be waived. The defendant in a capital case whose presence is mandatory may be restrained if necessary to prevent disruption.

1.580 Judgment

The judgment is the final determination or action of the court. A judgment of conviction consists of the plea, the verdict or finding of the court, and the adjudication and sentence. A finding of not guilty or any other reason for discharge of the defendant will be entered as judgment accordingly.

1.590 Sentencing Generally (Rule 32)

Following a conviction, sentence is to be imposed without unreasonable delay. Before a sentence is imposed, however, the defendant and the defense attorney both have the opportunity to speak on behalf of the defendant and to present any information in mitigation of punishment. The government's attorney also has an opportunity to address the court.

A pre-sentence report is prepared by the U.S. probation officer and is given to the judge as an aid in deciding on the proper sentence. It will include such information as prior criminal record, financial condition, personal characteristics and any other circumstances that affect the defendant's behavior. Any law enforcement officer who has information relevant to the determination of the sentence (which may have been inadmissible at the trial)

should convey such information to the U.S. probation officer either directly or through the office of the U.S. attorney.

1.591 The Federal Sentencing Guidelines

The United States Sentencing Commission is an independent agency in the judicial branch composed of seven voting and two nonvoting *ex officio* members. Its principle purpose is to establish sentencing policies and practices for the federal criminal justice system that will result in appropriate sentences for offenders convicted of federal crimes. The guidelines and policy statements developed by the Commission can be found at the Sentencing Commission's web site: www.ussc.gov.

The guidelines were originally created under the authority of the Sentencing Reform Act of 1984. They established presumptive sentences for federal criminal offenders based on the seriousness of the offense and the defendant's criminal history. Judges were required to follow the guidelines unless they documented a reason for departing from them.

In 2005, however, the role of the guidelines changed as a result of the U.S. Supreme Court ruling in *United States v. Booker*, 543 U.S. 220 (2005). In that case, the Court held that the imposition of an enhanced sentence under the federal sentencing guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant violated the Sixth Amendment. To avoid such Constitutional violation, the Court concluded that the federal sentencing guidelines must be used as an advisory, rather than a mandatory, system.

Consequently, district courts are required to properly calculate and consider the guidelines when sentencing offenders in order to ensure a uniform initial benchmark in federal sentencing. The guidelines calculation is, however, merely advisory. Post *Booker,* judges may now exercise discretion in making final sentencing decisions.

1.600 Right of Appeal

After the sentence has been imposed in a trial in which the defendant pleaded "not guilty," the court will advise the defendant of all rights to appeal. There is no duty of the court to give such advice after sentence when the defendant pleaded "guilty" or "nolo contendere." There is no right of appeal in such an event.

1.700 Statute of Limitations

A statute of limitations establishes a time period for prosecuting a crime. Beyond the specified period, such prosecution is forever barred.

While some laws may contain a specific statute of limitations, such as the *Federal Tort Claims Act*, most laws do not. If a law does not prescribe a specific

statute of limitations, then the general limitation of five years would be controlling for prosecutions under the law.

1.710 General Statute (18 U.S.C. § 3282)

The general statute of limitations is that, except as otherwise provided by law, no person shall be prosecuted, tried, or punished for any offense not capital unless the indictment is found or information instituted within five years after the offense has been committed.

1.720 Running of the Statute

The expression "running of the statute" means that the period of time during which the government can institute prosecution is expiring. At the end of the period, when the statute is said to have "run," prosecution is barred.

Under the general statute, the time begins to run on the day the offense is committed and the period for action ends at midnight five years from the day the offense is committed.

Example:

Crime committed	04/01/2009
Statute ends (last day to secure indictment or information) at midnight	03/31/2014

In this example, the government may institute proceedings against the suspect at any time from the moment of the crime on April 1, 2009, through midnight, March 31, 2014, a period of five years. However, if no indictment or information is obtained by midnight on the day the statute ends, March 31, 2014, the government is prohibited from prosecuting the individual thereafter for that crime.

For a crime that is a "continuing offense" (i.e. the criminal conduct is ongoing over a period of time) the statute of limitations does not begin to run (i.e. the clock does not start) until the criminal conduct ceases. Thus, in a conspiracy, the statute of limitations begins to run on the date of the last overt act or achievement of the objective, whichever occurs later.

1.730 Tolling the Statute

To "toll" the statute is to suspend or interrupt the running of the clock. Tolling will extend the date after which prosecution is barred.

A statute may be tolled when an individual is "fleeing from justice." The essential characteristics of fleeing from justice are leaving one's residence, usual place of

abode or resort, or concealing one's self with intent to avoid punishment.[40] The key word is "intent." One of the most common ways to flee from justice is to leave the country to avoid prosecution, but it is not the only one. Once a person has fled from justice, the reasons for any continued absence have no effect on tolling the statute. Thus, an excuse that the individual was in jail in Mexico is irrelevant if the original intent in going to Mexico was to avoid prosecution in the United States. The burden of proving the intent to flee is on the government. If proven, the statute will be tolled for the duration of the time the individual was "fleeing from justice."

For a discussion of the statute of limitations in a Customs civil violation, see chapter 8.

1.900 Disclosure of Documents or Information in Litigation

Disclosure refers, generally, to the sharing of documents or information between opposing parties in a legal action. In *Touhy v. Ragen*, 340 U.S. 462 (1951), the Supreme Court recognized the possibility of harm from unrestricted disclosure of information contained in the files of government agencies, and the need for a centralized procedure for challenging a subpoena *duces tecum* (a demand to produce specific items designated in the subpoena).

Unrestricted disclosure could clearly result in the unlawful or inappropriate disclosure of documents or information. Some documents or information may be subject to laws or privileges preventing their disclosure, may not be relevant or material to the pending action, may be available from other sources, or may not have been requested with sufficient particularity.

Additionally, CBP has a legitimate management interest in not having its agents and officers routinely appearing in court in private litigation (i.e. litigation in which the United States is not a party). Without a means for limiting the circumstances under which its personnel could be required to appear in such proceedings, CBP's ability to function effectively could be seriously compromised.

Accordingly, CBP has adopted procedures consistent with the standards outlined in *Touhy v. Ragen* to regulate the extent to which requests for government information received from parties to private litigation will be granted. Pursuant to the "Touhy" regulations,[41] if a CBP employee receives a formal demand from a court or other government entity to produce government information or documents (via a subpoena, notice of deposition or otherwise) in the context of litigation where the United States is not a party to the case, the employee must notify the Associate/Assistant Chief Counsel for the area where

40 *United States v. Florez*, 447 F.3d 145, 152 (2d Cir. 2006)
41 19 C.F.R. §§ 103.21-103.27 (2001).

the employee is located (or the Chief Counsel if at Headquarters or outside of the United States) and await instructions concerning the response to the demand.[42]

Unless waived by Chief Counsel upon request and for good cause shown, the demanding party must provide an affidavit, or statement, that summarizes the documents or testimony sought and its relevance to the proceeding, and the disclosure shall be so limited. In addition, any disclosure of commercial information or documents must first obtain the authorization of the Assistant Commissioner (Field Operations) in addition to the authorization of the Associate/Assistant Chief Counsel.[43]

Chief Counsel may authorize the disclosure of government information if:

1. The information sought is not subject to any law concerning privilege;

2. The disclosure would be appropriate under procedural rules;

3. The information is relevant and material, necessary, unavailable from other sources, and reasonable in its scope.

Disclosure will not be authorized if it would violate a treaty, statute, or rule of procedure. The so-called "Touhy regulations" further restrict the disclosure of classified or confidential information (such as a confidential source or informant), or investigatory records compiled for law enforcement purposes.[44]

Consider the following examples:

Example One: As a part of her assigned duties, CBP officer Jane Doe searched a suitcase belonging to Richard Ringer, a U.S. citizen returning from a trip abroad. During the examination, Officer Doe discovered sexually explicit images of children in Mr. Ringer's suitcase. Upon discovery of the images, Mr. Ringer volunteered that the images were extremely realistic artist renderings of children, not actual photographs of real children. Officer Doe seized the images and referred the matter for further investigation and possible criminal prosecution.

Six months later, Officer Doe received a subpoena from Attorney Jones who represents Peter Parent. Mr. Parent's child was the subject of the images found in Ringer's suitcase and the Parents have sued Ringer for damages caused by the creation and distribution of the pornographic images. Because Ringer is now claiming that he has no idea where the images came from or how they got into his suitcase, Attorney Jones wants to depose officer Doe regarding her

42 19 C.F.R. § 103.22(b) (2001).
43 19 C.F.R. §§ 103.22(c), (h) (2001).
44 19 CFR §§ 103.21 – 103.27 (2001); The Privacy Act, 5 U.S.C. § 552a, the Trade Secrets Act, 18 U.S.C. § 1905, the income tax laws, 26 U.S.C. §§ 6103 and 7213, grand jury secrecy under FED. R. CRIM. P. 6(e) (18 U.S.C. App.).

search of Ringer's suitcase and the statements Ringer made during that search. Officer Doe refers the subpoena to her local Assistant Chief Counsel. The Assistant Chief Counsel contacts Attorney Jones and explains to him that CBP has promulgated regulations governing the production or disclosure of official information in response to such a request, and that the Chief Counsel of CBP, through his designees, determines if and how much information may be disclosed by an employee in response to subpoena or subpoena duces tecum. When told that he must explain why he wants the information, Attorney Jones responds that he doesn't care about CBP regulations and that if officer Doe doesn't appear for the deposition, he will ask the court to hold her in contempt. Attorney Jones does not provide any further explanation and the Assistant Chief Counsel writes instructions for officer Doe to the effect that she may appear for the deposition but she may not testify about any information she obtained during the search of Mr. Ringer's suitcase. After officer Doe declines to testify, Attorney Jones moves the State court judge to hold officer Doe in contempt and the judge issues a Show Cause Order.

Upon officer Doe's written request for DOJ representation, the Assistant Chief Counsel refers the matter to the local Office of the U.S. Attorney. The AUSA assigned to the case moves in Federal District Court to remove the State Show Cause Order from the State to Federal court. The Federal Judge grants the motion and upon further motion by the AUSA quashes the Show Cause Order.

In this case, the CBP procedures prevented the disclosure of information that might well have been subject to laws preventing its disclosure.[45] Also, since the requesting attorney did not explain what information he wanted, or why it was relevant, CBP could not make a determination on these issues or whether the information was otherwise available.

Example Two: Officer Alpha is assigned to a Trade Enforcement Team ("TET") that inspects imported road construction equipment to ensure that it comports with DOT and EPA requirements. One day the TET is inspecting a shipment of 10 road rollers imported by Shoddy Distributors and discovers that, while all the appropriate CBP documents were presented, the vehicles do not have proper EPA labels affixed to the engines; by EPA regulations, these vehicles cannot be imported unless they are properly labeled. The TET detains the tractors and Shoddy Construction is notified. Upon further examination of the tractors, the TET discovers DOT violations as well. Over the next 25 days, officer Alpha is involved in many meetings with DOT and EPA personnel concerning the admissibility of the road rollers and learns precisely why these road rollers do not conform to DOT and EPA requirements. TET ultimately seizes the vehicles.

45 19 CFR Part 103, Subpart B (19 CFR §§ 103.21 – 103.27 (2001)); The Privacy Act, 5 U.S.C. 552a, the Trade Secrets Act, 18 U.S.C. 1905, the income tax laws, 26 U.S.C. 6103 and 7213, grand jury secrecy under FED. R. CRIM. P. 6(e) (18 U.S.C. App.).

Soon after the seizure, officer Alpha receives a subpoena from Attorney Zed. He represents Naïve Construction Company who has sued Shoddy in state court. Officer Alpha calls Attorney Zed and learns that Naïve previously purchased an imported road roller from Shoddy that was identical to the ones under seizure. This road roller has not worked properly since Naïve purchased it and it has sued Shoddy to get its money back. Attorney Zed wants officer Alpha to testify about why the road rollers do not meet EPA and DOT importation requirements. Officer Alpha refers the subpoena to his local Assistant Chief Counsel. The Assistant Chief Counsel contacts Attorney Zed and explains the CBP Regulations controlling disclosure of information. He also explains that, in this scenario, CBP is merely enforcing DOT and EPA regulations for those agencies and that the CBP decision to seize was based on determinations by those agencies that the vehicles were inadmissible. Attorney Zed then decides that officer Alpha does not really have the information he wants and tells the Assistant Chief Counsel that he will have the subpoena withdrawn. As in the first example, the CBP officer followed the proper CBP procedures concerning responding to subpoenas by referring the subpoena to the Assistant Chief Counsel for the area where the employee's supervisor was located. Also, as in the first example, CBP has access to information in the performance of its duties that may not be legal to disclose to private parties in litigation. This scenario is the most common.

Finally, a CBP employee may also encounter a situation where a court or other authority demands the production of such documents or information, either prior to the CBP employee receiving guidance from the Office of Chief Counsel, or in contradiction of CBP regulations or policies. In such a situation the employee shall appear and respectfully state that he is not authorized by CBP to comply with the demand. In such an event, the employee is immune from being held in contempt for the refusal to comply.[46]

Furthermore, pursuant to the decision in *Chen v. Ho*, 368 F.Supp. 2d 97 (D.D.C., 2005), if an agency declines to grant an employee the approval to respond to a subpoena to testify, the requesting party must then seek judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et. seq.* A federal court will then proceed to review the agency's decision under an "arbitrary and capricious" standard. The requesting party's failure to follow this APA procedure is fatal to a motion to compel compliance with the subpoena.

[46] *Touhy v. Ragen*, 340 U.S. 462 (1951).

1.1000 General Reference Information

1.1100 Glossary of legal terms

ADVERSARY PROCESS — the method courts use to resolve disputes; through the "adversary process," each side in a dispute presents its case as persuasively as possible, subject to the rules of evidence, and an independent fact finder, either judge or jury, decides for one side or the other.

ANSWER — the formal written statement by a defendant responding to a complaint and setting forth the grounds for defense.

APPEAL — a request, made after a trial, asking another court (usually the court of appeals) to decide whether the trial was conducted properly. To make such a request is "to appeal" or "to take an appeal."

ARRAIGNMENT (a-RAIN-ment) — a proceeding in which an individual who is accused of committing a crime is brought into court, told of the charges, and required to enter a plea to the charges.

BENCH TRIAL — a trial without a jury, in which the judge decides the facts.

BRIEF — a written statement submitted by the lawyer for each side setting forth the facts and law applicable to those facts in as favorable a light as possible to assist the court in deciding the case.

CASE LAW — the law as laid down in the decisions of the courts; the law in cases that have been decided.

CHAMBERS — the offices of a judge.

CHIEF DISTRICT JUDGE — the judge who has primary responsibility for the administration of the district court, but also decides cases; chief judges are determined by seniority.

CLERK OF COURT — an officer appointed by the court to work with the chief judge in overseeing the court's administration, especially to assist in managing the flow of cases through the court.

COMPLAINT — a written statement by the person starting a lawsuit; the "complaint" states the wrongs allegedly committed by the defendant.

CONTRACT — an agreement between two or more persons that creates an obligation to do or not to do a particular thing.

COUNSEL — a lawyer or a team of lawyers; the term is often used during a trial to refer to lawyers in the case.

COURT — an agency of government authorized to resolve legal disputes. Judges sometimes use "court" to refer to themselves in the third person, as in "the court has read the pleadings."

COURT REPORTER — a person who makes a word-for-word record of what is said in court and produces a transcript of the proceeding if requested to do so.

COURTROOM DEPUTY or CLERK — a court employee who assists the judge by keeping track of witnesses, evidence, and other trial matters.

CROSS-EXAMINATION — a lawyer's questioning of witnesses who were called and examined by the opposing attorney.

DAMAGES — money paid by defendants to successful plaintiffs in civil cases to compensate the plaintiff for their injuries.

DEFENDANT — in a civil suit, the person complained against; in a criminal case, the person accused of the crime.

DIRECT EXAMINATION — a lawyer's questioning of witnesses called by him.

DISCOVERY — the pre-trial process whereby lawyers exchange certain information, documents and evidence and seek by motions, depositions and other procedures to determine all the facts relevant to their case.

EN BANC — French for "in the bench" or "full bench." The term refers to a session in which the entire membership of the court participates in the decision rather than the regular quorum. The U.S. courts of appeals usually sit in panels of three judges, but for important cases may expand the bench to the full court and they are then said to be sitting *en banc*.

EVIDENCE — information in testimony or in documents that is presented to persuade the fact finder (judge or jury) to decide the case for one side or the other.

EX PARTE — on one side only; by or for one party; done for, in behalf of, or on the application of, one party only. A judicial proceeding, order, injunction, etc., is said to be *ex parte* when it is taken or granted at the instance and for the benefit of one party only, or by a person who is not a party to the proceeding but who has an interest in the matter and without notice to, or contestation by, any person adversely interested.

FELONY — a crime that carries a maximum penalty of more than a year in prison.

GOVERNMENT — as it is used in federal criminal cases, the prosecuting entity, i.e., the United States.

GRAND JURY — a body of citizens who listen to evidence of criminal activity presented by the government in order to determine whether there is enough evidence to justify filing an indictment. Federal grand juries consist of 16-23 persons and generally serve for 18 months.

HEARSAY — testimony given by a witness who relates, not what he knows personally, but what others have told him, or what he has heard said by others. Hearsay evidence is usually not admissible at trial.

IMPEACHMENT — (1) the process of charging someone with a crime (used mainly with respect to the constitutional process whereby the House of Representatives may IMPEACH high officers of the government for trial in the Senate); (2) the process of calling a witness' testimony into question, as in "impeaching a witness."

INDICTMENT — the formal charge issued by a grand jury stating that there is enough evidence that the defendant committed the crime to justify having a trial; used primarily for felonies.

INFORMATION — a formal charge filed by a government attorney against a defendant suspected of committing a crime. Without a defendant's consent, can only be used for misdemeanors.

INSTRUCTIONS — the judge's explanation to the jury of the law it must consider in its deliberation.

JUDGE — a government official with the authority to decide lawsuits brought before courts.

JUDICIAL REVIEW — this term typically refers to the authority of a court, in a case involving either a law passed by a legislature or an action by an executive branch officer or employee, to determine whether the law or action is inconsistent with a more fundamental law, namely the Constitution, and to declare the law or action invalid if it is inconsistent. Although judicial review is usually associated with the United States Supreme Court, it can be, and is, exercised by all courts. Judicial review sometimes means a form of appeal to the courts for review of findings of fact or of law by an administrative body.

JURISDICTION — (1) the legal authority of a court to hear and decide a case; (2) the geographic area over which the court has authority to decide cases.

LAWSUIT — an action brought by a plaintiff against a defendant alleging some wrong and seeking some relief.

LITIGANTS — see PARTIES.

MAGISTRATE JUDGE — in federal court, the U.S. magistrate judge is a judicial officer who assists the district judges in getting cases ready for trial. Magistrates

also may decide some criminal trials and may decide civil trials when both parties agree to have the case heard by a magistrate instead of a judge.

MISDEMEANOR — a crime the maximum punishment for which is one year imprisonment or less.

OPINION — a judge's written decision in a case. An OPINION OF THE COURT explains the decision of the court or of a majority of the judges. A DISSENTING OPINION is an explanation by one or more judges of why they believe the decision or opinion of the court is wrong. A CONCURRING OPINION agrees with the decisions of the court, but offers further comment.

ORAL ARGUMENT — in appellate cases, an opportunity for the lawyers for each side to summarize their position for the judges and answer the judges' questions.

PANEL — (1) in appellate cases, a group of three judges assigned to decide the case; (2) in the process of jury selection, the group of potential jurors brought in for voir dire.

PARTIES — the plaintiff(s) and defendant(s) to a lawsuit and their lawyers.

PETIT JURY or TRIAL JURY — a group of citizens who hear the evidence presented by both sides at trial and determine the facts in dispute. Federal criminal juries consist of 12 persons (sometimes with 1 or 2 alternate jurors in case one of the regular jurors cannot continue). Federal civil juries usually consist of 6 persons, with alternates. “Petit” is French for “small,” thus distinguishing the trial jury from the larger grand jury.

PLAINTIFF — the person who files the complaint in a civil lawsuit.

PLEA — in a criminal case, the defendant's statement of “guilty,” “not guilty,” or “no contest” respecting the charges.

PLEADINGS — in a civil case, the plaintiff’s complaint and the defendant’s answer.

PRECEDENT (PRESS-a-dent) — a court decision in an earlier case with facts similar enough to a dispute currently before a court to control the decision in the current case.

PRETRIAL CONFERENCE — a meeting of the judge and lawyers to decide which matters are in dispute and should be presented to the jury, to review evidence and witnesses to be presented, to set a timetable for the case, and sometimes to discuss settlement of the case.

PRO SE — a Latin term meaning “on one's own behalf.” In courts, it refers to persons who try their own cases without lawyers. A person who does that is called a plaintiff, pro se or defendant, pro se.

PROSECUTE — to charge someone with a crime or a civil violation and seek to gain a criminal conviction or a civil judgment.

RECORD — a written account of all the acts and proceedings in a lawsuit.

REMAND — when an appellate court sends a case back to a lower court for further proceedings.

REVERSE — when an appellate court sets aside the decision of a lower court because of an error. A REVERSAL is often followed by a remand.

SETTLE — in legal terminology, when the parties to a lawsuit agree to resolve their differences among themselves without having a trial.

SIDEBAR — a conference between the judge and lawyers held out of the earshot of the jury and spectators.

STATUTE — a law passed by a legislature.

SUMMARY JUDGMENT — a decision made on the basis of statements and evidence presented for the record without any need for a trial. It is used when there is no dispute as to the facts of the case and one party is entitled to judgment as a matter of law.

TESTIMONY — evidence presented orally by witnesses in any court or grand jury proceeding.

TRANSCRIPT — the written form of a mechanical or electronic recording of an event such as a trial, meeting or telephone conversation.

UPHOLD — when an appellate court approves a lower court decision.

U.S. ATTORNEY — a lawyer appointed by the President in each judicial district to prosecute cases for the federal government.

VENUE — the geographic location where a trial must take place.

VERDICT — a petit jury's decision.

VOIR DIRE — the process by which judges and lawyers select a petit jury from among those eligible to serve. “Voir dire” is a legal phrase meaning “to speak the truth.”

WITNESS — a person called upon by either side in a lawsuit to give testimony before the court or jury.

1.1200 Common Abbreviations in CBP Regulations (with examples)

Stat. ... = Statutes at Large 14 Stat. 178

R.S. = Revised Statutes of the U.S. R.S. 3061

U.S.C. . = United States Code 19 U.S.C. § 482

F.R. = Federal Register..... .43 F.R. 14451

C.F.R. . = Code of Federal Regulations 19 C.F.R. § 145.1

TIAS ... = Treaties & Other Int'l Acts TIAS 5539

U.S.T... = United States Treaties.....15 U.S.T. 1606

Citations for Court Decisions:

U.S. District Court case decisions are reported in the Federal Supplement, abbreviated "F. Supp." or "F. Supp. 2d" or "F. Supp. 3d," published by the West Publishing Company.

For example, a U.S. District Court case decision would be cited:

United States v. Blount, 30 F. Supp. 2d 308 (D. Conn. 1998).

U.S. Court of Appeals cases are reported in the Federal Reporter or Federal Reporter, Second or Third Series, abbreviated "F." or "F.2d" or "F.3d" also published by the West Publishing Company.

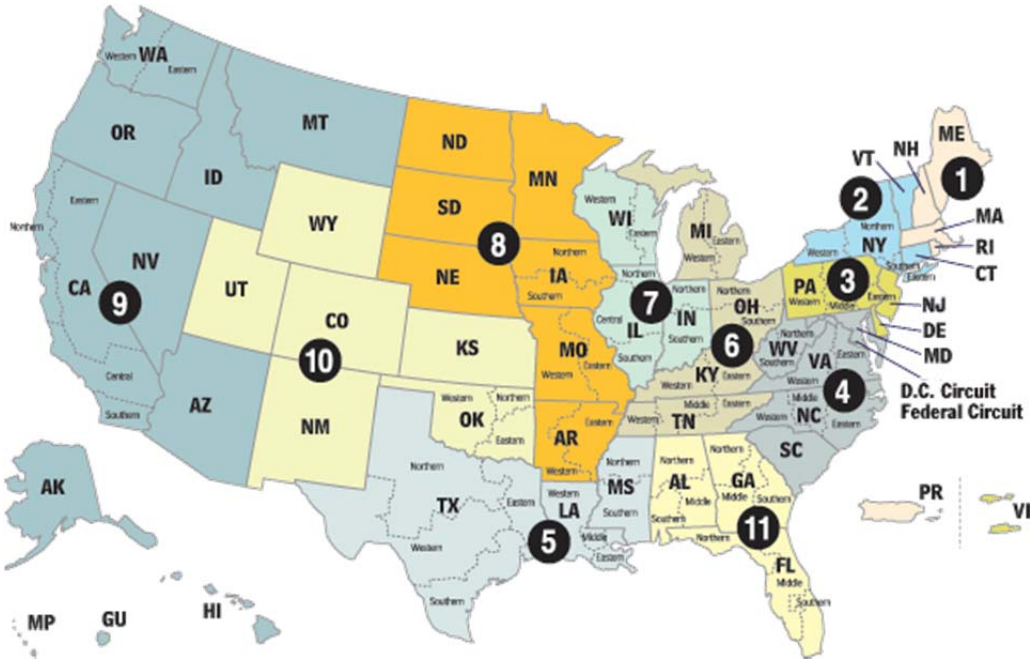
For example, a U.S. Court of Appeals case would be cited:

United States v. Rouse, 148 F.3d 1040 (8th Cir. 1998).

U.S. Supreme Court cases are reported by three different publishers: The Government Printing Office (GPO), the West Publishing Company and the Lawyers Cooperative Publishing Company. The abbreviations used are "U.S." (for the GPO), "S. Ct." (for West Publishing), and "L.Ed." (for Lawyers Co-op).

For example, U.S. Supreme Court cases in this publication use the official cite, as follows: *Carroll v. United States*, 267 U.S. 132 (1924).

Geographic Boundaries of U.S. Judicial Districts and Circuits



1.1400 Information about Laws and Regulations Enforced by CBP

CBP enforces a wide range of laws and regulations from many different federal departments and agencies. Information about these laws and regulations can be found on CBP Net, via the Chief Counsel Sharepoint site.

Chapter Two

Search and Seizure

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2.000 Introduction

Search and Seizure is a complicated and ever changing area of the law. However, having a good understanding of the issues in this area is fundamental for law enforcement officers and attorneys. Statutes and rules cover only a portion of the issues, and court decisions are frequently confusing, or even contradictory. Often, important points have never been addressed by the Supreme Court, so law enforcement officers and attorneys must look to the law of the various circuits or even the districts for guidance. An additional problem in the area of the Fourth Amendment (search and seizure) is that officers must often make decisions on the spur of the moment, without benefit of books, manuals, advice of government attorneys, or even assistance from more experienced officers. For these reasons, officers must have knowledge of the basic principles of search and seizure and be able to apply them to the array of circumstances that they confront on a daily basis.

The below is a discussion of the major issues that arise in search and seizure situations. However, as the law may vary among the circuits and changes with regularity, please ensure that you confer with your prosecutor or Associate/Assistant Chief Counsel when specific questions arise.

2.100 Constitutional Authority

2.110 The Exclusionary Rule
2.120 Levels Of Suspicion

The Constitution of the United States does two fundamental things of overriding concern to the law enforcement officer. First, the Constitution establishes the three branches of our government: legislative, executive (of which the law enforcement officer is a part), and judicial.

Second, the Constitution grants only limited powers to each branch. Congress has the Constitutional authority to pass the laws that the executive branch enforces, and that the judicial branch interprets. Law enforcement officers as part of the executive branch can act only to the extent permitted by the Constitution, irrespective of any statutory authority. Properly understood then, a law enforcement officer may act on behalf of the government only to the extent permitted by the Constitution and statutes passed by Congress as interpreted by the Courts. Furthermore, any statutory authority is subject to the limitations imposed by the Constitution. Constitutional problems may arise when a law enforcement officer acts outside his statutory authority or within his authority but outside Constitutional limits! Thus, "policing the police" or supervising the efforts of the executive branch in carrying out its duty has presented sizable issues for the courts over the years. For example, if a law enforcement officer has probable cause that an offense was committed and makes an arrest for that offense, but the officer's statutory authority only permits a summons for the offense, the question for the courts becomes whether the officer violated the

Constitution (in addition to the statute). If there is a violation of the Constitution, the question of the *exclusionary rule* becomes relevant.[1]

The Fourth Amendment states:

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

An immediate question raised by the opening words of the amendment is the scope of the phrase "the people." "The people" is not expressly limited to citizens of the United States. As a matter of practice, CBP presumes that aliens illegally present in the U.S. are protected by the Fourth Amendment.[2] Illegal aliens are also protected by other provisions of the Constitution.[3] Unusual situations can arise when applying these principles. For example, one such case involved whether the Fourth Amendment was applicable to a search by U.S. government (DEA agents) in Mexico of a non - U.S. resident Mexican citizen who was recently incarcerated in the U.S. The Supreme Court concluded that the term "the people" includes those who are part of a national community or who have otherwise developed sufficient connections with this country to be considered part of that community. It does not include persons, such as the Mexican citizen in this case, who have no voluntary attachment to the United States, such as owning property here or being a citizen or resident alien or otherwise being voluntarily within the territory. The Court held that under the above circumstances the Fourth Amendment was not applicable to the search. Once a person is deemed to be within the protected class (that is, "the people"), searches and seizures applicable to that person are governed by the Fourth Amendment, even if they occur outside the territory of the United States.[4]

The remaining language of the Fourth Amendment can be divided into two parts for the purpose of analysis. The first part flatly prohibits unreasonable searches and seizures. The second states that all warrants shall be based upon probable cause. Although the amendment does not mandate a warrant for all searches and seizures, the underlying premise in the law of search and seizure is that if the officer has time, a warrant should be secured. The courts have frequently stressed this preference for warrants, but have also recognized that unique circumstances may render a warrantless search nonetheless reasonable, so long as the search falls within one of the "few specially established and well

[1] See *Virginia v. Moore*, 553 U.S. 164 (2008) (officer who violated state statute in making arrest did not violate the 4th Amendment because he had probable cause; exclusionary rule did not apply, evidence not suppressed).
[2] *INS v. Lopez*, 468 U.S. 1032 (1984); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).
[3] *Plyler v. Doe,* 457 U.S. 202 (1982) (Fifth, Sixth, and Fourteenth Amendments).
[4] *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

delineated exceptions" to the warrant requirement. In other words, when a warrantless search is made, the burden is on the government to show an acceptable excuse for failure to secure a warrant. It cannot be overemphasized that wherever feasible law enforcement officers should make every effort to obtain a warrant.

2.110 The Exclusionary Rule

2.111 Purpose
2.112 Scope of Application

Searches and seizures will be challenged for a variety of reasons, generally by a defendant that wants evidence against him suppressed or excluded from his criminal trial. The Exclusionary Rule provides for the exclusion or suppression of evidence if it was acquired by the government in violation of the Constitution. The Exclusionary Rule developed as a court imposed remedy to law enforcement officers' violations of the Constitution.[5]

2.111 Purpose

The purpose of the exclusionary rule is to deter law enforcement officers[6] from exceeding their constitutional authority by removing the incentive to do so, i.e., prohibiting the use of any evidence so obtained.

Prior to 1914, the admissibility of evidence in United States courts was not affected by the illegality of the means by which it was obtained. In 1914, however, the Supreme Court of the United States held that evidence obtained through an unreasonable search or seizure by federal officers was inadmissible in a prosecution in federal court against the person aggrieved by the violation.[7]

A criminal defendant was thus enabled to ask the court to suppress (exclude from trial) evidence unreasonably (unlawfully) obtained. Considering the close relationship of the Fifth and Fourth Amendment, the "exclusionary rule" has been applied to violations of the Fourth Amendment (search and seizure), the Fifth Amendment (compelled self incrimination), and the Sixth Amendment (right to an attorney).[8]

Application of the exclusionary rule results in the suppression of the evidence that was unconstitutionally seized by the government. An offspring of the Exclusionary Rule is the so-called "fruit of the poisonous tree" doctrine.[9] Simply stated, this doctrine holds that illegally seized evidence cannot be used as the means of obtaining still more evidence. Stated another way, an officer cannot

5 *Weeks v. United States*, 232 U.S. 383 (1914).
6 Actions by private parties are not covered by the Fourth Amendment; it applies only to governmental action.
7 *Weeks v. United States*, 232 U.S. 383 (1914).
8 *Mapp v. Ohio*, 367 U.S. 643 (1961).
9 *Wong Sun v. United States*, 371 U.S. 471 (1963).

use any evidence directly or indirectly obtained from a violation of the Constitution. An example of "fruit of the poisonous tree" can be seen where officers illegally seize documents and the information therein is then used to establish probable cause for the issuance of a search warrant. Any evidence seized during a search pursuant to that warrant would be "fruit" of the original illegality (the "tree") and would thus be "poisoned" and subject to being suppressed.

2.112 Scope of Application

2.112a Violations of Agency Regulations
2.112b Extent of the Taint
2.112c Civil and Criminal Cases
2.112d Independent Source Exception
2.112e Inevitable Discovery Exception
2.112f Good Faith Exception

While illegal searches and seizures can result in the application of the exclusionary rule, not all illegal searches and seizures will trigger its application. First, only the person aggrieved by the violation may contest the search or seizure. Second, certain conditions or exceptions may exist where the purposes of the rule would not be served by its application.[10] Third, certain types of evidence, such as evidence of personal identity, are generally not subject to suppression.[11] *Lopez-Mendoza* originated as a removal hearing case; on appellate review the Supreme Court indicated that identity evidence is not suppressible. The Court in *Lopez-Mendoza,* left open the possibility that identity evidence could be subject to suppression if the law enforcement violation was egregious, or transgressed notions of fundamental fairness and undermined the probative value of the evidence obtained. *United States v. Fariaz-Gonzalez,* 556 F.3d 1181 (11th Cir. 2009) is an ICE illegal reentry case in which the Eleventh Circuit indicated that *Lopez-Mendoza* did not support a finding that identity-related evidence was never suppressible and therefore was not controlling in a criminal case. The Eleventh Circuit went on to apply a cost-benefit balancing test. They examined whether the exclusion of identity-related evidence in a criminal prosecution, where the evidence was offered solely to prove the identity of the defendant, was justified on the ground that the deterrence benefit of excluding the evidence outweighed its social costs. The court held that the fingerprints, photographs, and alien file of Farias-Gonzalez were not suppressible. See this case for a discussion on other circuit approaches. Also, there are a variety of interpretations by the lower courts on what constitutes an egregious violation for both removal and criminal cases.[12]

10 *Herring v. United States,* 129 S. Ct. 695 (2009) (Evidence obtained as a result of a violation of the Fourth Amendment because of careless police record keeping should not be suppressed.)

11 *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

12 For example: *Almeida-Amaral v. Gonzales,* 461 F.3d. 231 (2nd Cir. 2006); *United States v. Bowley*, 435 F.3d 426 (3rd Cir. 2006); *United States v. Oscar-Torres*, 507 F.3d 224 (4th Cir. 2007); *United States v. Navarro-Diaz*, 420 F.3d

2.112a Violations of Agency Regulations

The exclusionary rule is triggered by violations of the Constitution and is not applicable to non-constitutional violations unless a statute specifically requires its application. One such example is the federal wiretap law which does authorize sanctions for its violation.[13] (See Chapter Twelve, Electronic Surveillance.) A statutory or regulatory violation without a specific suppression provision, that does not otherwise violate the Constitution, does not invoke the application of the exclusionary rule.[14] For example, the Constitution allows the border search of international mail without suspicion, but a CBP regulation requires reasonable suspicion to open "sealed letter class mail." When Customs officers opened a package classified as "sealed letter class mail" without reasonable suspicion, the Constitution was not implicated but the regulation was. However, the violation of an agency regulation does not require suppression of the evidence.[15]

2.112b Extent of the Taint

In *Wong Sun v. United States*, 371 U.S. 471 (1963), the Court declined to "hold that all evidence is 'fruit of the poisonous tree' simply because it would not have

581 (6th Cir. 2005); *United States v. Guevara-Martinez*, 262 F.3d 751 (8th Cir. 2001); *United States v. Gudino*, 376 F.3d 997 (9th Cir. 2004); *United States v. Garcia-Beltran*, 389 F.3d 864 (9th Cir. 2004), and *United States v. Olivares-Rangel*, 458 F.3d 1104 (10th Cir. 2006) (remanded to determine if fingerprints and A-file subject to suppression).

13 18 U.S.C. §2515 prohibits the use of intercepted communications in any court proceeding if the disclosure of the information is prohibited by Chapter 119, Wire and Electronic Communications Interception and Interception of Oral Communications, 18 U.S.C. §2510 et seq.; 18 U.S.C. §2518(10) provides for the suppression of the contents of wire or oral communications intercepted pursuant to 18 U.S.C. §2510 et seq. on specified grounds. Some violations of the wiretap statute, such as the recordation and sealing requirements which are designed to protect the integrity of the evidence not to protect privacy as a constitutional matter, may not be subject to the exclusionary rule *U.S. v. Amanuel*, 615 F.3d 117 (2nd Cir.) 2010; *United States v. Abdi,* 463 F.3d 547 (6th Cir. 2006) (Evidence should not be suppressed under the exclusionary rule for a purely statutory violation unless the language of the statue expressly mandates suppression.).

14 *Virginia v. Moore*, 128 S.Ct. 1598 (2008) (officer who violated state statute in making arrest did not violate the Constitution because he acted with probable cause; federal exclusionary rule did not apply and the evidence not suppressed).

15 *United States v. Ani*, 138 F.3d 390 (9th Cir. 1998). See also *United States v. Harrington*, 681 F.2d 612 (9th Cir. 1982) (evidence not suppressed when Customs Service special agents, instead of DEA agents, obtained and executed a search warrant. The court explained that "there must be an exceptional reason, typically the protection of a constitutional right, to invoke the exclusionary rule").

come to light but for the illegal actions of the police." Thus the Court ruled that Wong Sun's confession was untainted by his illegal arrest because it was given after he had obtained his release and voluntarily returned to the station later, although there seemed to be no doubt that he would never have come in and confessed but for the prior arrest. In rejecting the "but for" test, Justice Powell later pointed out that the

> "Court's rejection in *Wong Sun* of a "but for" test … recognizes that in some circumstances strict adherence to the Fourth Amendment exclusionary rule imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes. The notion of the "dissipation of the taint" attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost."[16]

In essence, evidence obtained by the government indirectly in violation of the Constitution will be suppressed as the fruit of a poisonous tree unless the poison or taint of the violation is sufficiently attenuated or separated from the violation so that suppression serves no remedial purpose. The underlying purpose of the "dissipation of the taint" doctrine or sometimes called the "attenuation of the taint" is to mark the point of diminishing returns of deterrence called for by the exclusionary rule. It is not easy for courts to decide what amounts to sufficient dissipation or attenuation.

In a Customs case, *United States v. Oguns*, 921 F.2d 442 (2d Cir. 1990), the defendant was arrested as he walked to his apartment. Following the arrest, agents brought Oguns into his apartment without his consent, read him his *Miranda* warnings, and gave him a preprinted consent to search form. Oguns subsequently consented to a search of the apartment. Because the officers did not have a warrant for the apartment, the Court considered the entry into the apartment to be a violation of the Fourth Amendment.

To determine whether the illegal entry of Oguns' apartment "taints" Oguns' consent to search his apartment, the Court, following the Supreme Court in *Brown v. Illinois*, considered four factors:

- ✓ whether Miranda warnings were given;
- ✓ the "temporal proximity" of the illegal entry and the alleged conduct;
- ✓ the presence of intervening circumstances;
- ✓ the purpose and flagrance of the official misconduct.

In this case, the Customs agents read Oguns his *Miranda* warnings, and also effectively advised him of his Fourth Amendment rights regarding the consent to

16 *Brown v. Illinois*, 422 U.S. 590 (1975).

search. Although there was only a short lapse of time between the unauthorized entry and the consent to search, the agents did not search the apartment or seize any evidence until after Oguns consented to the search. Furthermore, the agents' conduct was not flagrant nor did it indicate an evil purpose or bad faith. In these circumstances, the lawful arrest had the effect of mitigating the "taint" of the entry, which was dissipated before Oguns consented to the search of his apartment. Accordingly, the evidence found during the consent search was admissible.

2.112c Civil and Criminal Cases

The exclusionary rule applies to the use of illegally obtained evidence in any criminal or quasi-criminal case.[17] A quasi-criminal case is one in which a penalty or forfeiture is sought to be recovered for the commission of an offense against the law.[18]

Several appellate courts have applied the exclusionary rule in a variety of civil cases to prohibit the use of unlawfully obtained evidence.[19]

Also, since the underlying rationale of the exclusionary rule is deterrence, that fundamental purpose would be frustrated, at least in part, if the government was free to use illegally obtained evidence in its civil actions against those offended.[20]

Whether viewed from either the deterrence perspective or a quasi-criminal analysis, the Court of International Trade has held that the rule is applicable to evidence sought to be used in 19 U.S.C. § 1592 civil penalty actions.[21]

On the other hand, the Supreme Court has ruled that the exclusionary rule will usually not be applied in alien removal proceedings.[22] It left open the possible application of the rule in removal proceedings in those cases where there are "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value

17 *1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965).
18 *Boyd v. United States*, 116 U.S. 616 (1886).
19 *Powell v. Zuckert*, 366 F.2d 634, 640 (D.C. Cir. 1966) (discharge proceeding against government employee); *Rogers v. United States*, 97 F.2d 691, 692 (1st Cir. 1938) (action to recover Customs duties); *Iowa v. Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391, 407 (S.D. Iowa 1968), *aff'd. sub nom.*, *Standard Oil Co. v. Iowa*, 408 F.2d 1171 (8th Cir. 1969) (civil antitrust action); *United States v. Stonehill*, 274 F. Supp. 420, 425-26 (S.D. Cal. 1967), *aff'd*, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969) (tax assessment case); *United States v. Blank*, 261 F. Supp. 180, 182 (N.D. Ohio 1966) (tax assessment case); *Lassoff v. Gray*, 207 F. Supp. 843, 848 (W.D. Ky. 1962) (tax assessment case).
20 *Pizzarello v. United States*, 408 F.2d 579 (2d Cir. 1969).
21 *United States v. Modes, Inc., et al*, 787 F. Supp. 1466 (Ct. Int'l Trade 1992).
22 *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

of the evidence obtained."[23] The circuit and district courts are still defining what they consider to be "egregious" and what "might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." [24]

2.112d Independent Source Exception

Where probable cause for a search and seizure has been developed independently of any constitutional violation, the mere fact that a violation occurred will not trigger the exclusionary rule. For example, where an officer has made an unlawful entry into an apartment while another officer was seeking a search warrant for that same apartment based upon information obtained independently of the unlawful entry, the evidence obtained as a result of the subsequent search with the warrant will be admissible. The purpose of deterrence has no application where the government lawfully developed the foundation for the warrant from an independent source.[25]

2.112e Inevitable Discovery Exception

Evidence can still be admissible even though constitutional authority was exceeded if the prosecution can establish by a preponderance of the evidence that the information inevitably would have been discovered by lawful means. For example, officers unconstitutionally compelled a suspect to tell them where he hid the victim's body, and he led them to the body. At the same time, however, a search party independently was searching culverts, was moving toward the specific culvert where the body had been placed and was just a short distance away. Since the evidence inevitably would have been found by the searching officers, the purpose of suppression would not be served. In other words, unconstitutionally obtained evidence may be admitted at trial if it inevitably would have been discovered by an independent line of investigation that was already being pursued when the constitutional violation occurred.

The inevitable discovery doctrine derives from another legal theory referred to as the independent source doctrine discussed at 2.112d. The difference is that the evidence sought to be introduced at trial through inevitable discovery was not in

23 *Id.* at 1050-51.

24 *Martins v. Attorney General of United States,* 306 Fed. Appx. 802 (3rd Cir. 2009); *Singh v. Mukasey*, 553 F.3d 207 (2nd Cir. 2009); *Tawfik v. Mukasey*, 299 Fed.Appx. 45 (2nd Cir. 2008); *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012 (9th Cir. 2008); *Melnitsenko v. Mukasey*, 517 F.3d 42 (2nd Cir. 2008); *Kandamar v. Gonzales*, 464 F.3d 65 (1st Cir. 2006); *Almeida-Amaral v. Gonzales*, 461 F.3d 231 (2nd Cir. 2006); *Orhorhaghe v. I.N.S.,* 38 F.3d 488 (9th Cir. 1994), and *Gonzalez-Rivera v. I.N.S.,* 22 F.3d 1441 (9th Cir. 1994).

25 *Segura v. United States*, 468 U.S. 796 (1984). *See also, Murray v. United States*, 487 U.S. 533 (1988); *United States v. Hanhardt*, 155 F. Supp. 2d 840 (N.D. Ill. 2002).

fact obtained from an independent source, but inevitably would have been had the violation not occurred.[26]

2.112f Good Faith Exception

(1) Good Faith in Deficient Warrants

The exclusionary rule does not apply to evidence seized under a deficient search warrant where officers acted in good faith in relying on the warrant. The good faith inquiry is confined to the objectively ascertainable question of whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization.

In making this determination the court does not inquire into what the officer subjectively thought, but rather into the objective reasonableness of all the circumstances surrounding the issuance of the warrant, including whether the warrant application had previously been rejected by a different magistrate judge.

This inquiry into good faith will include not only the officers who actually execute a warrant, but also the officers who originally obtained it or who provided information material to the probable cause determination. For example, an officer could not obtain a deficient warrant and have other officers ignorant of the circumstances serve it and expect the "good faith" of the other officers to cover the deficiency.

Moreover, this exception does not apply:

- ✓ if the issuing magistrate or judge was misled by information in an affidavit that the officer knew was false or would have known was false except for his reckless disregard of the truth;

- ✓ where the issuing magistrate wholly abandoned his detached and neutral role;

- ✓ where the affidavit is so lacking in indicia of probable cause as to render belief in the existence of probable cause entirely unreasonable; or

- ✓ where a warrant is so facially deficient, e.g., in failing to particularly describe the place to be searched or the things to be seized, that the executing officers cannot reasonably presume it to be valid.[27]

The good faith exception was not applicable to a warrant that was based on an affidavit which merely stated that a reliable person had seen oxycontin in a

26 *Nix v. Williams*, 467 U.S. 431 (1984).
27 *United States v. Leon*, 468 U.S. 897 (1984).

residence. The Court ruled that a reasonable officer would have known that the affidavit and warrant were deficient.[28]

(2) Good Faith Where Statute is Declared Unconstitutional

The exclusionary rule does not apply to evidence obtained by law enforcement officers who act in objectively reasonable reliance upon a statute authorizing warrantless administrative searches, such as inspection of records of automobile wrecking yards, but which subsequently may be found to violate the Fourth Amendment.

Application of the exclusionary rule in these circumstances would have little deterrent effect on future police misconduct, which is the basic purpose of the rule. Law enforcement officers conducting such searches are simply fulfilling their responsibility to enforce the statute as written. If a statute is not clearly unconstitutional, officers cannot be expected to question the judgment of the legislature that passed the law.[29]

(3) Good Faith Where Binding Precedent is Later Overruled

The exclusionary rule does not apply to evidence obtained by law enforcement officers who act in compliance with binding legal precedent that is later overruled.[30]

(4) Good Faith in Other than Deficient Warrants

The courts have extended the good faith exception to a number of other circumstances.

The Fifth Circuit has modified its application of the exclusionary rule by ruling that:

> Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence.[31]

28 *United States v. Lester,* 616 F.Supp. 2d 590 (W.D.Va. 2009).
29 *Illinois v. Krull*, 480 U.S. 340 (1987).
30 *Davis v. United States*, 654 U.S. ___ (2011) (No. 09-11328).
31 *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980). *See also*, *United States v. Beck*, 729 F.2d 1329, 1331 (11th Cir. 1984) (holding that the good faith exception applied to an arrest based on a deficient affidavit where the officers involved had sufficient personal knowledge of the suspect's criminal history and whereabouts to give them a reasonable and good faith, although possibly mistaken, belief that their actions were authorized) and *United States v. Nolan*,

The Fifth Circuit also noted in *Williams* that an officer's subjective belief concerning the legality of a search is not enough. Ignorance of the basic principles of criminal procedure is not "good faith." The police officer's actions must "be based upon articulable premises sufficient to cause a reasonable and reasonably trained officer to believe he was acting lawfully."

A Border Patrol agent observed a heavy welding truck loaded with a stack of plywood and noticed that when the driver saw him, the driver appeared to be surprised and "scared." The agent radioed in the license plate number and was told that the number belonged to a different truck. The dispatcher, however, transposed a number and so reported on the wrong plate. Believing that he had come upon criminal activity, the agent stopped the truck and eventually obtained consent to inspect the truck. Discovering compartments, a drug dog was obtained which alerted to the presence of drugs in the compartments. Over one thousand pounds of cocaine was discovered. The Fifth Circuit held that the agent's reasonable reliance on the erroneous information from the dispatcher in stopping the truck precluded application of the exclusionary rule.[32]

The Supreme Court refused to suppress evidence found pursuant to a search incident to an arrest where the arrest was based upon a computer check that reported a warrant outstanding for the arrestee. In fact, however, the warrant had been quashed over two weeks earlier, but due to an error of court personnel the warrant had not been deleted from the computer. In refusing to impose the exclusionary rule, the Supreme Court reiterated the purpose of the rule and said that since the error was neither made by, nor known by the police, the purpose of the rule would not be served by applying it in this case.[33] In January of 2009 the Supreme Court issued *Herring v. United States*, which held that when police mistakes leading to an unlawful search are the result of isolated negligence attenuated from the search, rather than systemic error or reckless disregard of constitutional requirements, the exclusionary rule will not apply.[34] It appears that the courts will be looking at such errors to determine if they are systemic or are the result of reckless disregard of constitutional requirements.

2.120 Levels Of Suspicion

2.121 Zero Suspicion
2.122 Some or Mere Suspicion
2.123 Reasonable Suspicion
2.124 Probable Cause
2.125 Reasonable Certainty
2.126 Proof Beyond a Reasonable Doubt

530 F. Supp. 386 (W.D. Pa. 1981), *aff'd*, 718 F.2d 589 (3rd Cir. 1983) (holding that an officer had a good faith basis to enter a motel room to arrest a parole violator without complying with the "knock and announce" rule of 18 U.S.C. § 3109).

32 *United States v. Leon Reyna*, 930 F.2d 396 (5th Cir. 1991).

33 *Arizona v. Evans*, 514 U.S. 1 (1995).

34 *Herring v. United States*, 129 S. Ct 695 (2009).

The Fourth Amendment requires that all searches be reasonable. In determining whether a law enforcement officers' actions were reasonable the courts balance the officer's conduct against the level of suspicion of criminal activity that the officer had when the action was taken. As an officer's conduct becomes more intrusive, a greater level of suspicion is required to sustain the reasonableness of that conduct. In that regard, six levels of suspicion have been developed in the law applicable to the Fourth Amendment as encountered by law enforcement officers of CBP. The facts that an officer uses to support or explain his suspicions are based upon articulable facts, that is, facts that can be put into words. Objectively articulable facts are those which one can see, hear, feel or smell and can talk about in court.

2.121 Zero Suspicion

Zero Suspicion is the lowest level of suspicion; it is the absence of any suspicion. Generally law enforcement may not rely on zero suspicion, however, at the border, much of the law enforcement activity is based upon zero suspicion because of the border search exception to the Fourth Amendment (addressed in subsection 2.680).

2.122 Some or Mere Suspicion

Some or mere suspicion is a subjective suspicion on the part of an officer, i.e., a suspicion in his mind and need not be based on any objectively articulable facts. Mere suspicion can be as little as just a "hunch" or based upon articulable facts that do not support a reasonable suspicion. Like zero suspicion, traditional law enforcement can not use mere suspicion as support for a law enforcement action. However, there are exceptions particularly at the border (addressed in 2.680).

2.123 Reasonable Suspicion

Reasonable suspicion is based on specific articulable facts which, when taken together with what one can reasonably infer from those facts, would lead a reasonable officer to suspect that a person *might* be engaged in criminal activity.

The point to be clearly understood here is that to be reasonable, the suspicion must be based upon articulable facts which constitute objectively valid reasons for an officer to suspect that a particular individual is involved in crime. Some facts, taken alone, can never serve that purpose. On the other hand, taken in the context of other known facts, those same facts may very well make one's suspicion reasonable.

In short, there must be "some basis from which the court can determine that the action was not arbitrary or harassing."[35] The officer, of course, "must be able to articulate something more than an inchoate and unparticularized suspicion or

[35] *United States v. Chatman*, 573 F.2d 565 (9th Cir. 1977).

hunch."[36] Reasonable suspicion can be based on information given to officers, but the content of the information and its degree of reliability are to be considered in the "totality of the circumstances." An anonymous tip predicting future conduct, when sufficiently corroborated, can provide reasonable suspicion.[37]

2.124 Probable Cause

Probable cause is that collection of facts and circumstances known to officers based upon reasonably trustworthy information that is sufficient in itself to warrant a person *of reasonable caution* in the belief that a particular person committed a crime or that seizable property would be found in a particular place or on a particular person.[38]

It is important to remember that probable cause does not hinge on any one individual fact. As one court has expressed it,

> probable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observe as trained officers. We weight not individual layers but the laminated total.[39]

Probable cause deals with probabilities, not hard certainties. Information collected must be weighed neither by scholars nor the average, reasonable person, but by those versed in law enforcement. It is a fluid concept, depending on the assessment of probabilities in a particular factual context and not reduced to a neat set of legal rules. Finely-tuned standards such as proof beyond a reasonable doubt (required for a conviction) or a preponderance of the evidence (utilized as the standard of proof in some civil trials) are useful in the trial itself, but have no place in determining whether or not there is probable cause.

In determining probable cause the Supreme Court has adopted a "totality of the circumstances" test.[40] In determining whether probable cause exists, the officer, and ultimately the court, must make a practical, common sense decision based upon the totality of the circumstances whether there is a fair probability that seizable property will be found in a particular place or that a particular person committed a crime.

Probable cause does not depend upon any one fact or combination of facts, but the determination will be influenced by a number of relevant factors and results

36 *United States v. Sokolow*, 490 U.S. 1 (1989).
37 *Alabama v. White*, 496 U.S. 325 (1990); *Florida v. J.L.,* 529 U.S. 266 (200) (tip lacked the moderate indicia of reliability present in *White*).
38 *Carroll v. United States*, 267 U.S. 132 (1925).
39 *Smith v. United States*, 358 F.2d 833 (D.C. Cir. 1966).
40 *Illinois v. Gates,* 462 U.S. 213 (1983).

from consideration of the whole mosaic of facts and circumstances and reasonable inferences from them. The following are among the most important factors to consider.

a. Objective Facts

Probable cause cannot be based upon mere suspicions or upon an officer's educated guess. Naked conclusions cannot be used to establish probable cause. *Probable Cause must be based on specific, articulable, facts and circumstances.*

b. Experience and Expertise of the Officer

As they gain experience, officers become familiar with the habits, patterns and methods of those engaged in particular types of criminal activity. What constitutes probable cause for a CBP crime is determined from the standpoint of a reasonable, properly trained CBP officer.

c. Prior Criminal Activity

Whether or not your suspect has engaged in prior criminal activity is a factor to consider when establishing probable cause.

d. Association with Other Persons

Mere association with a person whom the police have probable cause to arrest or to suspect is not enough in itself to establish probable cause, but could be used as a factor. In order to find probable cause based on association with persons engaging in criminal activity, some additional circumstances to infer participation must be reasonably shown. Whether the known criminal activity was contemporaneous with the association or whether the nature of the criminal activity is such that it could not normally be carried on without knowledge of all persons present are significant factors.

e. Gestures

Suspicious gestures, such as constantly looking over one's shoulder to see if he is being followed may be taken into account in establishing probable cause.

f. Flight

The flight of a person from the presence of police is insufficient, standing alone, to establish probable cause, but may be considered with other facts.

g. Nature of the Area

The courts have consistently concluded that activity in a high crime area is a relevant circumstance to be considered in determining the existence of probable cause.

h. Use of Senses

An officer may smell contraband or may see contraband or items associated with contraband, which may establish or be used to establish probable cause.

i. Evidence Found During A Border Search

Evidence of crime found during a lawful border search can provide probable cause to arrest.

j. Open View Observations of Evidence

Open view observations made from a place where an officer has a legal right to be, can provide probable cause. These could be observations made into a vehicle, vessel, or aircraft located in a public place. Or, they could be observations made during a lawful stop or as a result of boarding a vessel for a document check.

k. Information from Third Parties

Probable cause can be established through reports to the officer by a third party, such as an informant. Whether or not that information is enough to establish probable cause will depend on the totality of the circumstances.[41] Although no longer required under the "totality of the circumstances" test, a useful guide is the *Aguilar-Spinelli* standard.[42] This standard looks to the informant's credibility and the basis of that person's knowledge as factors in assessing reasonable trustworthiness.[43]

The credibility of your informant may be established by any of the following methods:

(1) Past Reliability

The "track record" of a previously reliable informant is the most frequently used method to demonstrate his credibility. If he has been truthful and accurate in the past, he is likely to be truthful now.

(2) Admissions

If the informant has participated in a crime and, as part of the information he discloses, he makes statements against his penal interest, he will generally be considered credible.

41 *Illinois v. Gates,* 462 U.S. 213 (1983).
42 *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 41 (1969).
43 *United States v. Gagnon*, 373 F.3d 230 (2d Cir. 2004) (Officers properly relied upon information from drug smuggler in order to search co-defendant's truck.)

(3) Good-Citizen-Informant

So-called "good-citizen" informants, or "ordinary-citizen" informants, who have nothing to gain by providing information to law enforcement officers, other than to assist the government in the enforcement of the law, will be presumed credible by most courts. Consideration should be given to the demeanor, age, occupation and any employment record of the citizen informant. Any arrest or conviction record would be relevant to credibility.

(4) Law Enforcement Official

Statements of fellow law enforcement officials are presumed to be credible.

(5) Victim of Crime

Statements given by a victim in reporting a crime will generally be presumed credible.

(6) Eyewitness to Crime

Statements made by an eyewitness in reporting a crime will generally be presumed credible.

Comment. These common methods of demonstrating credibility are not exclusive. Officers should try to articulate any circumstance that suggests the probable absence of any motivation to falsify information by the declarant-informant. Moreover, where no single fact, standing alone, establishes the informant's credibility, several factors taken together might be sufficient.

Remember: You must explain the facts to support your conclusion that an informant is credible.

Naked *conclusions*, such as, "information was received from a reliable informant," or "information was received from a good-citizen informant," are not sufficient. You must articulate the underlying facts from which you concluded that the informant is reliable, or that he is a good-citizen, and so forth.

If the officer has a first-time informant, an anonymous tip (which by itself cannot be probable cause) or some other information coming from a person whose credibility cannot be established, that information must be corroborated with facts that are presently known or that can be established through investigation. Another informant may also be used to corroborate facts.

The Supreme Court has said that uncertainty regarding the informant's credibility can be compensated for by a "strong showing" of a sound basis of belief.[44]

The informant's "Basis of Knowledge" may be established by:

- ✓ The informant telling how he obtained it, either by personal observation or in some other dependable way; or

- ✓ The information is extremely detailed, so that the average person would conclude that the declarant has first hand knowledge of the facts and is not relying on rumor.

The information obtained from an informant need not be information that will necessarily be admissible at trial.[45]

A magistrate judge can issue a search warrant based entirely upon direct observation by a reliable informant, even without independent corroboration of the informant's report. Of course, the affidavit must clearly establish that the informant has a record of reliability and has personally observed the items for which the warrant is sought.

m. A Positive Dog Alert.

Under the "totality of the circumstances" test, a positive dog alert can provide the probable cause necessary for a search warrant, provided the officer can demonstrate the "reliability" of the dog and the "basis of belief." This will usually be done by showing that the dog has been reliable in the past and that the dog alerted to the odor of narcotics or explosives in a reliable way.[46] Officers should, however, be very careful to document and explain other factors present that contribute to the probable cause equation. This last point is of critical significance in currency cases where the basis of seizure is probable cause to believe that the money is substantially connected to a controlled substance violation.[47] In such a case, a dog alert alone may not be sufficient to establish the requisite connection.[48]

44 *Illinois v. Gates*, 462 U.S. 213 (1983).
45 *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).
46 Courts are understandably hesitant to grant defense discovery motions seeking canine training records and related documents. *See, e.g., United Sates v. Morales,* 489 F. Supp. 2d 1250, 1260 (D.N.M. 2007) (court refused to grant discovery request seeking all records regarding dog's training and handling; the fact that the dog "was certified on the date in question and correctly alerted to the presence of contraband [was] sufficient to establish her reliability under the circumstances.").
47 21 U.S.C. § 881(a)(6).
48 *United States v. $506,231 in U.S. Currency*, 125 F.3d 442 (7th Cir. 1997);

2.125 Reasonable Certainty

Reasonable certainty is a high degree of probability. It is a standard which requires more than probable cause, but less than proof beyond a reasonable doubt. It is a "firm belief," a "firm conviction."[49]

Reasonable certainty is the standard of suspicion by which "nexus" (connection with the border) must be established in order for a CBP officer to conduct a border search.

2.126 Proof Beyond a Reasonable Doubt

Proof beyond a reasonable doubt is the standard necessary for conviction of a defendant.

> "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of their own affairs.[50]

Simply put, if the evidence is such that there is no valid reason to doubt the truth of the charge, then the evidence is "proof beyond a reasonable doubt."

2.200 Seizures - Defined
2.210 Seizures of Persons
2.220 Seizures of Objects

2.210 Seizures of Persons
2.211 The Consensual Encounter - No Seizure
2.212 Types of Seizures
2.213 Distinguishing Between Stops and Arrests
2.214 Pretextual Stops
2.215 Order Passengers out of Car Pending Completion of a Stop
2.216 Use of Force

The Fourth Amendment states, in part, that:

United States v. $53,082 in U.S. Currency, 985 F.2d 245 (6th Cir. 1993).
[49] *See United States v. Espinoza-Seanez*, 862 F.2d 526 (5th Cir. 1988); *United States v. Tilton*, 534 F.2d 1363 (9th Cir. 1976); *United States v. Corral Villavicencio*, 753 F.2d 785 (9th Cir. 1985).
[50] *Thomas v. Arn*, 704 F.2d 865 (6th Cir. 1982).

"[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable … seizures, shall not be violated, …"

The Amendment is intended to protect individuals from unreasonable searches and seizures conducted by government officers. The Amendment is not intended to control government conduct which is not a search or seizure, nor is it intended to control the activities of private parties. It does, however, guarantee all persons in this country, citizen or noncitizen, whether here legally or illegally, the right "to be secure in their persons, houses, papers and effects, against unreasonable … *seizures*."

The Supreme Court observed that "it must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person."[51] The Court subsequently amplified this observation by stating that a seizure occurs only when the restraint of freedom is such that a reasonable person, in view of all the circumstances, would believe he is not free to leave.[52] The Court later held that interference with freedom occurs either by an application of physical force, however slight, or, in the absence of such force, when a person submits to an officer's "show of authority."[53] In clarifying the application of these principles, the Court held that the essence of a seizure is whether the police have done something that would cause a reasonable, innocent person to believe that he was not free to terminate the encounter at will.[54]

The factors present in any seizure of a person are:

- ✓ Government
- ✓ Interference with freedom of movement (by means of physical force or show of authority)
- ✓ Reasonable belief not free to terminate encounter at will.

This test presupposes an innocent person standard. In other words, the potential intrusiveness of the officer's conduct must be judged from the viewpoint of an innocent person. Subjective intentions or state of mind of either the suspect or the officer are irrelevant as to whether a seizure occurs.[55]

51 *Terry v. Ohio*, 392 U.S. 1 (1968).
52 *United States v. Mendenhall*, 446 U.S. 544 (1980). But see *United States v. Al Nasser*, 555 F.3d 722 (9th Cir. 2009) (government's termination of freedom of movement must be intentionally applied; where motorists mistaken belief that he was required to stop was an accidental effect of otherwise lawful government conduct, no seizure occurred).
53 *California v. Hodari*, 499 U.S. 621 (1991).
54 *Florida v. Bostick*, 501 U.S. 429 (1991)(encounter on a bus).
55 *Arkansas v. Sullivan*, 532 U.S. 769 (2001).

2.211 The Consensual Encounter - No Seizure

Of course, some encounters between a law enforcement officer and a person are not Fourth Amendment seizures. A consensual encounter is not a seizure of a person. No Fourth Amendment consequences result from a consensual encounter.

Neither probable cause nor reasonable suspicion is required to contact a suspect. U.S. Supreme Court Justice White emphasized this in the *Terry* decision:

> There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go his way.[56]

An officer's questions relating to identity or a request for identification does not, by itself, constitute a Fourth Amendment seizure.[57]

The following actions, without more, should not convert a consensual encounter into a seizure:

- ✓ Approaching an individual in a public place;
- ✓ Identifying oneself as a law enforcement officer;
- ✓ Asking an individual if he is willing to answer a few questions;
- ✓ Questioning an individual if the person is willing to listen; and
- ✓ Asking for, examining, and returning form of identification.

The person approached need not answer. He may not be detained even momentarily without reasonable, objectively articulable grounds for doing so, and his refusal to listen or answer does not, without more facts, furnish these grounds.[58]

In order to help avoid turning a consensual contact into a seizure,[59] you may want to consider the following:

56 *Terry v. Ohio*, 392 U.S. 1 (1968).
57 *I.N.S. v. Delgado*, 466 U.S. 210 (1984); *See also, United States v. Angulo-Guerrero*, 328 F.3d 449 (8th Cir. 2003) (immigration check of bus passengers at scheduled stop); *United States v. Esparza-Mendoza*, 386 F.3d 953 (10th Cir. 2004) (officer stating she "needed" to see identification did not transform consensual encounter into seizure).
58 *United States v. Burton*, 228 F.3d 524 (4th Cir. 2000).
59 *United States v. Spence*, 397 F.3d 1280 (10th Cir. 2005).

- ✓ Be extremely polite.
- ✓ Identify yourself as soon as possible.
- ✓ Do not demand anything.
- ✓ Explain your purpose and request cooperation.
- ✓ Advise that cooperation is not necessary and that person is free to leave.
- ✓ Do not give *Miranda* warnings.
- ✓ Do not use any force.
- ✓ Do not frisk.

2.212 Types of Seizures
2.212a Temporary Seizures Without Suspicion
2.212b Temporary Seizure With Reasonable Suspicion
2.212c Arrest

A given seizure can be described by one of three possible labels:

- ✓ Zero Suspicion (Border/checkpoint detention);
- ✓ "Terry" stop (investigative detention);
- ✓ Arrest.

For many years a seizure, and thus, an arrest, was defined as any act that deprived "a person of his liberty by legal authority." In other words, any type of police detention was considered an arrest, the lawfulness of which depended upon the existence of probable cause. As the Supreme Court stated:

> It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime—"arrests" in traditional terminology ... It does not follow that because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of an arrest."[60]

[60] *Terry v. Ohio*, 392 U.S. 1, at 1877 (1968).

The reasonableness of seizures that are less intrusive than a traditional arrest depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers."[61]

Some seizures, such as border or checkpoint seizures, can be without any suspicion. Suspicionless seizures must weigh the gravity of the public interests served, the degree to which the seizures advance the public interests, and the severity of the interference with personal liberty. For example, the public interest that is served and advanced by a suspicionless border detention is the interdiction of merchandise upon which duty must be paid or that is being imported contrary to law, or the entry of unwanted persons into the country. Further, routine border detentions only briefly interfere with personal liberty.

Other suspicionless seizures have been similarly justified when carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. The courts will focus on the lack of discretion afforded the individual officers, the standardized procedures employed, and the minimal intrusion imposed on a person. Examples would be vehicle inspections at checkpoints by the Border Patrol,[62] by state or local officers for a routine driver's license or registration check and sobriety checkpoints,[63] or vessel document checks.[64]

Otherwise, seizures must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual or item.

When officers stopped Brown without specific, objective facts that he was engaged or had been engaged in criminal conduct, and then arrested him for failing to give his name and address as required by Texas law, the balance between the public interest and Brown's right to personal security and privacy tilted in favor of freedom from police interference. He could not be stopped simply to be identified.[65] The Court balanced the public interest against the interference with private liberties and found in favor of privacy.

2.212a Temporary Seizures without Suspicion
2.212a(1) Border Detention
2.212a(2) Vehicle Checkpoint Seizures

61 *Pennsylvania v. Mims*, 434 U.S. 106, 109 (1977); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).
62 *United States v. Martinez-Fuerte,* 428 U.S. 543, 556 (1976).
63 *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 450 (1990).
64 *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983).
65 *Brown v. Texas*, 443 U.S. 47 (1979).

2.212a(1) Border Detention

The Supreme Court in *United States v. Flores-Montano*, has reiterated the importance of the governmental interest in border detentions and searches. The Court observed that "[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border."[66] Citing an earlier Supreme Court case, the Court stated that "searches [and seizures] made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining person and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border."[67] Accordingly, border detentions comply with the reasonableness requirement of the Fourth Amendment.

Additionally, as discussed in Chapter Three, Border Authority, 19 U.S.C. § 1582 authorizes the detention (temporary seizures) of persons coming into the United States from foreign countries. Similar authority is found in 8 U.S.C. § 1225 for purposes of immigration detention and inspection of persons to determine their admissibility into the United States. These seizures are reasonable even without suspicion during a routine border inspection. They are not an "arrest."[68]

The Third Circuit applied a "balancing test" to determine the constitutionality of suspicionless immigration detentions, and held that the government's legitimate interest in controlling illegal immigration outweighs the minimal intrusion on individuals that results from a brief seizure to answer questions at the border where there is a reduced expectation of privacy.[69] In *Flores-Montano*, the Supreme Court also used a "balancing test" in concluding that a suspicionless border detention and search of a vehicle (the removal and inspection of a vehicle fuel tank) was constitutional. The Court weighed the critical interest of the government in protecting the border with personal privacy interests at the border and held that the government's interest prevailed.[70]

2.212a(2) Vehicle Checkpoint Seizures

The reasonableness of a particular checkpoint seizure is determined by a test that balances the "gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the

66 *United States v. Flores-Montano*, 541 U.S. 149 (2004).
67 *Id.* (citing *United States v. Ramsey*, 431 U.S. 606, 616 (1977)).
68 *See, e.g., United States v. Nava* (handcuffing a suspect while escorting him to a security office, patting him down for weapons, and keeping him in the locked security office while his vehicle was searched were part of a "reasonable border detention" rather than an arrest). *United States v. Nava*, 363 F.3d 942, 946 (9th Cir. 2004), *cert. denied, Nava v. United States*, 543 U.S. 973 (2004).
69 *United States v. Pollard*, 326 F.3d 397 (3rd Cir. 2003).
70 *United States v. Bravo*, 295 F.3d 1002 (9th Cir. 2002) (handcuffing an individual during a routine detention at the border does not automatically convert the border detention into an arrest).

interference with individual liberty."[71] In considering the severity of the intrusion on individual liberty, the court must consider both the objective intrusion of the seizure (its duration and the intensity of any brief questioning and visual inspection that might attend it) and its subjective intrusion (its potential for generating fear and surprise to law-abiding citizens). In the following instances the Supreme Court has recognized that the gravity of the public concerns outweighs the need for reasonable suspicion to stop a vehicle: Border Patrol checkpoints (immigration related) and police checkpoints to ensure compliance with *traffic*-related laws, such as driver's license, vehicle registration and drunk driving laws. An immigration checkpoint is a Border patrol operation that consists of stopping all vehicles entering a designated checkpoint to question the vehicle occupants regarding their citizenship and their right to be in or remain in the United States. The primary purpose is discovering illegal aliens. In supporting sobriety and immigration checkpoints the Supreme Court has focused on the lack of discretion afforded the individual officers, the standardized procedures employed, and the minimal intrusion imposed on the motorist. To minimize such intrusions, the duration of the checkpoint seizure is strictly limited to the time reasonably necessary to accomplish the purpose of the checkpoint.[72]

For example, the Supreme Court held that a so-called "sobriety checkpoint" involving a brief stop and detention without individualized suspicion was permissible, as long as *all* vehicles passing through the checkpoint are briefly stopped for the limited purpose of checking the driver for signs of intoxication.[73] In the absence of any evidence of intoxication, the driver must be permitted to continue his journey immediately. Individualized evidence of intoxication permits further detention of the particular motorist for more extensive field sobriety tests.

On the other hand, the Supreme Court held that a motor vehicle narcotics checkpoint program, in which motorists were briefly detained, i.e., seized, without any suspicion, was unconstitutional because it had as its primary purpose the discovery and interdiction of narcotics, "a general interest in crime control," which can only be justified under the Fourth Amendment when the seizure is based on some quantum of individualized suspicion.[74] The Court distinguished these facts from its earlier decisions in *Martinez-Fuerte* (fixed checkpoints to intercept illegal aliens) and *Sitz* (sobriety checkpoints) noting that they were designed to address immigration and safety issues, matters inextricably tied to the use of the nation's roadways, and not the general deterrence of criminal activity.

Since this decision addressed the constitutionality of narcotics checkpoints, it did not affect lower court decisions that have upheld the use of drug detection

71 *United States v. Pollard*, 326 F.3d 397 (3rd Cir. 2003).
72 *United States v. Portillo-Aguirre*, 311 F.3d 647 (5th Cir. 2002).
73 *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990).
74 *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

canines during stops associated with lawfully established driver's license checkpoints.[75] Indeed, the Fifth Circuit has expressly held that a checkpoint is lawful if it "has as its primary programmatic purpose the enforcement of immigration laws, regardless of whether or not it could also be said to have a secondary programmatic purpose of drug interdiction."[76]

An immigration checkpoint is not necessarily complete when a law enforcement officer has interviewed the visible passengers on a bus; the agent is also entitled to check for concealed persons in the restroom and the undercarriage luggage compartment, and may expose the contents of the luggage compartment to a detector canine as part of the immigration check.[77]

CBP articulated a need encompassing not merely illegal aliens, but also weapons of mass effect and special interest aliens in a checkpoint set up in Maine. The temporary immigration checkpoint was operated in conjunction with state law enforcement officers and was intended to deter and apprehend aliens and terrorists who might be seeking to disrupt national political conventions. The Court found the checkpoint to be constitutional.[78]

2.212b Temporary Seizure with Reasonable Suspicion

An officer who reasonably suspects that an individual is or has been engaged in crime may seize that person to investigate his suspicion.[79] This brief, investigatory inquiry is generally referred to as a "*Terry*" stop. Having lawfully seized a suspect pursuant to *Terry*, an officer is further authorized to take additional steps to investigate his suspicion where such steps are reasonably related in scope to the circumstances that justified the stop in the first place.[80]

To conduct a lawful "*Terry*" stop:

- ✓ there must be a "reasonable suspicion" of criminal activity; and
- ✓ the detention must be limited to a brief, investigatory inquiry.

In assessing whether or not reasonable suspicion exists, the Supreme Court has set forth two factors that underlie the determination.[81]

75 *C.f., Merrett v. Moore*, 58 F.3d 1547 (11th Cir. 1995).
76 *United States v. Moreno Vargas*, 315 F.3d 489 (5th Cir. 2002) (upholding the use of canines trained to detect both persons and narcotics at an immigration checkpoint).
77 *United States v. Ventura,* 447 F.3d 375 (5th Cir. 2006).
78 *United States v. Gabriel,* 405 F. Supp.2d 50 (D.Me. 2005).
79 *Terry v. Ohio*, 392 U.S. 1 (1968).
80 *Hiibel v. Sixth Judicial Circuit,* 542 U.S. 177 (2004) (State laws that require a criminal suspect to identify himself to police during a *Terry* stop are related to the purpose of the stop and therefore do not violate the Fourth or Fifth Amendments.
81 *United States v. Cortez*, 449 U.S. 411 (1981).

First, the assessment must be based upon all the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person, or that taken in isolation might appear innocent.[82]

The process does not deal with hard certainties, but with probabilities. Practical people have always formulated certain common sense conclusions about human behavior; jurors as fact finders are permitted to do the same—and so are law enforcement officers. Finally, the evidence collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

Second, all of these circumstances must raise a suspicion that the particular individual being stopped is engaged in wrongdoing.

Under appropriate circumstances force may be used to both stop and hold a suspect. An officer who has a reasonable suspicion that a person is engaged in wrongdoing may stop that person and if necessary, may use reasonable force to do so. He may never, however, use deadly force merely to stop a person whom he only reasonably suspects of wrongdoing.

It must be emphasized that a *Terry* stop is a temporary seizure, i.e., a detention, for only so long as is necessary to investigate the parameters of the suspicion at hand.[83] The guiding principle for "brief" is due diligence in resolving the particular suspicion. So long as the officer is proceeding diligently to confirm or dispel his suspicion, the resulting time will be "brief." A lack of diligence and the courts will likely view the detention as an arrest.[84]

2.212c Arrest

Any seizure that exceeds the bounds of a lawful suspicionless detention or, with reasonable suspicion, the bounds of a lawful *Terry* stop, is an arrest. In order for it to be a lawful arrest, probable cause to believe the person has committed a crime must exist. For a discussion on probable cause see section 2.124.

82 *United States v. Arvizu*, 534 U.S. 266 (2002); *United States v. Bautista-Silva,* 567 F.3d 1266 (11th Cir. 2009) (Border Patrol in Florida had reasonable suspicion to stop SUV with California plates on a known smuggling route - I95 - driven in an erratic manner, occupied by 6 Hispanic males who attempted to ignore the presence of the Border Patrol vehicle); *United States v. Mathurin,* 561 F.3d 170 (3rd Cir. 2009).

83 *Illinois v. Caballes*, 543 U.S. 405 (2005) (upholding the use of a drug dog during a stop for an unrelated traffic violation because police did not prolong the seizure to obtain the dog's assistance).

84 *United States v. Maltais*, 403 F.3d 550 (8th Cir., 2005) (discussing limits on the scope and duration of a lawful *Terry* stop).

Elements of a Valid Arrest:

- ✓ Probable cause to believe a crime has been committed; and
- ✓ Probable cause to believe that the seized person committed or is committing that crime.

2.213 Distinguishing Between Stops and Arrests

Test: In view of all the circumstances, is the seizure more intrusive than a stop?

The following are among the most important factors to consider.

a. The degree and manner of force used.

The display of a weapon or handcuffing the suspect does not automatically convert a stop into an arrest. The courts will not apply a hard and fast rule. Instead, they look at the nature of the crime under investigation, the degree of suspicion, the location of the stop, the time of day, and the reaction of the suspect to the approach of police.

b. Whether the officer's conduct was more intrusive than necessary for an investigative stop.

Examining all the facts, the courts decide if an officer's conduct was reasonable under the circumstances.

c. How far the suspect was moved.

A suspect might be moved a short distance during an investigative stop if officers have a legitimate law enforcement reason for the move, e.g., moving the suspect away from a cold wind or loud noise.

d. How long the suspect was detained.

The courts will not establish a precise time, but rather will examine whether officers diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly.[85] An officer or agent's actions must be reasonably related in scope to the circumstances which justified the stop, and they must be limited in time to effectuate the purpose of stop. Courts will look to the diligence the officer or agent employed in order to resolve his or her concerns. What constitutes "diligent" will depend on the circumstances. At one extreme is *Odofin v. United States,* 929 F.2d 56 (2nd Cir. 1991) in which a 24 day investigative detention was reasonable during a monitored bowel movement. The Court found that the government had reasonable suspicion that the

85 *United States v. Sharpe*, 470 U.S. 869 (1985). See also, *United States v. Place*, 462 U.S. 696 (1983).

defendant was an internal carrier. The government offered the defendant the option of an x-ray which was declined or obstructed by the defendant and the defendant also declined effective use of a laxative. Consequently the government had to wait for nature to take its course before the government could resolve its suspicions. In *Odofin* the defendant passed four balloons containing 43.9 grams of heroin 24 days after the start of the investigative detention. In *United States v. Montoya de Hernandez,* 473 U.S. 531, 544, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985) the Court found that the 16-hour detention of a woman suspected of smuggling contraband in her alimentary canal was "not unreasonably long," where the woman refused an x-ray and customs agents were awaiting nature. In *United States v. Schlieve,* 159 Fed. Appx. 538, *13-15 (5th Cir. March 22, 2005) the Court held that a forty-six minute detention was not unreasonable where officers had reasonable suspicion that Defendant was in possession of contraband and were attempting to locate a K-9 unit to confirm or dispel that suspicion. In sum, the courts focus on what the officer suspected and whether he or she took reasonably timely steps to resolve the suspicions.

e. Whether the suspect was searched.

A limited search for weapons only (a frisk) may be conducted only if the officer has a reasonable fear for his safety. Ordinarily, a frisk is a carefully limited search of the outer clothing of a person in an attempt to discover weapons. A more intrusive search would require consent or probable cause.

f. The degree of inconvenience to the suspect.

This will vary in each situation.

g. Whether *Miranda* rights were read.

Since custody for *Miranda* purposes is defined as a seizure in which a reasonable person would believe he has been, or is about to be, arrested, this would be a strong factor.

h. What the suspect was told about the detention.

If a suspect was told, "You are under arrest," that fact could indicate the seizure was an arrest, but such a statement would still only be a factor if there were other factors which could lead a reasonable person to conclude that the detention was only temporary.

i. The words used by the officer, his tone of voice and general demeanor.

If officers identify themselves, explain their purpose and are polite, these factors would tend to indicate a contact or a stop. Stronger language or actions may be necessary in particular circumstances. That would not necessarily convert a stop into an arrest but would be a factor.

j. The officer's statements to others who were present during the encounter.

Whatever is said to other witnesses, suspects, or officers in the hearing of the suspect could be considered in determining the intrusiveness of a seizure.

k. The purpose of the encounter and the gravity of the offense.

For example, the nighttime stop of a suspected convenience store robber at gun point, making him lie down on the ground, etc., might be held to be a lawful stop, whereas the same conduct likely would be an arrest if the reason for the stop was a burned-out tail light on an automobile.

l. Location of the encounter.

The courts are likely to view encounters in an open public area differently than those in a private or closed-in area.

m. The officer's safety.

The reasonableness of an officer's concern or fear of harm would be considered.

n. The intrusion of circumstances beyond the control of the officer.

Stops can involve rapidly changing circumstances. Intervening outside factors beyond the officer's control will be considered.

o. Whether the officers diligently pursued their investigation.

One highly relevant factor in assessing a detention's duration is whether the officer diligently pursued a means of investigation that was able to confirm or dispel their suspicions quickly. The reasonableness of an investigative detention is largely dependent upon the steps taken by officers to quickly confirm or dispel suspicions that initially justified the stop. The totality of the circumstances govern whether the officer is acting with due diligence.[86]

With respect to whether the police acted with diligence, courts have found the following factors significant:

- ✓ Whether the questions asked were related to the justification for the detention;[87]

- ✓ The number of people or items involved in the detention;[88]

86 *United States v. Sharpe*, 470 U.S. 675 (1995).
87 *See, e.g.*, *United States v. Davies*, 768 F.2d 893 (7th Cir. 1985); *United States v. Bautista*, 684 F.2d 1286 (9th Cir. 1982). *Cf. United States v. Babweh*, 972 F.2d 30 (2d Cir. 1992); *United States v. Kennedy*, 573 F.2d 657 (9th Cir. 1978).
88 *See, e.g.*, *Baker v. Monroe Tp.*, 50 F.3d 1186 (3d. Cir. 1995); *United States v. Ogden*, 703 F.2d 629 (1st Cir. 1983).

- ✓ Whether the police immediately call for a drug dog;[89]
- ✓ The length of the delay in waiting for a drug dog;[90]
- ✓ Subjects claiming that they do not know each other;[91]
- ✓ Tracking down the subject's misleading stories;[92]
- ✓ The subject's evasive answers to questions;[93]
- ✓ The officer awaiting backup while alone late at night with belligerent subjects;[94]
- ✓ Computer problems during a registration check;
- ✓ And the length of delay resulting from officers awaiting the arrival of officers with specialized experience.[95]

Example: Royer is seen in the Miami International Airport by two Dade County narcotics detectives. Royer was young and casually dressed, appeared pale and nervous, looking around at other people, and was carrying American Tourister luggage that appeared to be heavy. He purchased a one-way ticket to New York paying in cash with a large number of bills. He checked his two suitcases, placing on each suitcase an identification tag bearing the name "Holt" and the destination, "La Guardia" even though there was space for a name, address and telephone number.

The two detectives approached Royer in the concourse, identified themselves as policemen, and asked if Royer had a "moment" to speak with them. Royer said "Yes." Upon request he produced his airline ticket and driver's license. The airline ticket bore the name "Holt"; the driver's license, the name "Royer." When asked about the discrepancy, Royer explained that a friend had made the reservation in the name of "Holt." Royer became more nervous. The detectives

89 See, *e.g.*, *United States v. Villa-Chaparro*, 115 F.3d 797 (10th Cir. 1997); *United States v. Bloomfield*, 40 F.3d 910 (8th Cir. 1994); *United States v. Glover*, 957 F.2d 1004 (2d Cir. 1992); *United States v. Tavolacci*, 895 F.2d 1423 (D.C. Cir. 1990); *United States v. Hardy*, 855 F.2d 753 (11th Cir. 1988).
90 See, e.g., *Villa-Chaparro*, *Id.*; Bloomfield, Id.; *United States McFarley*, 991 F.2d 1188 (4th Cir. 1993); *Glover*, *Id.*; *United States v. Nurse*, 916 F.2d 20 (D.C. Cir. 1990); *Tavolacci*, *Id.*; Hardy, Id.; *United States v. Quinn*, 815 F.2d 153 (1st Cir. 1987); *United States v. Borys*, 766 F.2d 304 (7th Cir. 1983).
91 See, *e.g.*, *United States v. Knox*, 839 F.2d 285 (6th Cir. 1988).
92 See, *e.g.*, *United States v. Robinson*, 30 F.3d 774 (7th Cir. 1994).
93 See, *e.g.*, *Id.*; *United States v. Richards*, 500 F.2d 1025 (9th Cir. 1994).
94 See, *e.g.*, *Courson v. McMillian*, 939 F.2d 1479 (11th Cir. 1991).
95 See, *e.g.*, *United States v. Winfrey*, 915 F.2d 212 (6th Cir. 1990).

informed him they were narcotics agents and that they had reason to suspect him of transporting narcotics.

While continuing to hold his airline ticket and driver's license, one detective took the baggage claim stubs to recover Royer's baggage and the other asked Royer to accompany him to a room approximately forty feet away. Royer said nothing, but went with the officers as requested. The room was later described as a "large storage closet" located in the stewardess' lounge, containing a small desk and two chairs. Following the recovery of the checked suitcases, Royer consented to their search. Drugs were found.

Are the drugs admissible?

Analysis: How much suspicion did the detectives have? A nervous young man with two American Tourister bags, paid cash for an airline ticket to a "target city." These facts led to an inquiry that revealed that the ticket had been bought under an assumed name. Is this probable cause or reasonable suspicion? The Supreme Court said reasonable suspicion.

Was Royer seized? The test is whether in view of all the circumstances surrounding the incident, a reasonable person would believe he is not free to leave. Clearly Royer was seized.

Was the detention non-intrusive and limited? On the concourse the detention was limited, but continuing to hold his ticket and license and requesting him to accompany one detective to a small room—a large closet—equipped with a desk and two chairs, while the other retrieved his luggage from the airline, was conduct more intrusive than necessary for a "brief" investigative detention.

Result: An arrest occurred without probable cause. Even if the later consent to open the suitcases was voluntary, the drugs would be suppressed since the consent was the fruit of an unconstitutional seizure.[96]

2.214 Pretextual Stops

A pretextual stop is one where an officer's motive for making the stop is other than the reason given for the stop. An example would be an officer using a minor traffic infraction—perhaps a lane change without signaling—to create an opportunity to stop and identify a suspect driver or look inside a suspect vehicle.

A pretextual stop is different than when an officer reasonably suspects that a vehicle and/or any of its occupants is, has been, or is about to be engaged in criminal activity, and is therefore authorized to stop the suspect for the purpose of conducting a brief investigatory inquiry.[97] The question of "pretext" does not

96 *Florida v. Royer*, 460 U.S. 491 (1983).
97 *Terry v. Ohio*, 392 U.S. 1 (1968).

arise in this instance because the actual and given reasons for the stop, the suspicion of criminal conduct, are one in the same.

By contrast, the question of pretext is squarely presented when the actual motivation for a stop is not supported by reasonable suspicion, but there exists an independent, lawful basis to make the stop. In this case, the lawfulness of the stop depends upon the level of suspicion held by the officer regarding the ostensible reason for the stop.

The Supreme Court has held that so long as an officer has probable cause to believe that a traffic infraction has occurred, and he is otherwise authorized to make a stop for such a violation, he may lawfully do so irrespective of other motivations for making the stop.[98] The Court reaffirmed this principle and explicitly extended it to cover pretextual, probable cause-based arrests as well.[99]

In *Sullivan*, the officer stopped a motorist for speeding and operating a motor vehicle with an improperly tinted windshield. When the officer examined the driver's license, the officer recalled having seen "intelligence concerning narcotics" on the subject. While attempting to locate the vehicle's registration and proof of insurance documents, the driver exposed a roofing hatchet located on the floorboard to the officer's view. Based on this and the aforementioned traffic offenses, the officer arrested the driver. Following the arrest, the officer conducted an inventory search of the vehicle pursuant to his department's policy and discovered methamphetamine and drug paraphernalia in the car.

The Supreme Court upheld the arrest and subsequent inventory search citing *Whren* and holding that a traffic arrest, based on probable cause, would not be rendered invalid on the grounds that it was a mere pretext for the officer to obtain legal authority to search the arrestee's vehicle for narcotics.

2.215 Ordering Passengers Out of Car Pending Completion of a Stop

When an officer makes a traffic stop both the driver and the passengers are seized for the purposes of the Fourth Amendment and therefore have standing to challenge the seizure.[100] The Supreme Court has held that passengers may be ordered out of a car pending completion of a traffic stop.[101] Both the driver and the passengers may be subject to a Terry frisk if the officer has reasonable suspicion that the subject is armed and dangerous.[102]

2.216 Use Of Force

2.216(a) Use of Deadly Force
2.216(b) DHS/CBP Use of Force Policies

98 *Whren v. United States*, 517 U.S. 806 (1996).
99 *Arkansas v. Sullivan*, 532 U.S. 769 (2001).
100 *Brendlin v. California*, 551 US 249 (2007).
101 *Maryland v. Wilson*, 519 U.S. 408 (1997).
102 *Arizona v. Johnson*, 129 S.Ct. 781 (2009).

2.216(c) Use of Deadly Force - Vehicles

The Supreme Court has held that the use of force, deadly or otherwise, is to be analyzed under the reasonableness clause of the Fourth Amendment, and that the "reasonable means" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.[103] The foundational principle is that only such force as is both reasonable and necessary may be used in any given situation, including deadly force.

In determining whether the force used to effect a search or seizure is "reasonable" under the Fourth Amendment, the courts focus carefully on the facts and circumstance of each particular case. The perspective is from the view of whether there were valid reasons for the particular officer to use the particular degree of force under the circumstances. As stated by the Supreme Court, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving—about the amount of force that is necessary in a particular situation."[104] The reasonableness of the officer's belief as to the appropriate level of force should be judged from the on-scene perspective.[105]

In doing so, the Supreme Court has instructed that the following specific factors are to be considered:

(1) The severity of the crimes at issue;

(2) Whether the suspect poses an immediate threat to the safety of the officers or others; and

(3) Whether he is actively resisting arrest or attempting to evade arrest by flight.[106]

These factors encompass three general circumstances in which officers must make judgments regarding the use of force in the context of Fourth Amendment seizures:

- ✓ To prevent escape;
- ✓ To defend themselves and others; or

103 *Graham v. Conner*, 490 U. S. 386, 396 (1989).
104 *Id.* at 396, 397 (1989).
105 *Saucier v. Katz*, 533 U.S. 194 (2001) (receded from in *Pearson v. Callahan,* 129 S.Ct. 808 (2009) as it relates to the procedural steps for making out a violation of constitutional rights in qualified immunity claims).
106 *Graham v. Conner*, 490 U. S. 386 (1989).

- ✓ Overcoming resistance to lawful actions.[107]

The totality of circumstances includes training, mental attitude, strength, sex, age and size of the officer and suspect; the weapon(s) involved; presence of other officers, suspects, or bystanders; and environmental conditions. Two officers, therefore, might have different and yet equally proper responses to the same problem. For example, a 115-pound officer working alone would probably respond differently to an unarmed 225-pound assailant than would a 200-pound officer skilled in defensive tactics or the martial arts who was working with a partner.

2.216(a) Use of Deadly Force

The term "deadly force" means force that is likely to cause either death or serious physical harm. In addition to the use of a firearm, an officer might inflict "serious physical harm" with hands, feet, a club, flashlight, handcuffs, or other means such as ramming one automobile with another. Indeed, a wide variety of means may inflict bodily harm depending on the manner in which they are employed.

Firing a weapon where there is a high risk that someone will be struck generally will be viewed as the use of deadly force. In one case, for example, a game warden fired a shotgun at an escaping van because he believed that it contained an illegally taken deer. The officer explained that he fired the shot, not for the purpose of hitting anyone, but to "mark" the van for later identification. Unfortunately, the rifled slug entered the van and fatally wounded one of the passengers. The court held that "firing a loaded shotgun at a vehicle known to be occupied constitutes deadly force as a matter of law." In that case the use of deadly force resulted in an unreasonable seizure of the passenger.

The circumstances under which deadly force can be used to prevent the escape of a suspect was defined by the Supreme Court in 1985.[108] In that case, a police officer, responding to a "prowler inside" call, heard the back door slam and saw a figure fleeing from the subject dwelling. Ordering the suspect to freeze, the officer illuminated him with a flashlight and approached, recognizing that the

107 Although use of force may be necessary when a person passively resists by failure to obey commands, a person who is not assaultive may not be convicted under 18 U.S.C. §111 for forcibly resisting arrest. *United States v. Chapman,* 528 F.3d 1215 (9th Cir. 2008). 18 U.S.C. §111 penalizes persons who forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any designated federal officer or employee engaged in or on account of the performance of official duties. The Sixth Circuit in *U.S. v. Gagnon*, 553 F.3d 1021 (6th Cir. 2009) concluded that misdemeanor "simple assaults" under § 111 referred to cases where a defendant forcibly performed one of the prohibited actions of § 111(a) without forcibly or intentionally creating physical conduct himself and without the intent to commit a serious felony.

108 *Tennessee v. Garner*, 471 U.S. 1 (1985).

suspect did not appear to be armed. The suspect, crouched at the base of a fence, then began to climb the fence. Believing that the suspect would make good his escape if he cleared the fence, the officer shot and killed the suspect.

The Court held that in such circumstances deadly "force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."[109]

In amplifying what it meant by "significant threat of death or serious physical injury to the officers or to others," the Court offered two examples: "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm . . . ," then deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.[110]

For example, Newcomb entered a 7-11 store that had two clerks and several customers. He went around the sales counter and placed a knife at the back of one of the clerks. For more than one-half hour he remained in the store, directing the clerks to empty the cash registers and demanding that the clerks provide him with a ride away from the store. During this period, Newcomb intermittently held the knife to the back and throats of the clerks. At some point the police were called. They observed Newcomb, first behind the counter with the clerks, then as he moved out from behind the counter. By this time Newcomb had placed the knife in his back pants pocket. After he moved away from the clerks, the order was given to the officers to enter the store and arrest Newcomb. Uniformed officers entered the store and shouted, "Freeze." Newcomb responded by throwing a coffee pot at the officers and ran toward the rear of the store. When he reached the end of the counter, he ran behind it. One of the clerks was still behind the counter. Newcomb either tripped or lunged and he began to fall to the ground near the clerk. An officer fired one shot from his service revolver and struck Newcomb in the back of the head, inflicting serious injury.

Newcomb sued the officer and argued, first, that he was merely making a futile attempt to escape and posed no threat of harm that would justify the use of deadly force. The Court rejected this argument since Newcomb had spent considerable time behind that counter threatening the store clerks with a knife and the police knew that he could not perfect an escape by flight alone.

Secondly, Newcomb argued that the use of deadly force was unreasonable because he was "unarmed," having placed the weapon in his pants pocket. Since he had taken no affirmative step to relinquish the weapon, the court was unimpressed by this argument.[111]

109 *Id.* at 3.
110 *Id.* at 11.
111 *Newcomb v. City of Troy*, 719 F. Supp. 1408 (E.D. Mich. 1989).

The officer's belief in the necessity of using such force must be "reasonable." The law does not require that the person who believes himself to be in apparent danger of losing his life or suffering serious physical harm use unerring judgment or that his actions be judged with 20/20 vision of hindsight. The justification for using force intended or likely to cause serious physical harm is determined from surrounding facts and circumstances and, ultimately, is a question for the trier of fact, either the jury or the judge.

This is illustrated by a case in which, police officers heard a police radio broadcast concerning a series of armed robberies by four suspects. The broadcast indicated that the suspects were armed and were driving a blue van. Another radio message indicated that the van had been spotted nearby. The policemen saw the van being chased at a high rate of speed by two other police cars. Eventually the driver lost control of the van after striking a pedestrian. One of the officers saw a male and a female exit the van through the sliding door. The male was behind the female with his left hand around her waist and was holding a handgun in his right hand. The officer fired his gun seven to nine times, killing the male and wounding the female. Officers later learned that the injured female and her brother had been car-jacked by the other two and then were taken as hostages while the robberies were being committed.

In a suit by the wounded female, the court held the use of deadly force reasonable since the officer had "probable cause to believe that the suspects posed a threat of serious physical harm to him" and to others if the suspects were allowed to flee. Because the officer reasonably could have believed that all the suspects posed an imminent, deadly threat, he was justified in using deadly force.[112]

2.216(b) DHS/CBP Use of Force Policies

The Customs and Border Protection has adopted a policy on the use of force that is applicable to all law enforcement activities.[113] The common threads that run throughout the policies are the acknowledgement of an "imminent danger" and "necessity" standard and the reaffirmation of the basic principle that even when an imminent danger exists, deadly force should not be used if to do so would create an unreasonable risk to innocent third parties.

Deadly force is never permitted by law or under these policies merely to prevent a suspect from escaping, nor upon mere suspicion that a crime, no matter how serious, was committed. First, they require probable cause to believe that the suspect, presently or if he escapes, poses an imminent danger before deadly force is permitted.

Second, in addition to a threat of imminent danger, both law and policy require probable cause to believe that the application of deadly force is necessary to

112 *Stroik v. Ponseti*, 35 F.3d 155 (5th Cir. 1994).
113 CBP Use of Force Policy Handbook, October, 2010; HB 4500- 01B.

prevent the imminent harm. In other words, when the threat occurs in a context where lesser alternatives to preventing the harm do not reasonably appear.

The policy and guidelines do not purport to answer all of the questions that may confront law enforcement officers on the scene, nor do they attempt to eliminate an officer's ability—and responsibility—to exercise judgment. Rather, they provide a framework of general principles to guide those judgments—a framework within which each agency is permitted to "develop and conduct its own training on deadly force. . . ."

In sum, whether the suspect be a fleeing felon or not, the application of deadly force is authorized only where there is probable cause to believe that the suspect poses an imminent danger of death or serious physical injury to the officer or to another person AND that the application of deadly force is necessary to prevent the imminent harm.

Verbal Warnings: if feasible, must be given.

NO WARNING SHOTS ARE TO BE FIRED ANYWHERE OTHER THAN THE OPEN WATER AND THEN ONLY IN STRICT ACCORD WITH CHAPTER 9 OF THE USE OF FORCE HANDBOOK.

2.216(c) Use of Deadly Force - Vehicles

DHS policy specifically addresses firing at vehicles. Weapons may be fired at the driver or other occupant of a moving motor vehicle *only* when 1) the circumstances permitting the use of deadly force are present, and 2) the public safety benefit outweighs the risks to the safety of others under the circumstances. The mere fact that the suspect is using a vehicle to escape does not, in itself, create the justification for deadly force.

2.220 Seizures of Objects

2.221 Border Detentions of Personal Property
2.222 Seizures Based Upon Reasonable Suspicion
2.223 Seizures Based on Probable Cause

With respect to objects, as opposed to people, a seizure occurs when there has been a meaningful interference with a possessory interest in that object.[114]

Therefore, the elements of a seizure of an object are:

- ✓ Government
- ✓ Meaningful interference
- ✓ With a possessory right.

114 *United States v. Jacobsen*, 466 U.S. 109 (1984).

The interference must be meaningful.[115]

Likewise, movement by an officer of luggage on a public conveyance is not a meaningful interference.[116] The extent to which luggage may be manipulated in the process, however, is a search issue discussed below.

2.221 Border Detentions of Personal Property

As with people detained at the border, objects may be detained (i.e., seized) at the border for the limited time necessary to search for merchandise and to determine whether any such merchandise is being imported contrary to law or without payment of duty. Once a determination is made that an object has been properly imported, the reason, and thus the authority, for a border detention terminates.

2.222 Seizures Based Upon Reasonable Suspicion

Law enforcement officers may lawfully seize property based on reasonable suspicion to conduct a brief and properly limited investigation to confirm or dispel that suspicion (e.g., exposing a suitcase to a dog sniff).[117]

In the case of luggage in the possession of a domestic traveler, the level of suspicion justifying temporary detention of the luggage is identical to that for stops of people. Thus, the reasonableness of the seizure will be determined by investigative diligence, length of detention involved *and* the information conveyed to the suspect.

Diligence is characterized by a steady, earnest, energetic, and attentive application and effort toward a predetermined end. Where officers are proceeding diligently toward making a probable cause determination, courts are likely to find their conduct reasonable even when events beyond an officer's control cause delays. Where, however, an officer fails to use investigative diligence to confirm or dispel the reasonable suspicion, such a seizure will become unreasonable. Thus, a state highway patrol officer's seizure of green cards from Hispanic motorists on reasonable suspicion that they were forged became an unreasonable seizure when the officer unjustifiably failed to return the cards for four days, a period much longer than the following day when the then Immigration and Naturalization Service (INS) could have verified their authenticity.[118]

115 *United States v. Karo*, 468 U.S. 705 (1984). For analysis of the use of tracking devices on vehicles and containers in public, See *United States v. Jones*, No. 10-1259 (January 23, 2012), discussed in Section 2.332e.
116 *United States v. Va Lerie*, 424 F.3d 694 (8th Cir. 2005); *United States v. Gant*, 112 F.3d 239 (6th Cir. 1997).
117 *United States v. Place*, 462 U.S. 696 (1983).
118 *Farm Labor Organizing Committee, et al. v. Ohio State Highway Patrol*, et al., 308 F.3d 523 (6th Cir. 2002).

There is no bright line rule about the length of detention of an object. Whether an object is seized from its owner or from a third party carrier is certainly a factor. In one case officers in Maine caused a bag to be removed from the FedEx delivery process, but officers involved in the investigation, including the drug dog handler, were off-duty and not able to immediately respond (the case officer was baby sitting for an infant child, but apparently initiated steps to determine if drugs were present in the package as soon as his wife returned). The process exposing the package to the drug dog and dog alert were therefore protracted and did not take place until approximately 135 minutes after the defendant had a right under his contract with FedEx to receive the package. The court said, in effect, that the defendant did not have a possessory interest that was impinged upon until his contract-based right to have the package arose.[119]

In another case, postal inspectors' three day detention of packages was not unreasonable, given that most of the delay was occasioned by the problems associated with traveling in interior Alaska, a factor which the court noted was beyond the control of the government.[120]

If a person is not told how he may be reunited with his property, the seizure of the property may be tantamount to a seizure of the person because a "person must either remain at the scene or else seemingly surrender his effects permanently to the police."[121]

2.223 Seizures Based on Probable Cause

The seizure of an object for more than a brief, temporary purpose, as noted above, must be supported by probable cause to believe that it is evidence, a fruit or instrumentality of a crime, its possession is prohibited or that it is otherwise subject to forfeiture.[122]

2.300 Search Defined

2.310 Government
2.320 Intrusion
2.330 Reasonable Expectation of Privacy

The Fourth Amendment states, in part, that

"[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches … shall not be violated …"

As it does with seizures, the Fourth Amendment prohibits the government from engaging in unreasonable searches. Thus, if police conduct is not a search, the Fourth Amendment restrictions do not apply. But what is a search?

119 *United States v. La France*, 879 F.2d 1 (1st Cir. 1989).
120 *United States v. Aldaz*, 921 F.2d 227 (9th Cir. 1990).
121 *United States v. Place*. 462 U.S. 696 (1983).
122 See *Florida v. White*, 526 U.S. 559 (1999).

Federal officers had "bugged" one of Katz's telephone conversations by placing a device on the roof of a public telephone booth (a three-sided kiosk with folding doors) that he regularly used to convey gambling information. Katz was convicted on the evidence obtained by the bug.

On appeal, Katz argued that his privacy had been invaded by the police; that since he reasonably believed his conversations would be private, the police needed a warrant before they could "bug" the telephone booth.

By its literal terms, the Fourth Amendment protects "persons, houses, papers and effects" from unreasonable government intrusion. The government argued, consistent with the law at that time, that since a public phone booth was not a home, nor "papers or effects," nor a "person," it was not protected by the Fourth Amendment. Therefore, the government reasoned, the "bug" could be placed on the booth without a warrant.

Katz won. In reversing his conviction, and prior law, the Supreme Court said:

> [t]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[123]

Since Katz subjectively expected his conversations to be private and since that expectation was objectively reasonable, they were protected from unreasonable government intrusion.

The *Katz* case, therefore, is a landmark decision for the proposition that a search occurs only when there is

- ✓ Government
- ✓ Intrusion upon
- ✓ A reasonable expectation of privacy.

2.310 Government

As already noted, the Fourth Amendment is a limitation on government conduct only. It cannot be construed to control the independent activities of private parties. The courts therefore, will not exclude evidence obtained by a private person acting purely on his own initiative. Whether the intrusion by the private person is accidental or deliberate or reasonable or unreasonable is of no consequence.[124]

123 *Katz v. United States*, 389 U.S. 347 (1967).
124 *Coolidge v. New Hampshire*, 403 U.S. 443, 487-90 (1971).

An intrusion is "private" if and only if:

- ✓ A private person does it,
- ✓ It's his own idea,
- ✓ Without government help.

The same idea applies for intrusions by law enforcement officers in a foreign country. If the foreign intrusion is conducted by a foreign officer, it is his idea and done without U.S. government help, just as with a private person here, then any evidence obtained may be admissible in U.S. courts, as long as the methods used were not so severe as to shock the conscience of the court. On the other hand, if U.S. officers are present with the foreign officers then the question will be whether there was a joint venture with the foreign officers sufficient to trigger the requirements of the Fourth Amendment. Finally, the Fourth Amendment reasonableness requirement fully controls where U.S. officers are engaged in a "joint venture" with foreign officers or otherwise act independently. The question to be resolved in determining a "joint venture" is the degree to which the officer participated, and whether such is sufficient to trigger Fourth Amendment applicability. Generally, in "joint venture" cases, courts have found the conduct to be "reasonable" where authorized by the foreign law.[125] This is not to say, of course, that mere compliance with foreign law will always be "reasonable" for Fourth Amendment purposes. If a court finds the conduct unconscionable, it will surely find it unreasonable, authorized or not. However, when U.S. officials act on foreign territory a preliminary inquiry regarding the application of the Fourth Amendment is required. See section 2.100 Constitutional Authority discussion on who is included in "the people" for purposes of the Fourth Amendment.

2.320 Intrusion

The very term "intrusion" requires "action," i.e., doing something to overcome an expectation of privacy that, under the totality of the circumstances, is legitimate or "reasonable." The passive reception of information or evidence cannot be a search so long as there has been no government act to precipitate or facilitate the reception of that evidence.

For example, when a conversation is overheard with the "naked ear," (i.e. no special listening device is used) from a location lawfully accessible to the general public, such will not be a Fourth Amendment "search." Under such circumstances, the overhear is passive, thus no governmental intrusion.

125 *United States v. Barona*, 56 F.3d 1087 (9th Cir. 1995); *United States v. Juda*, 46 F.3d 961 (9th Cir. 1995); *United States v. Peterson*, 812 F.2d 486 (9th Cir. 1987).

The concept of "open view" embraces that which is passively received by an officer who is not engaged in any kind of an intrusion. Information that anyone can naturally sense, i.e., see, smell, touch, taste or hear, without physically or otherwise intruding upon a reasonable expectation of privacy to do so, is said to be in "open view."

This idea is to be carefully distinguished from the concept of "plain view," which simply describes the circumstances under which an object may be lawfully seized without a warrant. The "plain view" doctrine is discussed at length under section 2.520.

Furthermore, the Supreme Court has stated that the use of a drug-trained dog to detect contraband in or about a closed container is *not* a "search" under the *Katz* test.[126] The reason, of course, is that the dog sniff involves no intrusion. At most, the dog is reacting to the presence of molecules surrounding the exterior of the container. The Supreme Court has also held that a person does not have a reasonable expectation of privacy in contraband.[127] Conduct that could only reveal the presence of contraband, and that does not otherwise intrude on a reasonable expectation of privacy is not a search. It should be recognized, however, that placing the dog into a position to sniff an article may, itself, be a search. For example, while the sniff is not itself a search, allowing the dog to physically intrude into a space in which one has a reasonable expectation of privacy would be (e.g., bringing the dog into a house in order to sniff).

Also, in cases where the dog was permitted to engage in an "up-close" sniff of persons, including where the dog's nose was permitted to touch the person, the courts have found such to be offensive and thus an intrusion into a reasonable expectation of privacy.[128]

2.330 Reasonable Expectation of Privacy
2.331 Test
2.332 Expectations of Privacy Not Reasonable
2.333 Special Applications

2.331 Test

A reasonable expectation of privacy exists only if:

- ✓ An individual actually expects privacy, and

126 *United States v. Place*, 462 U.S. 696 (1983).
127 *United States v. Jacobsen,* 466 U.S. 109, 123 (1984).
128 *Powers v. Plumas Unified School District*, 192 F.3d 1260 (9th Cir. 1999) (up-close dog sniff constitutes a search); *Horton v. Goose Creek Independent School District*, 690 F.2d 470 (5th Cir. 1982) (same); *United States v. Kelly*, 128 F. Supp.2d 1021 (S.D. Tex. 2001) (same).

- ✓ That subjective expectation is objectively reasonable.

Note: The first part of the *Katz* test, the subjective expectation, will be presumed in virtually every case unless there is evidence to the contrary.

Among the factors to consider in deciding whether a reasonable expectation of privacy exists are:

- ✓ The extent to which the public has access to the place or area (for example, a public restroom versus a patio, yard, bedroom, etc.);
- ✓ The possession or ownership of the area searched or property seized; and,
- ✓ The extent of one's ability to control or exclude others' use of the property.[129]

For example, an overnight guest in a home has a reasonable expectation of privacy in that home.[130] On the other hand when a visit in a home is of a purely commercial nature for a short period of time and there is no previous connection between the householder and the visitor, the visitor has no reasonable expectation of privacy in the home.[131] An escapee has no expectation of privacy in his motel room.[132]

2.332 Expectations of Privacy Not Reasonable

2.332a Open Fields
2.332b Abandoned Property
2.332c Trash Placed for Collection Off the Curtilage
2.332d Things and Places Previously Lawfully Searched
2.332e Movement of Vehicles and Containers in Public
2.332f Movement of Containers Transported on a Public Conveyance

The endless possible factual circumstances and the differing reactions of the courts to the *Katz* test make it difficult to articulate clear rules of law in all cases as to when or where a person may reasonably expect privacy. The circumstances discussed in this section, however, are those in which the courts have held that society is not prepared to recognize as legitimate a person's subjective expectation of privacy.

129 See *United States v. Young*, 350 F.3d 1302 (11th Cir. 2003) (no reasonable expectation of privacy in search of FedEx envelope containing cash).
130 *Minnesota v. Olson*, 493 U.S. 955 (1990). See also, *United States v. Gamez-Orduno*, 235 F.3d 453 (9th Cir. 2000) (holding that an overnight guest in a home has a reasonable expectation of privacy in a home even where the purpose of the guest's travel is illegal activity).
131 *Minnesota v. Carter*, 525 U.S. 83 (1998).
132 *United States v. Ward*, 561 F.3d 414 (5th Cir. 2009).

Although these exceptions are clearly recognized as a matter of law, the application of these exceptions to your facts may not be so clear. The safest course, therefore, whenever possible, is to obtain a search warrant whenever you believe your conduct might be a "search" or when you are in doubt.

2.332a Open Fields

Areas of open private property that are outside the curtilage[133] of a dwelling are referred to as "Open Fields." Moreover "Open Fields" need be neither "open" nor a "field," as those terms are commonly used, and may include any unoccupied or undeveloped area outside the curtilage. As early as 1924, the Supreme Court of the United States recognized that the "open fields" of private property were not protected by the Constitution.[134]

The Supreme Court has since reaffirmed the "open fields" doctrine, which was founded on the explicit language of the Fourth Amendment protecting "persons, houses, papers and effects."[135] Open fields are not "effects" within the meaning of the Fourth Amendment. In addition, the Court consistently has held that society is not willing to recognize an individual's subjective expectation of privacy in "open fields" as objectively reasonable.[136]

It should be understood, however, that there may be places within "open fields," such as an enclosed building, where the occupant may have manifested an objectively reasonable expectation of privacy. Intrusions into such places, of course, would be a search.

2.332b Abandoned Property

There is no legitimate expectation of privacy in abandoned property. Thus, when one abandons property, the right of privacy therein ends. The fundamental question is whether the relinquishment occurred under circumstances that indicate the person retained no subjective expectation of privacy in the object. A disclaimer of ownership is to be distinguished from abandonment. Abandonment presumes ownership and that the owner has done something that manifests an intent to relinquish all possessory and ownership

133 Curtilage is the area that harbors those intimate activities associated with domestic life and the privacies of the home. The courts will look at: 1) the proximity of the area to the home; 2) whether the area is included within an enclosure surrounding the home; 3) the nature of the uses to which the area is put, and 4) the steps taken by the resident to protect the area from observation by people passing by. *U.S. v. Dunn*, 480 U.S. 294 (1987).

134 *Hester v. United States*, 265 U.S. 57 (1924).

135 *Oliver v. United States*, 466 U.S. 170 (1984).

136 *United States v. Perry*, 95 Fed.Appx. 598, LEXIS 7798 (5th Cir. 2004) (no reasonable expectation of privacy in an open shed that was visibly not a residence or within the cartilage of a residence, and that was located in an open field).

rights in the property. Abandonment, then, is a question of fact based generally upon a combination of actions and intent.[137] A disclaimer of ownership, on the other hand, is simply a disclaimer of any personal privacy interest in the object.

Abandonment under the Fourth Amendment is not a property issue but a reasonable expectation of privacy issue. The suspect may continue to have ownership rights in property, as a technical matter, yet by words or actions signifies he no longer seeks to exercise those rights and thus relinquishes any subjective expectation of privacy in the property. If so, it can be examined by officers and the examination is not a search.

There is one limitation on the abandonment rule: abandonment must not be caused by unlawful government conduct. As an example, if an officer in a patrol car behind another vehicle turns on his lights and siren just to see what reaction he can precipitate and a baggie is immediately ejected from the car in front of him, the baggie will not be abandoned.

2.332c Trash Placed for Collection Off the Curtilage

Trash left for collection outside the curtilage[138] of a residence is not protected. The Supreme Court has ruled that an owner does not have a reasonable expectation of privacy in a trash receptacle that he has put in a public place for collection.[139] In other words, if the owner has done all he needs to do to effect the collection of the trash, and no correlative search, such as entering upon the curtilage, is involved, then recovering the trash will not involve an intrusion into a reasonable expectation of privacy.

2.332d Things and Places Previously Lawfully Searched

The Supreme Court has held that no reasonable expectation of privacy remains in an area or object subjected to a lawful intrusion. Thus once a container has been lawfully opened, no protected privacy interest remains. The subsequent reopening of the container where its condition has not changed, therefore, is not a "search." A Federal Express employee checking for damage to a dropped package illustrates this point. The employee opened the package, removed a sealed tube, opened the tube and extracted a plastic bag containing white powder. He then resealed the tube and replaced it in the package and called DEA. The responding DEA agent then reopened the package and tube, and removed the plastic bag. Since the DEA agent did no more than what the private person did at that point, no reasonable expectation of privacy in the package was intruded upon by the agent.

In some cases, a law enforcement officer may permissibly exceed the scope of the private intrusion if the nature of the container is such that it could no longer

137 *United States v. Morales*, 737 F.2d 761 (8th Cir. 1984).
138 For a definition of curtilage see section 2.332a.
139 *California v. Greenwood*, 486 U.S. 35 (1987).

support any expectation of privacy in its contents. To continue the example above, after the DEA agent opened the plastic bag, he extracted some powder and field tested it. Thus the scope of the prior private intrusion was exceeded to the extent of the field test. Since, however, the clear plastic bag could not support a reasonable expectation of privacy and the field test could disclose no information other than whether the substance was some kind of hydrochloride, no reasonable expectation of privacy was infringed by the further intrusion.[140] As stated the key issue is whether the contexts changed between the time of the lawful opening and the subsequent reopening.

The burden will be on the government to show that no such change occurred. Gaps in conducting surveillance of a container may occur, the contraband may be removed or other items placed inside during such gaps. The likelihood of whether this has happened depends on all the facts and circumstances including the nature and uses of the container, the length of the break in surveillance, and the setting in which these events occur.

The standard to be applied is whether there is a *substantial likelihood* that the contents of the container have been changed during the gap in surveillance. If not, then the reopening of the container is not a "search." If there is a substantial likelihood that the contents have changed, the reopening would be a "search" and would require probable cause and a warrant or one of the other exceptions.[141]

The principle that no reasonable expectation of privacy remains in an area or object subjected to a lawful search has been applied to the entry of backup officers called into a dwelling by an undercover officer who was present with consent.[142] For reasons discussed above, the backup officers properly restricted their entry to those areas in which the undercover officer had been permitted to go by the suspect.

Similarly, the principle has been applied to the entry of officers into dwellings after being summoned by private persons who entered lawfully in their own right.[143] As discussed above with respect to containers, great caution should be exercised to ensure that circumstances have not changed between the initial intrusion and the subsequent intrusion. In both of these dwelling cases there was ample opportunity for the homeowner to have reacquired a reasonable expectation of privacy in his dwelling, but this issue was neither raised nor discussed in either case.

The same principle applies to CBP law enforcement officers searching an office pursuant to a warrant specifically limited to documents involving a particular

140 *United States v. Jacobsen*, 466 U.S. 109 (1984).
141 *Illinois v. Andreas*, 463 U.S. 765 (1983).
142 *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996).
143 *United States v. Miller*, 152 F.3d 813 (8th Cir. 1998); *United States v. Paige*, 136 F.3d 1012 (5th Cir. 1998).

company. Knowing from prior history that a second company was also involved, the lead legacy Customs agent alerted the searching officers to be on the lookout for documents related to the second company, as well. In searching a desk, an agent found a file relating to the company named in the warrant. Continuing the search through more documents, the agent found several relating to the second company and brought them to the lead agent who, glancing at them, recognized their evidentiary value. The searching agent's search of the documents to determine if they related to the target company was authorized by the warrant. The lead agent's glance at them involved no further search of the document than was validly conducted by the first agent. The appearance of the second company's name on the document, given the lead agent's knowledge of the investigation, was sufficient to provide the requisite probable cause for a plain view seizure.[144]

2.332e Movement of Vehicles and Containers in Public

The use of tracking devices (beepers, transponders, or GPS technology) to gather information about the movement of vehicles and containers in public areas is an evolving area of law.[145] In 2012, the Supreme Court decided *United States v. Jones,* No. 10-1259 (January 23, 2012), holding that the installation and use of a GPS device to gather information about the movement of a vehicle in public areas is a search under the Fourth Amendment. Accordingly, such operations must be supported by a warrant or an established exception to the warrant requirement. Until the implications of the *Jones* decision are more fully settled, any enforcement operations that involve the warrantless installation and monitoring of GPS (or similar) devices, whether for intelligence, law enforcement, or other purposes, should be carefully coordinated through the appropriate local Associate or Assistant Chief Counsel and the local United States Attorney's Office.

The use of a lawfully installed tracking device to locate a container inside a *private* residence or area is a more settled area of law. Such action clearly constitutes a search because the beeper reveals critical facts about the interior of the premises, a location not open to visual surveillance, which the government could not otherwise obtain without a warrant.[146]

2.332f Movement of Containers Transported on a Public Conveyance

When a bag, suitcase or other container has been consigned to the operator of a public conveyance (e.g., bus, airplane, etc.) for transport, or placed in a bin or

144 *United States v. Menon*, 24 F.3d 550 (3rd Cir. 1994).
145 See *United States v. Knotts*, 460 U.S. 276 (1983) and *United States v. Jones,* No. 10-1259 (January 23, 2012). See also *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010) and *United States v. Cuevas-Perez*, No. 10-1473 (7th Cir. April 28, 2011).
146 *United States v. Karo*, 468 U.S. 705 (1984).

rack accessible by others on the conveyance, there remains no reasonable expectation that others will not touch or move those bags or containers. However, a traveler does reasonably expect that people, including police officers, will not probe, squeeze or otherwise manipulate a bag for the purpose of ascertaining the contents thereof. Thus, if a police officer manipulates a bag in a manner beyond that which reasonably would be expected to be done by others in the same circumstance, and thereby is enabled to infer the contents, a search has occurred.[147] The Fifth Circuit has held that a routine immigration checkpoint detention may not be extended by agents "squeezing and sniffing" luggage to look for drugs without individualized suspicion.[148]

2.333 Special Applications
2.333a Curtilage
2.333b Visual Sensing Aids
2.333c Aircraft Overflights
2.333d Thermal Imaging

2.333a Curtilage

"Curtilage" is the land immediately surrounding and associated with the home. It is the area to which extends the intimate activity associated with the "sanctity of a man's home and the privacies of life," and therefore should be considered part of the home itself for Fourth Amendment purposes.[149]
To determine if an area is within the curtilage, the courts consider:

- ✓ Its nearness or connection to the dwelling;
- ✓ Whether it is enclosed;
- ✓ How it is used by the occupant; and
- ✓ The steps taken by the resident to protect the area from observation by people passing by.[150]

Whether a driveway is protected from entry by officers depends on the circumstances. The mere fact that a driveway is within the curtilage of a house is not determinative. For example, its accessibility and visibility from a public highway may rule out any reasonable expectation of privacy.[151] Also, walkways and front door porches, although within the curtilage, do not carry a reasonable expectation of privacy. Indeed, absent indication to the contrary, homeowners

147 *Bond v. United States*, 529 U.S. 334 (2000).
148 *United States v. Ellis*, 330 F.3d 677 (5th Cir. 2004).
149 *Oliver v. United States*, 466 U.S. 170 (1984) citing *Boyd v. United States*, 116 U.S. 616 (1886).
150 *United States v. Dunn*, 480 U.S. 294 (1987).
151 *United States v. Smith*, 783 F.2d 648 (6th Cir. 1986).

expect that people will use their walkways and front door porches, be they friends, neighbors or door-to-door salesmen.

2.333b Visual Sensing Aids

Whether the use of visual enhancement devices like binoculars, night vision goggles, satellites, etc., constitutes a search depends exclusively upon whether the person's subjective expectation that he is not being observed in the particular circumstances is objectively reasonable. An expectation of privacy in what one knowingly exposes to view by anyone lawfully in a position to observe is not reasonable. Visual enhancement to observe more clearly that which is already being exposed to view will not be a search (e.g., a drug transaction in a parking lot or an automobile). Courts have also approved the use of flashlights, cameras, and night vision goggles which amplify light, to enhance vision or to preserve what is seen.[152]

Plainly, if an activity is otherwise visible to the lawfully present naked eye, use of a tool to see the activity more clearly will not be a search. However, if use of the tool permits observation of that which otherwise could not be observed, such as when the aids are highly sophisticated or used from a vantage point that is very remote or unusual, the observation will likely be a search. By maintaining focus on whether the subject reasonably expects privacy against being observed in the particular circumstance, the question is quickly answered. If the expectation that one is not being observed under the circumstances is objectively reasonable, then it is immaterial which tool one uses to overcome that expectation. The use of any tool (telescope, infrared, etc.) to intrude upon that which has been established as a reasonable expectation of privacy is a search. For example, it should be readily apparent that the occupant of an apartment on the fourteenth floor of a high rise building overlooking a mountainside reasonably expects that he is not being observed as he reads a newspaper in his living room. Therefore, the use of a high-powered telescope to peer into the apartment and monitor every activity of the occupant, including what he is reading, from the mountain side a quarter mile away was held to be a search.[153]

Similarly, to determine the existence of certain activities within a home by means of an infrared device is a search.[154] By the same token, although using binoculars to observe conduct through an open window in daylight or at night with the lights on would not be a search, to make the same observation using night-vision goggles at night with the lights off would likely be a search. The location of the activity may impact the analysis.[155]

152 *United States v. Dunn*, 480 U.S. 294 (1987); *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986), *United States v. Vela,* 486 F. Supp. 2d 587 (WD Tex. 2005)

153 *United States v. Kim*, 415 F. Supp. 1252 (D. Haw. 1976); See also *United States v. Taborda*, 635 F.2d 131 (2d Cir. 1980).

154 *United States v. Kyllo*, 533 U.S. 27 (2001).

155 *United States v. Vela,* 486 F. Supp. 2d 587 (WD Tex. 2005).

In all events, the inquiry must begin with the reasonableness of any expectation of privacy under the circumstances. If an expectation that one is not being observed is reasonable, then anything that a law enforcement officer does to make that observation will be deemed a search. Conversely, even the use of highly sophisticated surveillance equipment to make aerial observations will not constitute a search where it does not reveal intimate details which otherwise would not be visible.[156]

2.333c Aircraft Overflights

The question of the reasonableness of aerial observations involves a unique interplay between open fields and curtilage. Whether one has a reasonable expectation that an aircraft will not occupy a particular vantage point from which observations can be made is analogous to the questions involved when one erects barriers to observation by persons on the ground. Plainly, an officer on a public sidewalk does not intrude into a reasonable expectation of privacy when he observes all that can be observed upon one's unshielded property. Where, however, the property owner erects a fence that effectively blocks casual observations by persons passing by, a reasonable expectation of privacy is created. If our officer now obtains a stepladder and uses it to observe what he otherwise could not, an intrusion has occurred. So also with overflights. If an aircraft is used as a kind of ladder to overcome what a property owner has established as a reasonable expectation of privacy, a search takes place.

Where, however, the aircraft is operated lawfully and in airspace where such flights are routine, no intrusion by the aircraft into a reasonable expectation of privacy occurs.[157]

The Supreme Court has held that police in a helicopter operating at 400 feet did not intrude into a reasonable expectation of privacy when they observed marijuana plants through holes in the roof of a greenhouse located within the curtilage.[158] The observations, therefore, did not constitute a search. The court observed that any member of the public could have operated a helicopter at 400 feet and made the same observation and, significantly, that the operation of the aircraft did not interfere with the use of the curtilage.

Although helicopters may legally operate at altitudes below the minimum for fixed wing aircraft as long as they pose no safety hazard, their operation in certain circumstances may still constitute a search. For example, if a helicopter assumes an altitude or vantage point at which helicopters rarely, if ever, travel and thereby observe intimate details connected with the use of the home or curtilage or create undue dust, wind, or noise or otherwise interfere with the use of the curtilage, such operation may well intrude upon a reasonable expectation

156 *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986).
157 *California v. Ciraolo*, 476 U.S. 207 (1986).
158 *Florida v. Riley*, 488 U.S. 445 (1989).

of privacy and thus constitute a search even though the aircraft is not being operated unlawfully under FAA regulations.

2.333d Thermal Imaging

Law enforcement officers used a thermal imager to confirm their suspicion that Danny Kyllo was growing marijuana in his home. In the early hours of the morning the officers imaged the front and back of the Kyllo home while standing in the streets. The image revealed an abnormal concentration of heat emanating from a section of the house. In light of other facts developed, the officers concluded that a marijuana grow operation was occurring and obtained a search warrant to enter the home.

The Supreme Court held that the use of a thermal imager to obtain information regarding the interior of a home was indeed a search. The Supreme Court completely ignored the "dog sniff" and "waste heat" analogies employed by the lower courts. Rather, the Court grounded its holding squarely and simply on the logic expressed in *Knotts*, and *Karo*, i.e., the use of an imager to obtain information concerning the interior of a home not otherwise observable is a search.[159]

In the case of thermal imagers, "intimate details" well beyond determining the mere presence of a container can be obtained, such as a dehumidifier inside a closet;[160] the presence of a person in front of a curtained window;[161] or a divider wall and rafters in a mobile home.[162]

2.400 Warrant Requirement

2.410 Neutral and Detached Judicial Officer Requirement.
2.420 Particularity Requirement
2.430 Oath or Affirmation Requirement
2.440 Manner of Execution
2.450 Scope of Search
2.460 Scope of Seizure
2.470 Anticipatory Search Warrants
2.480 "Sneak and Peek" Warrants
2.490 Applicable Statutes

Subject to a few, very narrowly defined exceptions (such as a border search), every search and seizure must be conducted under the authority of a valid warrant. The Fourth Amendment expressly requires that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Probable Cause is discussed at section 2.123.

159 *United States v. Kyllo*, 533 U.S. 27 (2001).
160 *United States v. Field*, 855 F. Supp. 1518 (W.D. Wis. 1994).
161 *State of Washington v. Young*, 867 P.2d 593, 595 (Wash. 1994).
162 *United States v. Olson*, 21 F.3d 847 (8th Cir. 1994).

A search conducted under a warrant is presumed to be lawful and the defendant has the burden of proving it was illegal. Therefore, when time permits, you should obtain a warrant before searching, even though an exception might be available.

2.410 Neutral and Detached Judicial Officer Requirement

Warrants can be issued only by neutral and detached judicial officers sitting in the district where the property to be seized is located. Law enforcement officers, prosecutors, and others who are involved in "the competitive enterprise of ferreting out crime" cannot issue warrants.[163]

Federal search warrants can be issued by federal judges, federal magistrate judges, or if none reasonably available, judges of state courts of record within the district where the property sought is located.[164]

The legacy Customs civil search warrant authorized by 19 U.S.C. § 1595 can be authorized by any justice of the peace, any municipal, county or federal judge or magistrate judge. The legacy Immigration civil warrant is authorized by the District Court pursuant to *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) and Sections 103(a), 279 and 287 of the Immigration and Nationality Act of 1952, as amended by IMMACT 1990, 8 U.S.C. 1103(a), 1329 and 1357.

Once issued, only a judicial officer can change or correct a search warrant.

2.420 Particularity Requirement

2.421 The Place to be Searched
2.422 The Persons or Thing to be Seized

The warrant must particularly describe

- ✓ The place to be searched; and
- ✓ The persons or things to be seized.

Describing in detail the area to be searched and things to be seized insures that the search will be as limited in scope as possible. So-called "general warrants" which once allowed the King's officers to go on "fishing expeditions" are forbidden by the Fourth Amendment.

By forcing government officers to particularly describe the place to be searched, the Fourth Amendment prevents officers from conducting overly broad searches. By forcing the officers to identify the objects to be seized, the amendment prevents them from "rummaging" in a person's belongings in the hopes of finding something incriminating. A warrant that is particular but then adds

163 *Johnson v. United States*, 333 U.S. 10 (1948).
164 FED. R. CRIM. P. Rule 41(b).

language authorizing the seizure of all possible evidence of any crime was so broad as to contaminate the entire warrant and result in the suppression of all evidence.[165]

2.421 The Place to be Searched

A description of the place to be searched is sufficient if the officer can, with reasonable effort, ascertain and identify the place intended.

As a practical matter, officers must identify the place in as much detail as possible, so that the searching officers are able to easily locate the property, and there is little chance of confusion or mistake.

Minor errors in description will not affect the validity of the warrant, as long as the description, read as a whole, enables the officers to identify the site intended.

In *Maryland v. Garrison,* the Supreme Court ruled that there was no violation of the Fourth Amendment when officers with a warrant supported by probable cause for an apartment on the third floor (believed to be the only apartment on the third floor) searched a second apartment not properly covered by the warrant. The Court said: "[T]he validity of the search of respondent's apartment pursuant to a warrant authorizing the search of the entire third floor depends on whether the officers' failure to realize the over breadth of the warrant was objectively understandable and reasonable. Here it unquestionably was. The objective facts available to the officers at the time suggested no distinction between [the suspect's] apartment and the third-floor premises."[166]

2.422 The Persons or Thing to be Seized

2.422a Persons
2.422b Property
2.422c Business Records
2.422d Obscene Materials
2.422e Contraband
2.422f Searches of Premise of Third Parties

The standard of "practical accuracy" applied to describing places, also applies to describing persons and things.

2.422a Persons

2.422a(1) Suspect's Home
2.422a(2) Search Warrant Required in Protected Areas Other than in the Home

Arrest warrants are obtained by filing a sworn complaint before a magistrate judge. Probable cause to believe that an offense has been committed and that

165 *Cassady v. Goering,* 567 F.3d 628 (10th Cir. 2009).
166 *Maryland v. Garrison,* 480 U.S. 79, 88 (1987).

the suspect committed it must be stated in the complaint. The warrant must be executed by an officer authorized by law.

An arrest warrant may be executed anywhere in the United States, its possessions or its territories at any time that the opportunity to arrest presents itself, regardless of the period of time that has elapsed since the issuance of the warrant.

It is a good practice to obtain a warrant whenever practical, but one should bear in mind that when a warrant is issued, it "commands" *any* officer who comes across the individual to arrest him. Getting a warrant, therefore, when further investigation, or undercover work is ongoing, could prematurely end the investigation. For example, the suspect may be arrested on the warrant resulting from a simple traffic stop.

Persons should be identified by name, physical description and location, whenever possible, but none of these "identifiers" is indispensable.

2.422a(1) Suspect's Home

Entry into the home of a suspect for the purpose of arresting him implicates the Fourth Amendment. Thus, unless officers enter in "hot pursuit" or by consent (discussed below), a warrant is required. Where the entry is into the *suspect's* home for the purpose of making an arrest, an arrest warrant is sufficient authority to satisfy the Fourth Amendment.[167]

The Supreme Court has held that the "knock and announce" rule of 18 U.S.C. § 3109 also applies to the execution of arrest warrants. Therefore, before entering a dwelling in execution of any warrant, officers must announce their identity and purpose in a loud and clear voice and be refused entry before forcing entry. Exceptions to this requirement are discussed below.[168]

2.422a(2) Search Warrant Required in Protected Areas Other than in the Home

Although an arrest warrant alone is adequate for entry into the *arrestee's* home, it will not authorize entry into a place protected by the Fourth Amendment for the purpose of arresting a suspect, absent "hot pursuit" or consent. Thus, for example, the officer would not be lawfully present in a third party's home unless a search warrant had been obtained for the home.[169]

Although a search warrant is required to justify the search in such circumstances, several circuit courts have held that an arrest of a suspect in the third person's home with just an arrest warrant does not violate any rights of

167 *Payton v. New York*, 445 U.S. 573 (1980).
168 *Miller v. United States*, 357 U.S. 301 (1958).
169 *Steagald v. United States*, 451 U.S. 204 (1981).

the suspect. Of course, the entry into the home without a search warrant does violate the Constitution with respect to the third person.

2.422b Property

Once probable cause has been established, virtually anything may be subject to seizure as evidence, subject only to the Fourth Amendment's overriding admonition that the search and seizure be reasonable. The particularity requirement is met when the things to be seized are described specifically as the nature of the object allows. Even when the description is less particularized than possible, it will be deemed sufficient if the searching party can, with reasonable certainty, distinguish what is to be seized from what may not be seized.

The items to be seized must be described in both the affidavit and the warrant.[170]

2.422c Business Records

As is the case generally, the description for searches and seizures of business records should be so definite that it eliminates the officer's discretion in determining which items are covered, which are not, and when the search must come to an end. However, because it is not always possible to meet this standard, the particularity requirement may be applied with less rigidity than in other settings. In assessing particularity, a magistrate judge must determine if the description of the records (whether in writing or electronically maintained) is as specific as the circumstances and the nature of the activity under investigation allow—or in the alternative, whether the description is sufficiently specific to prevent the searching party from unnecessarily examining non-relevant records in order to find the desired records.

The particularity requirement is most likely to be met when

- ✓ Probable cause exists to seize all the items within a particular category, as when the entire enterprise is permeated with fraud or other misconduct, or
- ✓ When the warrant sets out some objective standard, a limiting feature, that allows the officers to differentiate between what can and cannot be seized, or
- ✓ When the application describes as fully as possible, in light of what the investigators know, what is to be seized, or

170 *Groh v. Ramirez*, 540 U.S. 551 (2004).

- ✓ When the warrant spells out the method for executing the search that limits the exposure of non-relevant materials, such as appointing a third-party monitor.

2.422d Obscene Materials

With respect to applications for the seizure of obscene materials, as distinguished from child pornography, the particularity requirement must be applied with special care so as not to suppress expression protected by the First Amendment.[171] The Supreme Court has used the term "scrupulous exactitude" to describe the judicial officer's responsibility when the basis for the seizure is the ideas contained in the objects sought. The materials should be identified by title or such other description that will remove discretion from the searching party and, whenever practicable, should be appended to and made part of the warrant. If the materials to be seized are not submitted to the magistrate judge for review, the affidavit must be sufficiently detailed to allow the magistrate judge to ascertain whether the items identified are likely to be obscene under the prevailing test enunciated in *Miller*.

When the seizure contemplated is substantial, involving many copies of the same item or a large number of different items, and will operate as a prior restraint on dissemination or exhibition, the Constitution requires that the magistrate judge hold an adversary hearing before reaching a decision. *Ex parte* review of the application is deemed constitutionally adequate only when a limited number of copies are taken for evidentiary purposes.

A film may be seized when the seizure will not prevent its exhibition, as when the film is to be copied and the original returned to the exhibitor, but not otherwise.[172]

2.422e Contraband

Contraband such as heroin or marijuana does not have to be described in detail. This rule recognizes the fact that officers often have not seen the particular contraband for which they are searching and thus are unable to describe it in detail. Moreover, most contraband does not lend itself to detailed description.[173] If officers have seen the contraband to be seized, however, such as when the officers have supervised a controlled delivery of the contraband, they should describe it in as much detail as possible.

171 *Miller v. California*, 413 U.S. 15 (1973).
172 *Ft. Wayne Books v. Indiana*, 489 U.S. 46 (1989); explaining *Heller v. New York*, 413 U.S. 483 (1973).
173 *United States v. James Industries*, 48 F.3d 1548 (10th Cir. 1995).

2.422f Searches of Premises of Third Parties

Searches of the premise of third parties who are not suspects may implicate the restrictions of the *Privacy Protection Act*. See Chapter Fourteen, Privacy Protection Act.

2.430 Oath or Affirmation Requirement

2.431 Checklist for Telephonic or Oral Search Warrant
2.432 Statement of Facts
2.433 Misstatement of Facts
2.434 Timeliness

The Fourth Amendment requires that the facts and circumstances relied upon to establish probable cause, together with the other necessary elements of a warrant, be presented to a judicial officer in "sworn" form. In most cases it will be a written affidavit but if the circumstances make it reasonable to dispense, in whole or in part with the written affidavit, Rule 41 of the Federal Rules of Criminal Procedure (FED.R.CRIM.P.) allows for sworn oral testimony to be communicated by telephone or other appropriate means including a facsimile transmission.[174]

2.431 Checklist for Telephonic or Oral Search Warrant

An electronically received communication is treated as the legal equivalent of an affidavit. In evaluating its legal sufficiency, the magistrate judge will apply the same rules concerning probable cause, particularity, and other matters that would be considered in reviewing a written affidavit. Beyond this, the judicial officer must observe certain procedural requirements, unique to the oral or telephonic application, designed to ensure that a proper record of the proceeding is made.

The following is a checklist of legal requirements for the officer to consider when presenting a telephonic or oral application:

1. Discuss the application with the AUSA prior to contacting the magistrate judge. Prior communication between the AUSA and the officer concerning what is to be related to the magistrate judge is likely to make for a more focused and comprehensible presentation. Where practicable, the AUSA should be included in the telephone conversation along with the applicant and the judicial officer.

2. An accurate record must be made of the proceeding. However, the use of a telephonic recording device is not essential. A verbatim stenographic or handwritten transcript will suffice.

174 FED. R. CRIM. P. Rule 41.

3. Advise the magistrate judge that the purpose of the call is to request a warrant. Thereafter everything must be recorded.

4. Prior to initiating the formal application process, all parties should identify themselves for the record and state the date and time that the formal application process begins.

5. The magistrate judge should administer an oath to all parties who will be providing information concerning the issuance of the warrant. If more than one officer and/or a prosecutor is on the telephone line, then all parties should be placed under oath to avoid the possibility that the magistrate judge relied upon unsworn information.

6. The rule requires that the magistrate judge be satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit.

7. The affiant should identify himself, state the authority to make the application, and provide any information concerning his background, training and experience that may be pertinent to the finding of probable cause.

8. The affiant should describe with sufficient particularity the premises, vehicle, or person for which search authority is to be sought.

9. The affiant should describe with appropriate particularity the items to be seized.

10. The affiant should detail all the facts and circumstances that the affiant wishes the magistrate judge to consider in determining whether probable cause exists. The magistrate judge may solicit additional information for clarification of ambiguities in the presentation.

11. If the affiant is requesting authority to serve the warrant at night or to make a forcible "no knock" entry, required justification must be provided.

12. After the affiant has concluded the presentation and requested a warrant, the magistrate judge will probably state on the record whether probable cause to support the request for a search warrant exists; restate specifically what premises or persons the affiant is authorized to search, and highlight any differences between the authority requested and that which was granted; identify what items the affiant may search for, and indicate whether the affiant's request has been modified or limited. If a nighttime entry and/or "no knock" entry is authorized, that authorization should also be

clearly stated in the record. Finally, the magistrate judge should specify the time period within which the warrant must be served.

13. After the magistrate judge has specified the applicant's authority (where the search may be conducted and what may be seized), the officer should fill out a duplicate search warrant describing the location to be searched and the items to be seized, and to sign the magistrate judge's name on the duplicate warrant—which the officer will then use as authority to conduct the search. The magistrate judge fills out a duplicate copy of the same document. The magistrate judge's name and the date and time of the authorization should appear on both copies. As a double-check, the affiant should read the search warrant back to the judicial officer. If any changes are necessary, both the original and the duplicate warrant must be modified identically.

14. The recording or transcription should conclude with the date and time that the formal application process terminated.

2.432 Statement of Facts

An officer is not required to tell the magistrate judge every fact he has learned about the case. He need only give the magistrate judge enough information to make an independent finding of probable cause. On the other hand, the facts communicated to the magistrate judge must establish probable cause "on their face." In other words, only the information contained within the affidavit will be considered in determining if probable cause exists. Facts known to an officer, but not communicated to the magistrate judge in the affidavit cannot be used to establish probable cause for the issuance of a warrant.

2.433 Misstatement of Facts

Officers must be careful not to misstate facts in an affidavit (or any other testimony). In the event of misstatement, however, such will not invalidate the warrant unless

(a) The misstatement was *knowingly* made with the *intent* to deceive the court, and

(b) The misstatement was *material*, i.e., without it there would be no probable cause.

2.434 Timeliness

Probable cause must exist at the time the warrant is issued and at the time of the search. A warrant cannot be based on stale information. Therefore, in addition to the other requirements for probable cause, there must be sufficient facts presented in the affidavit so that the magistrate judge can conclude that

the items to be seized are currently located in the place to be searched. Anticipatory search warrants addressed in section 2.470.

The questions to be answered in establishing timeliness have nothing to do with when the officer received his information, but rather when the items to be seized were last seen or known to be in the place to be searched and whether there is probable cause to believe that they will be in the place to be searched at the time of the proposed search.

How fresh in time the information must be depends on the circumstances of each case, considering the nature of the evidence sought, plans of the violators, etc. As with the other areas of probable cause, corroboration and surveillance work by officers can aid in establishing timeliness and thus probable cause.

2.440 Manner of Execution

2.441 Authorized Persons
2.442 Time of Service
2.443 Need Not Exhibit Warrant
2.444 Site Need Not Be Occupied
2.445 Announcement is Required
2.446 Damage to Property
2.447 Protective Measures
2.448 Receipt for Seized Property
2.449 Returning the Warrant to the Court

Generally, challenges to the execution of a warrant involve inquiries into whether the scope, intensity and duration of the warrant execution were excessive; whether certain items not named in the warrant were properly seized; whether certain persons were properly detained or searched incident to execution of the warrant; whether the warrant was executed in an untimely fashion or whether officers' entry without prior notice of authority and purpose was permissible.[175]

2.441 Authorized Persons

The Fourth Amendment does not require that a warrant name a specific officer to execute it. Such phraseology as "to any special agent of the Customs Service" or "to any U.S. marshal, any of his deputies, or any other authorized person" has been held to be proper.

The courts have held that an authorized officer named (individually or in a class) in the warrant may be accompanied by other law enforcement officers even if they are not designated in the warrant. Thus, a warrant specifying service by "any special officer of the U.S. Fish and Wildlife Service" must be executed by at least one special officer of Fish and Wildlife, but he may be accompanied by any

[175] *United States v. Medlin*, 798 F.2d 407 (10th Cir. 1986).

other federal or local officer, and anyone participating in the warrant execution may lawfully seize evidence.

The Supreme Court has held that "it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant."[176] Accordingly, in light of the fact that the unauthorized presence of third parties during the execution of a search warrant is likely to be a violation of the Fourth Amendment, CBP law enforcement officers should contact their Associate/Assistant Chief Counsel for guidance before allowing nonessential persons to accompany them during the execution of a search warrant.

2.442 Time of Service

Federal Rule of Criminal Procedure 41(e)(2)(ii) indicates that a search warrant should be executed in the daytime, which is defined by Rule 41(a(2)(B)) as 6:00 a.m. to 10:00 p.m. local time unless good cause expressly authorizes its execution at another time. A search that begins during the daytime may extend past 10:00 p.m. if such extension is reasonably necessary to complete the search.

Rule 41(e)(2)(i) also states that the search shall be conducted within a specified period of time not to exceed 14 days. If, for some reason, the warrant is not executed within the specified period, it is no longer valid and the officer must seek a new warrant based on such probable cause as may still exist. The magistrate judge has no authority simply to "extend" the specified period of time.

An otherwise valid search warrant "dies" and has no continuing validity when:

- ✓ Probable cause vanishes; or
- ✓ The period fixed by statute expires; or
- ✓ The period fixed by warrant expires; or
- ✓ The search pursuant to the warrant has been concluded.

As soon as any one of the above events occurs, the warrant is dead. A second search warrant, however, can be issued so long as probable cause still exists.

2.443 Need Not Exhibit Warrant

The Fourth Amendment does not require officers to exhibit, read, or provide anyone with a copy of a search warrant *before* or during its execution. The

176 *Wilson v. Layne*, 526 U.S. 603 (1999), and *Hanlon v. Berger*, 526 U.S. 808 (1999).

Ninth Circuit, however, has interpreted FED. R. CRIM. P. 41(d) as requiring that when there is a person present at the place to be searched, such person must be given a copy of the warrant before the search.[177]

2.444 Site Need Not Be Occupied

Neither the Fourth Amendment nor any other federal law requires that the property be occupied at the time it is searched.

2.445 Announcement is Required

The Fourth Amendment incorporates the common law rule that police must knock on a dwelling's door and announce their identity and purpose before attempting forcible entry.[178] Moreover, the requirement has been codified at 18 U.S.C. § 3109 which states that an:

> officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

This section has been held to apply to all entries under color of law, either to search or to arrest, and whether with or without a warrant. The officer must announce both his authority and his purpose. Merely saying "federal officers" will not suffice; the officer must also state that he has a search warrant or an arrest warrant. Announcing without knocking is also inadequate.[179]

The courts have given a broad construction to the terminology in the statute. The word "break" in the statute carries its common law meaning. Opening an unlocked door or window or using a passkey constitutes "breaking" and thus will trigger the application of § 3109.

The term "refused admittance" means that an officer must wait a reasonable length of time before forcing entry. There is no set minimum time. As stated above, the occupant must be given ample time to open the door voluntarily. What constitutes a reasonable length of time will depend on such factors as the size of the dwelling, the destructible nature of the evidence, the time of day, and the physical condition of the occupant. Thus an athlete in his motel room at noon will ordinarily be entitled to less time to respond than would an invalid living alone in a sixteen-room mansion at night.

177 *United States v. Gantt*, 194 F.3d 987 (9th Cir. 1999) overruled on other grounds by *United States v. W.R. Grace,* 526 F.3d 499 (9th Cir. 2008) .
178 *Wilson v. Arkansas*, 514 U.S. 927 (1995).
179 *Hudson v. Michigan,* 547 U.S. 586 (2006).

The *Wilson* Court recognized, however, that the Fourth Amendment does not require that the rule be inflexible or rigidly applied in all circumstances.
In order to justify a "no-knock" entry, officers must have reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This standard strikes a balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries.[180] The reasonable suspicion standard applies even if a "no-knock" entry results in the destruction of property.[181]

The words in the statute "or when necessary to liberate himself or a person aiding him in the execution of the warrant" does not mean that compliance with § 3109 is excused whenever an officer or informant is inside. Some special circumstances, such as an earlier threat or an overheard plan to injure the inside man must be present.

Since the word "house" is used in the statute, some circuits have limited the application of § 3109 to dwellings. Other circuits, however, have extended the meaning of "house" to cover such structures as offices, smokehouses, and barns. Law enforcement officers should therefore be familiar with the rule in their areas of operation when contemplating the entry of such buildings. That the Supreme Court used the word "dwelling" in its opinion in *Wilson, supra*, may obviate some of the concern in cases involving buildings other than dwellings.

Law enforcement officers are not required to make an announcement at each point of entry into a house. A single proper announcement is enough, but no one may enter until a proper announcement has been made.[182]

Although the Supreme Court has held that the Fourth Amendment does not require a rigid application of the rule on the one hand, it nonetheless does not permit blanket exceptions for certain classes of crimes, either. Thus, it would be improper for a court to establish a *per se* rule that officers are never required to knock and announce when executing felony drug warrants.[183]

2.446 Damage to Property

When the service of a search warrant is likely to involve damage to property, officers should seek prior judicial approval for such action. Such a request will be evaluated according to the Fourth Amendment standards of reasonableness.

2.447 Protective Measures

2.447a Anything Necessary and Proper

180 *Richards v. Wisconsin*, 520 U.S. 385 (1997).
181 *United States v. Ramirez*, 523 U.S. 65 (1998).
182 *United States v. Bustamante-Gamez*, 488 F.2d 4 (9th Cir. 1973).
183 *Richards v. Wisconsin*, 520 U.S. 385 (1997).

2.447b Securing People
2.447c Securing Weapons
2.447d Protective Impoundment

A search warrant is an order issued by a judicial officer in the name of the government, commanding an officer to conduct a search for specified objects.

No one has the right to resist the execution of a search warrant, even though the warrant may later be held to be invalid.

2.447a Anything Necessary and Proper

Subject to policy restrictions (for example, restrictions on the offensive use of firearms) and restrictions imposed by statute, officers conducting a lawful search under a warrant have authority to insure that their search will be conducted without interference. Thus, officers may take any steps reasonable and necessary to protect their safety and that of persons and property under their control during the search.

2.447b Securing People

The Supreme Court held that during the execution of a search warrant, law enforcement officers may *always* detain persons found at the premises provided that (1) the search is for contraband; and, (2) the persons detained are occupants.[184] The Court did not require any particularized suspicion of the persons detained, given the obvious fact that such suspicion is inherent in the circumstances. Indeed, the Supreme Court would later say that the search warrant [at issue in *Summers*] implied a judicial determination that police had probable cause to believe someone in the house was committing a crime.[185] Further, the Court, in describing the factors it relied upon in *Summers*, stated that "the safety of the officers was served by the governmental intrusion; the intrusion was minimal; and the search stemmed from some probable cause focusing suspicion on the individual[s] affected by the search."[186]

Further, courts have held that this rationale applies to residents and visitors alike, as well as those who enter the premises while the search is in progress.[187] The Supreme Court held that if officers have probable cause to believe that drugs are inside of a dwelling, they can prevent a homeowner from entering his home unaccompanied pending the issuance of a search warrant.[188]

184 *Michigan v. Summers*, 452 U.S. 692 (1981).
185 *Maryland v. Buie*, 494 U.S. 325, 334 (1995).
186 *New York v. Class*, 475 U.S. 106, 117 (1986).
187 See*, United States v. Fountain*, 2 F.3d 656 (6th Cir. 1993);, cert. denied, 510 U.S. 1014, (1993), and overruled on other grounds*, Trepel v. Roadway Express, Inc.,* 194 F.3d 708, 717 (6th Cir. 1999), *United States v. Berlin*, 686 F.2d 81, 87 (2d Cir. 1987).
188 *Illinois v. McArthur*, 531 U.S. 326 (2001).

Included within this authority is the seizure of those about to leave as the officer arrives and those who show up while the search is in progress. Such persons may be detained for more than just a few minutes and perhaps for the entire time the officers are present, as the particular facts dictate. Others may be detained for short interviews designed exclusively to learn more about the property specified in the warrant or any connection between it and the person being interviewed. Any further seizure will require a connection between the person and the items subject to seizure. In essence, the principles applicable to a *Terry* stop are fully applicable to those present during the execution of a search warrant.[189] In *Muehler v. Mena,*[190] Mena was detained in handcuffs for the length of the search during the execution of a search warrant for contraband. She subsequently sued pursuant to § 1983. The Supreme Court held that the officers did not violate the Fourth Amendment and ruled that an officer's authority to detain incident to a search is categorical and does not depend on the "quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." There was a warrant to search the premises and Mena was an occupant of the premises at the time of the search so her detention during the search was reasonable. The Court advised that the use of handcuffs (a use of force) was reasonable because the governmental interest in minimizing the risk of harm to both officers and occupants. The marginal intrusion was outweighed by the fact that the warrant authorized a search for weapons and a wanted gang member resided on the premises. In addition there was a need to detain multiple occupants which made the use of handcuffs all the more reasonable. A 2 to 3 hour detention in handcuffs under these circumstances did not outweigh the government's continuing safety interests. It should also be noted that the officers questioned Mena about her immigration status during her detention. The Court indicated that the questioning did not violate her Fourth Amendment rights as mere police questioning does not constitute a seizure as her initial detention was lawful and the detention was not prolonged by the immigration questions.

2.447c Securing Weapons

A law enforcement officer may take temporary possession of any weapon in the area that he reasonably believes could be used against him.

Of course, once the search is over and the danger has passed, continued possession of the weapon cannot be justified as a safety measure. Unless some other justification exists for retaining the weapon, it must be returned to the owner (See § 2.520, Plain View Seizures).

2.447d Protective Impoundment

In addition to seizing objects under the warrant, you can take *temporary* custody of personal property, such as currency, jewels, weapons, etc., which require

189 See, *Muehler v. Mena*, 544 U.S. 93 (2005).
190 *Id.*

safekeeping whenever the owner has been arrested and the premises are no longer secure.

2.448 Receipt for Seized Property

Although officers are not required to exhibit a search warrant *before* conducting the search, they are required by statute to leave a copy of the warrant and an inventory of seized property at the premises *after* the search is completed.[191] There is no requirement, however, to provide the owner with notice of remedies available for seeking the return of the property.[192]

2.449 Returning the Warrant to the Court

Rule 41(d) of the Federal Rules of Criminal Procedure provides in part:

> Inventory. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person. In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied.
>
> Receipt. The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property.
>
> Return. The officer executing the warrant must promptly return it--together with a copy of the inventory--to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

A failure to comply with the technical requirements regarding the return will generally not affect the validity of the search warrant, provided the defendant has not been prejudiced by the error and provided, further, that the officer did not willfully violate these requirements.

191 FED. R. CRIM. P. 41(d).
192 *City of West Covina v. Perkins*, 525 U.S. 234 (1999).

2.450 Scope of Search
2.451 Premises
2.452 Vehicles on Premises
2.453 Persons on Premises
2.454 Time

A search warrant restricts the search to only those places described in the warrant. Moreover, the search within the authorized place is further restricted to those areas within which the objects authorized for seizure reasonably may be hidden. The search cannot exceed this scope.

The extent to which you can search an area depends entirely upon the size and shape of the objects for which you are searching. If you are lawfully searching a home for a stolen elephant, you may not look in dresser drawers or the bread box. You must confine your search to areas where the elephant reasonably could be.

As noted earlier, the areas to be searched must be particularly described in the warrant. By restricting the search to these areas, the Fourth Amendment protects citizens from overly broad searches, or "fishing" expeditions.

2.451 Premises

A search of premises under a warrant can extend to all parts of the property necessarily a part of the premises, even if not specifically described in the warrant. Appurtenances, such as the garage and adjacent outbuildings, may or may not be construed as part of the premises, depending on the jurisdiction. To minimize problems with this issue, where appropriate include "outbuildings and appurtenances" in the warrant application.

2.452 Vehicles on Premises

Although many courts consider vehicles parked upon the curtilage to be a part of the premises and subject to search, this is not a hard and fast rule. To be safe, vehicles for which there is probable cause to search should be named in the warrant. Also, a full and pointed inquiry should be made of informants and other sources of information to establish pertinent facts that might establish probable cause to search vehicles found on premises.

2.453 Persons on Premises

A search warrant for premises does not automatically authorize a *full* search of persons either found on the premises or who come onto the premises while the search is in progress.

If, on the other hand, the persons on the premises or coming onto the premises are connected to the illegal activity, and could be concealing objects named in the warrant, they can be searched if you have *probable cause* to believe they are concealing items named in the warrant.

2.454 Time

Officers may remain on the premises for as long as is necessary to conduct a thorough search for the objects named in the warrant.

You must, however, stop searching once you find all the objects named in the warrant.

2.460 Scope of Seizure

As noted earlier, the activity of the officers executing the warrant must be limited to searching for those items named in the warrant and no others. When officers grossly exceed the scope of a search warrant and transform a valid warrant into a general warrant, the Fourth Amendment's particularity requirement is undermined and all evidence seized under the warrant will be suppressed.[193] The most frequently quoted explanation of this rule is that of the U.S. Supreme Court in *Marron v. United States*:

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.[194]

The only exception to this restriction is seizures made under the "plain view" theory, discussed in § 2.520. The original area to be searched cannot be extended to find "plain view" evidence, nor can the extent, time, or invasiveness of the search be expanded in anticipation of finding plain view evidence. "Plain view" will apply only to seizable property immediately apparent as such and that is found within the scope of the original search for the items named in the warrant.

2.470 Anticipatory Search Warrants

The Fourth Amendment only requires probable cause to believe that an item to be seized is present at the time of the search.[195] As the name implies, "anticipatory" search warrants are validly issued where there is probable cause to believe that a crime has been (or is being) committed and there is probable cause to believe that evidence of such crime will be found at the described location *at the time of the search*, even though not present at the time the warrant issues.[196]

193 *United States v. Foster*, 100 F.3d 846 (10th Cir. 1996).
194 *Marron v. United States*, 275 U.S. 192 (1927).
195 *United States v. Grubbs*, 547 U.S. 90 (2006).
196 *United States v. Hugoboom*, 112 F.3d 1081 (10th Cir. 1997).

In *United States v. Grubbs*, 126 S.Ct. 1494 (2006), the Supreme Court addressed the issue of anticipatory search warrants. In the *Grubbs* case, a federal magistrate judge issued an "anticipatory" search warrant for Grubbs' house based on a federal officer's affidavit. The affidavit explained that the warrant would not be executed until a package containing a videotape of child pornography – which Grubbs had ordered from an undercover postal inspector – was received at, and physically taken into, the residence. The affidavit referred to two attachments describing the residence and items to be seized. After the package was delivered and the search commenced, Grubbs was given a copy of the warrant, which included the attachments, but not the supporting affidavit. Grubbs admitted ordering the videotape and was arrested; the videotape and other items were seized. Grubbs moved to suppress the seized evidence arguing that the warrant was invalid because it failed to list the triggering condition for execution of the warrant.

The Supreme Court first addressed whether anticipatory search warrants are categorically unconstitutional. An anticipatory warrant is based on an affidavit showing probable cause that at some future time evidence of a crime will be located at a specific place. Most anticipatory warrants subject their execution to some condition precedent other than the mere passage of time – a so-called "triggering condition." Grubbs argued that for this reason anticipatory warrants violated the Fourth Amendment's provision that "no Warrants shall issue, but upon probable cause." The Court rejected this argument, explaining that the probable cause requirement looks to whether evidence will be found when the search is conducted, not whether contraband is presently located at the place described in the warrant. In that sense, anticipatory warrants are no different in principle from ordinary warrants, in that they require the magistrate to determine that it is *now probable* that contraband or evidence of a crime *will be* on the described premises when the warrant is executed. To comply with the Fourth Amendment's probable cause requirement, the Court explained that an anticipatory search warrant must satisfy two prerequisites: (1) probable cause to believe that the contraband or evidence will be found in a particular place, and (2) probable cause to believe that the triggering condition will occur. The Court concluded that both prerequisites were met in this case.

The Court in *Grubbs* also noted that the Fourth Amendment sets forth two matters that must be "particularly described" in the warrant, to include, "the place to be searched" and "the persons or things to be seized." The Court held that the particularity requirement does not require that the conditions precedent to the execution of the warrant be included in the warrant itself. The Court explained that the Fourth Amendment does not require that the warrant set forth the magistrate's basis for finding probable cause, much less any description of a triggering condition. The Court also rejected the contention that listing the triggering condition in the warrant was necessary to assure the individual whose property is searched that officers are abiding by the limits of the search (i.e., to allow the individual to "police" the officers' conduct). The Court noted that this argument assumed that the executing officer must present the property owner with a copy of the warrant before conducting the search. However, neither the Fourth Amendment nor Rule 41 of the Federal Rules of

Criminal Procedure imposes such a requirement. Instead, the Court explained, the Constitution protects property owners by interposing the "deliberate, impartial judgment of a judicial officer … between the citizen and the police," by providing a right to suppress evidence improperly obtained, and by creating a private cause of action for damages when officers act improperly.

2.480 "Sneak and Peek" Warrants

A court's authority to order covert entries to search for and seize intangibles, such as conversations and the viewing of criminal activity has long been recognized. In an early example of a "sneak and peek" warrant, DEA surveillance and information from informants developed probable cause to believe defendant was operating a cocaine factory on his farm. DEA obtained a warrant that did not seek the seizure of tangible evidence, but instead authorized clandestine entry to photograph the factory and permitted delaying notice of the search for seven days. The warrant was executed and photographs taken. The photographs evidenced a large-scale cocaine manufacturing operation, but nothing was seized. No copy of the warrant was left on the premises. Agents obtained repeated extensions of the seven day notice requirement in order to continue their investigation without alerting the offenders.

The Second Circuit has noted that when a "sneak and peek" warrant meets the Fourth Amendment particularity requirements, such as crime under investigation, place to be searched and things to be seized, it is valid even if only intangible evidence is to be seized.[197] Further, when nondisclosure of the authorized search is essential to its success, the Fourth Amendment does not prohibit such covert entry.

However, when an entry is to be covert and no tangible evidence is to be seized, safeguards must be imposed to "… minimize the possibility that the officers will exceed the bounds of propriety without detection." To that end, the court imposed two limitations on the issuance of warrants for covert-entry searches. First, officers must make a showing of reasonable necessity for delay in giving notice; and, second, if notice is to be delayed, notice of the search must be given to the person "within a reasonable time." What constitutes a "reasonable time" depends on the circumstances of each individual case, but delay should not be authorized for more than seven days. Extensions of the delay period may be granted upon a fresh showing of the need for further delay.[198]

197 *United States v. Villegas*, 899 F.2d 1324 (2d Cir. 1990).

198 *Id.*; See also, *United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986) readdressed in *United Sates v. Freitas,* 856 F.2d 1425 (9th Cir. 1988); *United States v. Ludwig*, 902 F. Supp. 121 (W. D. Tex. 1995).

2.490 Applicable Statutes

Some of the criminal statutes that have application to unlawfully procured or executed search warrants are as follows:

18 U.S.C. § 242	Deprivation of rights under color of law - $1000/one year or both.
18 U.S.C. § 2234	Authority exceeded
18 U.S.C. § 2235	Search Warrant procured maliciously
18 U.S.C. § 2236	Searches without warrant.
18 U.S.C. § 1621	Perjury generally - $2,000/five years or both.
18 U.S.C. § 1622	Subornation of perjury - $2,000/ five years or both.

During the execution of a warrant, occupants also may commit other federal crimes: Section 18 U.S.C. §§ 2231, 2232, 2233 (statutes relating to assault during the execution, interference or rescue of seized property).

2.500 Exceptions To The Warrant Requirement

2.510 Arrests in Public
2.520 Plain View Seizures
2.530 Exigent Circumstances
2.540 Mobile Conveyances

The general rule, of course, is that a search or seizure without a warrant is presumed to be unreasonable and therefore unlawful. Circumstances can exist, however, in which the failure to get a warrant will be excused. In other words, searches and seizures without a warrant may nonetheless be reasonable if circumstances so warrant.

2.510 Arrests in Public

The Supreme Court has ruled that the test of the validity of an arrest is probable cause to make that arrest. In general, if an officer has probable cause, he may make a valid arrest in a public place even though (1) he had ample time to obtain a warrant and failed to do so, or (2) the warrant turns out to be defective. In other words, the propriety of an arrest is judged by whether or not there is probable cause and not by the existence or nonexistence of a valid warrant.[199] The arresting officer should also be mindful of whether an arrest is within the scope of his statutory authority. See Chapter Six, Suspect's Rights.

199 See *Virginia v. Moore*, 553 U.S. 164 (2008) (officer who violated state statute in making arrest did not violate the Constitution because he acted with probable cause; federal exclusionary rule did not apply and the evidence not suppressed).

2.520 Plain View Seizures
2.521 Probable Cause
2.522 Lawful Access to the Object

The necessary elements for a lawful plain view seizure are:

- ✓ There must be probable cause to believe that the item is seizable property; and

- ✓ The officer must have lawful access to the object itself.

The plain view doctrine is an acknowledgment by the courts that the reasonableness requirement of the Fourth Amendment is not offended by the lack of a warrant to seize an object to which an officer has a lawful right of access and where the object's seizeability is immediately apparent.[200] Moreover, "lawful right of access" to the object to be seized is to be understood in the context of an existing search where that search is not expanded beyond its original lawful purpose. For example, consider officers who obtain a search warrant authorizing them to search a suspect's home for a fugitive. The search warrant gives the officers lawful right of access to the home and authority to search any places within the home where a fugitive may be found. If in the course of executing the warrant the officers observe child pornography sitting on a table in the home in open view, the officers would be authorized to seize the offending items under the plain view seizure doctrine. The search warrant gave the officers lawful right of access to the home and it was immediately apparent that the child pornography pictures were subject to seizure. The fact that the officers' purpose in entering the home was unrelated to a child pornography offense does not matter.

If, however, the officers executing the same search warrant observed a closed file folder sitting on a table in the home in open view, and had only reasonable suspicion to believe that the folder contained child pornography, then the officers would not be authorized to open the folder or seize the items it contained. In this scenario, the officers had no lawful right of access to the contents of the file folder because the warrant that authorized their entry into the home allowed them to search only in those places where a fugitive might be found. Because a fugitive could not possibly be found inside a file folder, the officers had no lawful right of access to the contents of the file folder. If the officers opened the file folder to view its contents, they would be engaging in a search beyond the scope authorized by the warrant for which there would be no independent justification. If, on the other hand, the officers observed only the outside of the closed folder sitting on the table in open view, as they were authorized to do, they would not have probable cause to seize the folder because it was not immediately apparent that the folder contained contraband.

200 *Horton v. California*, 496 U.S. 128 (1990); *Arizona v. Hicks*, 480 U.S. 321 (1987); *Texas v. Brown*, 460 U.S. 730 (1983).

The plain view seizure doctrine is a useful tool that allows law enforcement officers to seize items that are discovered during the course of an otherwise lawful search. The plain view seizure doctrine does not authorize officers to expand the scope of a search. Rather, it allows the officers to seize items that can immediately be identified as contraband or evidence of crime when such items are discovered in the course of an otherwise lawful search.

Related to the concept of plain view are the concepts of plain feel / touch and plain smell. Plain feel is addressed in section 2.633. Plain smell is not an exception in and of itself, but is an articulable fact that may lead an officer to further investigation. For example, a Border Patrol agent was justified in approaching a vehicle based upon particularly facts which give rise to a reasonable suspicion that aliens were being transported in the truck. As he was leaning over the bed of the truck to touch the objects covered by the tarp he smelled the odor of marijuana. The Court held that once the agent smelled the marijuana, he was justified in searching the entire truck.[201] A vehicle search without a warrant generally rests upon the mobile conveyance search exception.

2.521 Probable Cause

The officer making a seizure under plain view must have probable cause to believe, without further investigation, that the item at hand is seizable. For example, if officers go to the home of a known convicted felon to interview him, are admitted to the premises, and see a pistol on a table, they may seize the pistol because its value as evidence of the crime of possession of a weapon by a convicted felon is immediately apparent to them. On the other hand, if officers enter the home of a suspect, not a convicted felon, on a warrant to search for gambling devices, and observe several sporting rifles, they may not seize the weapons since, without more, there is no probable cause to believe that they are seizable.

2.522 Lawful Access to the Object

As noted above, lawful right of access must be understood as existing separate and apart from the observation itself. In other words, any search necessarily involved to gain access to the object in order to seize it must be authorized by a warrant or some other exception to the warrant requirement. Although seizable items often may be seen and identified without intruding into a reasonable expectation of privacy (i.e., an "open view" observation), an intrusion into a space in which one reasonably expects privacy to retrieve the items requires a warrant or some authorized exception thereto. Walking past a home and seeing an object through the window of a house does not mean that the officer can straight away enter and seize the object. A warrant or one of the exceptions (discussed herein) would be required.[202]

201 *United States v. Merryman*, 630 F. 2d. 780 (10th Cir. 1980).
202 *United States v. Paige*, 136 F.3d 1012 (5th Cir. 1998).

2.530 Exigent Circumstances

2.531 Hot Pursuit
2.532 Warrantless Entries When Officers Not in Hot Pursuit
2.533 Destruction of Evidence: The "Now or Never" Doctrine

Officers may make warrantless emergency entries to arrest suspects when there is probable cause that a suspect is in the area to be entered and the officers enter while in hot pursuit of a fleeing felon, to prevent imminent destruction or removal of evidence, or other emergencies where entry is necessary to prevent injury or loss of life to others.

2.531 Hot Pursuit

An officer may enter and search premises for a fleeing felony suspect who is in the process of escaping and whose whereabouts are continually known by the officer.

- ✓ There must be probable cause to arrest for a felony offense; and
- ✓ The officer must generally have a continuous knowledge of the suspect's whereabouts; and
- ✓ There must be a need for speed; and
- ✓ There must be probable cause to believe the suspect is in the particular premise.

In order for officers to enter a private location without a warrant under this exception, the suspect must be fleeing from a crime. By definition, if the suspect is not trying to get away, police are not in hot pursuit. However, the chase is not required to be the classic "hue and cry through the city streets."

For example, local narcotics officers had probable cause to believe that Santana had marked money in her possession, which had just been used to make a heroin buy. They spotted her standing in the doorway of her home holding a paper bag. As they approached the house she retreated inside and the officers entered to effect her arrest. In the process they seized the bag which contained the marked money and some heroin that had fallen from the bag. The Supreme Court held that this warrantless entry into the house to effect the arrest was "in hot pursuit."[203]

On the other hand when a man left the scene of an accident and walked home, the Supreme Court ruled that "... the claim of hot pursuit is unconvincing because there was no immediate or continuous pursuit of the petitioner from the scene of a crime."[204]

203 *United States v. Santana*, 427 U.S. 38 (1976).
204 *Walsh v. Wisconsin*, 466 U.S. 740 (1984).

2.532 Warrantless Entries When Officers Not in Hot Pursuit

In *Warden v. Hayden*,[205] the Supreme Court approved an entry that did not involve a police chase. Hayden committed an armed robbery of a taxi company. Two cab drivers followed the robber to a residence. The police were contacted by radio. Within minutes, officers arrived at the house, knocked, and announced their presence. They entered the residence and spread out through the house in search of the robber who was found.

The Supreme Court ruled that "... neither the entry without warrant to search for the robber, nor the search for him without warrant was invalid. Under the circumstances of this case, the exigencies of the situation made that course imperative" The police were informed that a robbery had taken place five minutes earlier and acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons that he used in the robbery and might use against them. "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others."[206]

When a case involves hot pursuit, the emergency is apparent. However, when the basis for the emergency is not dependent upon the suspect's being hotly pursued, the courts examine the situation closely.[207]

A sample of factors that the circuit courts have considered is

(i) The gravity or violent nature of the offense

(ii) Whether suspect is reasonably believed to be armed;[208]

(ii) Whether there is a clear showing of probable cause that the suspect committed the crime;

(iv) Strong reason to believe suspect is in the place to be entered;

(v) A likelihood of escape if not swiftly apprehended;

(vi) Whether officers can enter the premises in a peaceful manner.[209]

2.533 Destruction of Evidence: The "Now or Never" Doctrine

An officer or agent may conduct a warrantless search if:

- ✓ There is probable cause to search, and

205 *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967).
206 *Warden v. Hayden,* 387 U.S. 294, 298 (1967).
207 *United States v. Jones*, 239 F3d 716 (5th Cir. 2001).
208 *United States v. Arellano-Ochoa*, 461 F.3d 1142 (9th Cir. 2006).
209 *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970) (en banc); *United States v. McDonald*, 916 F.2d 766 (2d Cir. 1990) (en banc).

- ✓ There is probable cause to believe that evidence is threatened with imminent removal or destruction.[210]

This type of "exigent circumstance" extends to vehicles, buildings, containers and any other area. It also extends to emergency searches of individuals.

For example, officers have been permitted to cause a blood sample to be seized from a drunk driving suspect without a warrant because the delay to obtain a warrant would result in a loss of the evidence of the amount of alcohol in the suspect's blood.[211] Also, officers have been allowed to seize and search clothing or take scrapings from a suspect's fingernails where a delay to obtain a search warrant would result in an opportunity for the suspect to remove or destroy the evidence.

A "now or never" seizure of a computer may initially be permissible, however the subsequent failure to timely get a search warrant to search the computer rendered the search a violation of the Fourth Amendment. Law enforcement seized a computer from a suspect because of fear of destruction of evidence. A warrant was not obtained for 21 days because the law enforcement officer went to a training class. The court considered the initial seizure lawful, but the subsequent delay in execution unreasonable.[212]

Actual knowledge that evidence is being destroyed is not necessary. On the other hand, a generalized fear that evidence, especially drugs, will be quickly removed or destroyed is not enough, by itself, to establish exigent circumstances.[213] Officers must have probable cause to believe that the evidence is in danger of imminent removal or destruction for the exception to be applicable.

If, however, the exigency arises because the government has engaged in unreasonable or unlawful conduct, (i.e., conduct that violates the Fourth Amendment), then a warrantless entry under this exception is impermissible. For example, if police threatened to enter a home without a warrant where warrantless entry would be unreasonable, they may not then rely on the resulting exigency (the imminent destruction of evidence) as a basis for entering the home under this exception.

Conversely, as the U.S. Supreme Court explained in *Kentucky v. King*, "where . . . the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed."[214] In other words, if

210 *United States v. Jeffers*, 342 U.S. 48 (1951); *McDonald v. United States*, 335 U.S. 451 (1948).
211 *Schmerber v. California*, 384 U.S. 757 (1966).
212 *United States v. Mitchell,* 565 F.3d 1347 (11th Cir. 2009).
213 *Vale v. Louisiana*, 399 U.S. 30 (1970).
214 *Kentucky v. King,* 563 U.S. ___ (May 16, 2011)

police conduct created the exigency (for example, if police lawfully approached a home to conduct a knock-and-talk interview), but such conduct was lawful and appropriate, then the "now or never" exigency exception may be relied upon by the police in making a warrantless entry if the police reasonably believed that the destruction or removal of evidence in the home was imminent.

2.534 Emergency Aid

Police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury.[215] In *Brigham City, Utah v. Stuart,* officers responded to a noise complaint and saw through the screen door an alteration involving a punch and spitting blood. The officers announced their presence and opened the screen door, however, it was not until they entered the home that the altercation subsided. The Court held that the officers did not violate the Fourth Amendment as they had an exigent circumstance that was objectively reasonable. The Court subsequently indicated in *Michigan v. Fisher* that it will look to whether there was an objectively reasonable basis for believing medical assistance was needed or that persons were in danger. This is true even if there is only one participant who refuses to respond to officers such as Mr. Fisher, who was screaming and throwing things and refused to answer questions regarding his need for medical attention.[216]

The Court has previously held that warrantless entry to fight a fire does not violate the Fourth Amendment.[217] The assertion by law enforcement officers that suspected illegal aliens had been dropped off at a house and appeared to be fatigued was insufficient to establish exigent circumstances.[218]

2.540 Mobile Conveyances

2.541 Scope of Exception - When
2.542 Scope of Exception - Where
2.523 Scope of Exception - What

An officer may conduct a warrantless search of a mobile conveyance if:

- ✓ There is probable cause to search, and
- ✓ The conveyance is actually mobile or readily mobile.

Since 1925, the Supreme Court has recognized that the exigency associated with a conveyance on the highway authorized the warrantless seizure and search of the vehicle so long as probable cause existed to believe seizable property was

215 *Brigham City v. Stuart*, 547 U.S. 398 (2006).
216 *Michigan v. Fisher,* 130 S.Ct. 546 (2009)
217 *Michigan v. Taylor,* 436 U.S. 499 (1978).
218 *United States v. Troop,* 514 F.3d 405 (5th Cir. 2008).

contained therein.[219] Known as the *Carroll* doctrine, the rule was understood to apply only to vehicles actually on the highway. However, in *California v. Carney*,[220] the Supreme Court extended this exception to a motor home parked in a parking lot. Officers watched Carney approach a youth who accompanied Carney to the motor home. The youth was stopped soon after leaving the motor home and admitted receiving marijuana from Carney. The agents entered the motor home with Carney present and searched it. The Supreme Court approved of the warrantless search since, under the circumstances, the motor home was "readily mobile." A special showing of exigent circumstances is not required.[221]

When the use of a houseboat at the time of the search is more like a vehicle than a home, then this exception applies. Thus, when houseboats are in open, public navigable waters, they are being used as boats. In such circumstances, the houseboat, as with a motor home, is a vehicle rather than a dwelling.[222]

If a conveyance has been completely immobilized or is otherwise not "readily mobile" a court may not apply this exception to a warrantless search. For example, the vehicle may be in a garage for major repairs; up on cinder blocks with wheels removed; engine removed; damaged so as to be inoperable, operator not readily available, etc. However, in *U.S. v. Navas,* 597 F.3d 492 (2nd Cir. 2010) the Court found the search of an unattached trailer, parked in a warehouse with its front stabilizing legs lowered into place to be a mobile conveyance search because if its inherent mobility.

If probable cause to search a vehicle develops sufficiently in advance, the better practice, of course, is to obtain a warrant that preempts the issue.

Once the requirements for a *Carroll* search have been met, then a warrantless search may be made that is as thorough as a magistrate judge could authorize by a warrant. Where law enforcement officers have probable cause to search a conveyance, they may conduct a warrantless search of every part of the conveyance, locked or unlocked, including all containers and packages that reasonably may conceal the object of the search. This includes the search of a passenger's belongings even when probable cause arises from information about the driver.[223]

2.541 Scope of Exception - When

If a vehicle that is subject to a full search under the *Carroll* doctrine is impounded, the search may be conducted even after impoundment. As the Supreme Court stated,

219 *Carroll v. United States*, 267 U.S. 132 (1925).
220 *California v. Carney,* 471 U.S. 386 (1985).
221 *Pennsylvania v. Labron*, 518 U.S. 938 (1996) (per curiam).
222 *United States v. Albers*, 136 F.3d 670 (9th Cir. 1998); *United States v. Hill*, 855 F.2d 664 (10th Cir. 1988).
223 *Wyoming v. Houghton*, 526 U.S. 295 (1999).

> [i]t is ... clear that the justification to conduct such a warrantless search does not vanish once the car has been immobilized, nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant.[224]

2.542 Scope of Exception - Where

Pursuant to an investigation of a suspected drug smuggling operation, legacy Customs officers using ground and air surveillance observed two pickup trucks as they traveled to a remote private airstrip in Arizona and observed the arrival and departure of two small airplanes. The officers smelled the odor of marijuana as they approached the trucks and saw in the back of the trucks packages wrapped in dark green plastic and sealed with tape, a common method of packaging marijuana. After arresting several people at the airstrip, the officers took the trucks back to Drug Enforcement Administration (DEA) headquarters, and the packages were then placed in a DEA warehouse. Three days after the packages were seized from the trucks, government agents, without obtaining a search warrant, opened some of the packages and took samples that later proved to be marijuana. The Supreme Court upheld the warrantless search because:

a. The officers had probable cause to believe that not only the trucks but also the packages themselves contained contraband;

b. The officers could have lawfully searched the packages when they were first discovered;

c. Nothing requires that the warrantless searches of the containers must invariably be conducted "immediately" as part of the vehicle inspection or "soon thereafter."[225]

2.543 Scope of Exception - What

The Supreme Court has refined its earlier rules regarding the extent to which the *Carroll* doctrine applies to containers found within a mobile conveyance. Simply stated, as long as probable cause exists to believe that seizable property is in a mobile conveyance, irrespective of whether the initial suspicion is of a specific container, all containers or places within the conveyance which might contain the property, may be opened without a warrant. The astute officer will recognize, of course, that if his probable cause includes facts that the ultimate object is in a suitcase, he may not search the glove box, a purse or other containers that could not house a suitcase. On the other hand, all such larger places or containers, and, of course, all suitcases, may be opened without a

224 *Michigan v. Thomas,* 458 U.S. 259 (1982).
225 *United States v. Johns*, 469 U.S. 478 (1985).

warrant just as they could had his suspicion not been on a particular container.[226]

2.600 Exceptions To Probable Cause Requirement
2.610 Search Incident to a Lawful Arrest
2.620 Consent Searches
2.630 Frisk/Protective Sweep
2.640 Routine Inventories
2.650 Regulatory Searches
2.660 Administrative Searches
2.670 Emergency Searches
2.680 Border Searches

In a limited number of situations, a search may be "reasonable," and therefore valid under the Fourth Amendment, even though there is no probable cause to search. Keep in mind that unlike the exceptions to the warrant requirement, discussed above, the existence of probable cause to search is *irrelevant* to searches conducted under one of these exceptions.

2.610 Search Incident to a Lawful Arrest
2.611 "Incident" to Arrest
2.612 Scope of Search
2.613 Search for People Incident to an Arrest

The search of a suspect incident to his arrest is the most frequently used exception to the probable cause and warrant requirement. Search incident to arrest is based on the concern for officer safety and destruction or loss of evidence.

Incident to a lawful arrest, an officer may

- ✓ Conduct a full search of the arrestee; and
- ✓ Articles in his possession; and
- ✓ The area within the arrestee's immediate control.

No probable cause to search is required. No exigent circumstances are required, but the arrest must be objectively reasonable (e.g., there must have been probable cause to make the arrest). An officer's subjective motivation in making an objectively reasonable arrest does not invalidate a search incident to an arrest.[227] If the arrest is unlawful for any reason, the search will also be unlawful and any evidence found may be suppressed.[228]

226 *California v. Acevedo*, 500 U.S. 565 (1991).
227 *United States v. Hudson*, 100 F.3d 1409 (9th Cir. 1996).
228 *Brown v. Illinois*, 422 U.S. 590 (1975).

The arrest must be custodial. An encounter in which an officer merely issues a citation and permits the person to leave is not a "custodial arrest" and no search is permitted.[229] If, however, the officer seizes the person for the purpose of transporting him, the seizure is a "custodial arrest" justifying a search incident to that arrest.

The arrest must not be timed. If officers delay making the arrest with the bad faith intent of searching an area into which the arrestee goes, the arrest is "timed."

To determine if an arrest has been timed, courts will look at:

- ✓ Whether a valid investigative purpose existed for delaying the arrest; and

- ✓ Whether there is evidence that the officers delayed in a bad faith effort to conduct a search.

In *Arizona v. Gant*, the Supreme Court established important new limitations on when police may search a vehicle incident to arrest. [230] The decision does not affect CBP's border search authority, but it applies to certain vehicle searches by CBP officers and agents in non-border search situations. The Court held that law enforcement officers may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if (1) the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search, or (2) it is reasonable to believe that the vehicle contains evidence of the offense of arrest.

With respect to the first criterion, the Court questioned how often this situation actually arises, noting: "Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the *rare case* in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains." Accordingly, the expectation of the Court appears to be that most vehicle searches incident to arrest will be based on the second criterion.

When these justifications are absent, the Court held that a search of an arrestee's vehicle will be unreasonable unless officers obtain a warrant or show that another exception to the warrant requirement applies. In *Gant*, the Court concluded that the search failed to meet the above-mentioned criteria, since the arrestee was handcuffed and locked in a patrol car while the officers searched his vehicle, and in addition, the officers searching the vehicle had no reason to believe that they would find evidence of the crime of arrest – which in *Gant* was the crime of driving on a suspended license.

229 *Knowles v. Iowa*, 525 U.S. 113 (1998).
230 *Arizona v. Gant,* 129 S. Ct. 1710 (2009).

While there is currently little if any case law involving CBP searches within the *Gant* context, in most CBP cases it is likely that there will be probable cause to believe that evidence of the arrest crime will be found in the vehicle. In many instances CBP arrest crimes involve controlled substances or alien smuggling, both of which are likely to have additional evidence in the vehicle, thereby meeting the second prong of *Gant*.

The discussions below on various aspects of search incident to arrest may be impacted by the *Gant* decision as the lower courts explore search incident to arrest analysis in light of *Gant*.

This decision does not affect other legal bases for a vehicle search, such as search pursuant to probable cause, a warrant, consent, border search, or inventory search. In addition, officers retain authority to search the passenger compartment of a car, limited to those areas in which a weapon may be hidden, if the officer has a reasonable belief, based on specific and articulable facts, that an individual is dangerous and might gain immediate control of weapons in the car. See *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). The *Gant* decision impacts cases in which the facts occurred before the decision, but which are still pending in the system. One such case is *United States v. Ruckes,*[231] in which the Court held that the officer's search incident to arrest was not valid under *Gant* but that as the officers were going to impound the vehicle, their discovery of the cocaine and firearm were admissible under the doctrine of inevitable discovery.

2.611 "Incident" to Arrest:
2.611a Immediately Following the Arrest
2.611b During the "Booking Process"
2.611c After the "Booking Process"

2.611a Immediately Following the Arrest

A search conducted immediately following the arrest is incident to the arrest with the limitations set forth in *Gant* as noted above.

2.611b During the "Booking Process"

Searches conducted as part of the "booking process" are lawful either as "incidental to the arrest" or as a "routine inventory."[232]

2.611c After the "Booking Process"

Even searches that take place after the booking process may be upheld as "incident to the arrest" *if* there is a legitimate reason for the delay.

231 *United States v. Ruckes*, 586 F.3d 713 (9th Cir. 2009).
232 *Illinois v. LaFayette*, 462 U.S. 640 (1983); *United States v. Edwards*, 415 U.S. 800 (1974).

2.612 Scope of Search
2.612a Person
2.612b Property Carried by Arrestee
2.612c Areas Within Immediate Control

2.612a Person

The arrestee and everything worn by the arrestee is subject to a complete inspection. The officer making the search does not have to articulate any expectation of finding evidence of any particular offense. Thus, if an individual is arrested on a warrant for failure to appear on a traffic citation, the arresting officer may search his entire person and if counterfeit currency is found in his pocket, it will be admissible as evidence.

a. Strip Searches

The law on strip searches during booking is variable. Law enforcement officers should communicate with counsel in their jurisdiction.

Caution: Strip searches must be reasonable under all the circumstances.

If the arrestee is unnecessarily embarrassed, the search will be unlawful (for example, conducting a strip search in public, or by strip searching a female in the presence of males.)

b. Body Cavity Searches Incident to Arrest

Body cavity searches involve intrusions beyond the body's surfaces, i.e., into the stomach, rectum or vagina. Prior to a search of a body cavity, there must be a "reasonable basis to suspect" that there is contraband in the cavity.

Caution: Body cavity searches incident to arrest should be conducted by medical personnel.

2.612b Property Carried by Arrestee

Anything carried by the arrestee may be searched.

These things might include a briefcase, purse, wallet, cigarette pack, or anything in the possession of the arrestee, whether locked or unlocked. Cell phones and related items present significant issues and the law is unsettled on this matter. The Supreme Court has not addressed the issue. The several circuit courts of appeal[233], and various District Courts[234] have issued decisions on the issue.

233 *United States v Finley*, 477 F.3d 250 (5th Cir. 2007); cert. denied, *Finley v. United States,* 127 S. Ct 2065 (2007); *United States v. Parada*, 289 F. Supp. 2d 1291 (Kans. 2003); reversed on other grounds, *United Sates v. McNeill*, 136 Fed. Appx. 153 (10th Cir. 2005); cert denied, *McNeill v. United States*, 543 U.S. 1193

However, even those courts that have addressed the issue have looked at different variables and utilized different approaches. As the case law in the area of search incident to arrest and cell phones is rapidly evolving it is imperative that you seek legal advice on the current status in your jurisdiction.

2.612c Areas Within Immediate Control

Areas within the arrestee's immediate control, that is, areas into which he might quickly reach to grasp a weapon or to destroy evidence, may also be searched.[235] Areas within the arrestee's immediate control might include: a desk, a cabinet, under a bed, under a seat, and so forth.

For a discussion on search incident to arrest involving a vehicle see section 2.610 discussing the Supreme Court decision in *Gant.*

There are two other limitations on searching areas within the arrestee's immediate control.

First, as noted above, once you remove the arrestee from the arrest area, you may not later return to search that area as incident to the arrest (e.g., apartment from which arrestee has been removed).

Second, you cannot allow the arrestee the freedom to roam, and then justify the search of every area into which he moves as incident to his arrest.[236]

2.613 Search for People Incident to an Arrest

Distinct from searching for weapons or evidence in an area within the arrestee's immediate control, as discussed above, closets and other spaces immediately adjoining the place of arrest may be searched for *persons* who could immediately launch an attack.[237] Unlike protective sweeps, discussed later, the ability to search adjacent spaces from which an attack could be immediately launched does not depend on the existence of any suspicion that persons actually may be present. If the arrest is made just outside the home, of course, this rule would not apply. Lawful entry into a house in that circumstance would depend upon consent or the existence of facts justifying a protective sweep. See § 2.634.

Clearly, the scope of a search of adjacent spaces incident to an arrest is limited to persons (i.e., one who might launch an attack) and, unlike the other aspects of a search incident to arrest, does not permit a search for evidence. Indeed, some courts have referred to this extended authority as a second type of

(2006) *US v. Ortiz* 84 F.3d 977 (7th Cir. 1996).
234 *United States v. Wurie*, 612 F. Supp. 2d 104 (D. Mass. 2009).
235 *Chimel v. California*, 395 U.S. 752 (1969).
236 *United States v. Erwin*, 507 F.2d 937 (5th Cir. 1975).
237 *Maryland v. Buie*, 494 U.S. 325 (1990).

"protective sweep."[238] That such a search, however, may proceed without any particularized suspicion that dangerous persons are actually present markedly distinguishes this aspect of a search incident to arrest from a protective sweep, which requires reasonable suspicion.

2.620 Consent Search
2.621 Free Choice
2.622 Person With a Dual or Apparent Authority
2.623 Scope of Consent
2.624 Revocation

If an individual freely consents to a search, the search is reasonable under the Fourth Amendment. Neither probable cause nor a warrant is required to search with consent.

A consent search is lawful if:

- ✓ There is a voluntary permission to search;
- ✓ Given by a person with authority, i.e., one with a right to the property or having equal access to the property; and
- ✓ The search is confined to the scope of consent.

2.621 Free Choice
2.621a Coercion or Duress
2.621b Bad Faith Threat to Obtain Warrant
2.621c Show of Force
2.621d During Seizures
2.621e Knowledge of Right to Refuse
2.621f *Miranda* Warnings
2.621g Capacity
2.621h Written Consent
2.621i Clarity of Expression
2.621j Consent Following a Confession
2.621k Entry by Trick
2.621l Consent Once Removed

Consent to search must be freely and voluntarily given. The burden is on the officer to show that a consent is voluntary. The voluntariness of a consent is a question of fact that must be determined from all of the surrounding circumstances.[239]

238 *United States v. Lauter*, 57 F.3d 212 (2d Cir. 1995), *United States v. Ford*, 56 F.3d 265 (D.C. Cir. 1995).
239 *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

Although no single factor determines the voluntariness of a consent, the following are among the most important factors to consider:

2.621a Coercion or Duress

Any coercion, intimidation, or threat, whether actual or implied, will tend to invalidate the consent. Coercion may result from acts or words intended to induce an improper consent. Distinguished is the circumstance where officers merely communicate, accurately, the lawful consequences of the various options available to the person. That the person may not like any of the choices presented, so long as they are a fair presentation of what the law provides, will not make his choice coerced.

For example, agents explained to an arrestee that they believed that there were drugs in his apartment and that one of two things was going to happen. First, they could present their facts to a judge and if they got a search warrant would return and search to whatever extent was necessary until they found the drugs. Alternatively, the arrestee could simply tell them where the drugs were and avoid all that a search would entail. The arrestee directed the officers to the hidden drugs to avoid the search. In response to his later challenge that the consent was procured by coercion and threats, the court said that "the threat to obtain a warrant which would facilitate a thorough and perhaps disruptive search of the premises was merely a threat by the officers to exercise rights granted them by the law. The record does not show the threat was misleading or made groundlessly in bad faith."[240]

2.621b Bad Faith Threat to Obtain Warrant

As seen from the above, where an officer has no grounds to believe he can obtain a warrant, but "advises" a person that unless he consents, he or his property will be held until a warrant is obtained, any permission to search is probably invalid.

The same is true where an officer claims to have a warrant, but does not; or has a warrant that is invalid.[241] The 8th Circuit found it coercive to convey to the subject that the drug dog had alerted on the bag as a means of getting consent when the dog had not alerted.[242]

2.621c Show of Force

Where officers enter premises or approach a person with weapons drawn, subsequent consent to search may be invalid.

240 *United States v. Gardner*, 553 F.2d 946 (5th Cir. 1977).
241 *Bumper v. North Carolina*, 391 U.S. 543 (1968).
242 *United States v. Escobar,* 389 F.3d 781 (8th Cir. 2004).

2.621d During Seizures

The fact that a person is seized when he consents is merely another factor to be considered in deciding the validity of the consent given. During a traffic stop there is no requirement that a lawfully seized person be told that he is "free to go" before his consent to search will be considered voluntary. The test for a lawful consent is voluntariness, which is a question of fact to be determined from all the circumstances.[243]

Where, however, a suspect is unlawfully taken into custody, even if his consent is truly voluntary, the evidence is likely to be suppressed as "fruit of the poisonous tree."

2.621e Knowledge of Right to Refuse

A person's knowledge of his right to refuse to give consent is merely a factor to be considered in determining voluntariness. As a general matter, an officer who seeks consent to search need not inform the person of his right to refuse. By CBP policy, however, an exception to this general rule exists for consensual body scan imaging, x-ray exams and body cavity searches in the border context. See Chapter Three, Border Authority and *Personal Search Handbook*, CIS HB 3300-04B, dated July 2004 (Appendix).

Bus searches and seizures, where officers board interstate buses and request to check on-board luggage for illegal contraband such as alcohol, narcotics, weapons or explosives, have created their own problems. The Supreme Court held that the Fourth Amendment does not require police officers to advise bus passengers of their right not to cooperate and to refuse consent to searches."[244]

2.621f *Miranda* Warnings

The failure to give *Miranda* warnings before obtaining a consent from a suspect in custody is merely an element to be considered in determining voluntariness. The court in the *Gardner* case, discussed above under Coercion and Duress, made a point of noting that *Miranda* warnings were given to the defendant before explaining the options. Since the statement disclosing the location of concealed drugs is certainly incriminating, one should be careful to note the difference between seeking consent for a general search and seeking consent to recover specific items. In the latter case, *Miranda* should always precede seeking such consent from a person in custody.

2.621g Capacity

The age, education, intelligence, physical and psychological condition of the person who consents must be considered in determining voluntariness.

243 *Ohio v. Robinette*, 519 U.S. 33 (1996).
244 *United States v. Drayton*, 536 U.S. 194 (2002).

Certainly, if a person is mentally incompetent at the time he gives consent, the consent will not be considered voluntary. On the other hand, well-educated, successful or "street-wise" suspects will be hard-pressed to convince a court that they believed that they were obligated to consent.

2.621h Written Consent

A signed written consent is evidence that the consent was given voluntarily, but such written consent is not required.

2.621i Clarity of Expression

Did the suspect expressly say "Sure, go ahead and search" or, was his consent a nod or a gesture? How clearly was his expression of consent? The burden of showing consent is heavier where consent is not explicit, since consent is not to be inferred lightly.[245]

2.621j Consent Following a Confession

The fact that a suspect made a valid confession before he consented to a search tends to show that the consent was voluntary.

2.621k Entry by Trick

Generally, a consent to enter premises, even if obtained by deception or trick, is a valid consent but the courts will draw a line at official misrepresentation. Where an officer gains entry to premises by assuming a false identity seeking to purchase contraband or otherwise seeking to become involved in illegal activities, the entry and any subsequent observations have been held to be legal.

Two important exceptions to this general rule exist, however. First, deception involving official misrepresentation is not to be countenanced. "Official" misrepresentation occurs when a government official, *known to be such by the consenting party*, misrepresents his status or purpose or other material aspect of his reason for gaining entry. For example, an IRS Special Agent (CID) telling a taxpayer that he is a revenue agent is an official misrepresentation, communicating, in effect, that the purpose for the visit is administrative rather than criminal.

In *United States v. Parson,*[246] the Court found that an ICE ruse which gained "consent" to access a computer violated the Fourth Amendment. ICE was investigating computer child pornography and based on information procured from a search warrant, they identified a suspect who they believed had subscribed to the pornography site. That information was passed to the local ICE office in the area where the suspect lived. Local ICE agents did a knock and

245 *United States v. Impink*, 728 F.2d 1228 (9th Cir. 1984).
246 *United States v. Parson,* 599 F. Supp.2d 592 (W.D. Pa. 2009).

talk with the suspect. They identified themselves as ICE but indicated that they were investigating identity theft. The suspect was 65 years of age, and collected social security of $725 a month. He lived in a small trailer on his brother's land and worked part time for his brother. He was hard of hearing, had difficulty seeing due to cataracts, and took medication for depression. He had had previous problems with someone using his credit card without authorization. He was upset at the prospect that he may have been the victim of identity theft and he "consented" to the ICE agents accessing his computer. The Court determined that Parson's personal characteristics were highly relevant to the totality of the circumstances analysis as to whether his consent was voluntary. The Court found that Parson did not voluntarily consent. The Court looked at many factors but focused on the agent's misrepresentation as inducing invalid consent, thus resulting in a violation of the Fourth Amendment. The Court noted that "The agents' lies and trickery in this matter violated widely shared social expectations." The Court went on to say:

> In this situation, the agents lied about their purpose and claimed to be on alternative government business. Lies such as this, if condoned, would obliterate citizens' widely shared social expectations that they may place some modicum of trust in the words of government officials acting as such. Society expects that law enforcement officers who present themselves and show badges will be honest and forthright with the community that they serve. The catastrophic consequences for a society which loses trust in its constables may be conjured without even the exercise of any creative effort.[247]

The second exception to consent by trickery is that posing as a person charged with public safety responsibilities, as a matter of public policy, is not appropriate, in that it sows the seeds of distrust for people who, for public safety purposes, must be trusted by the public, and not seen as tools of law enforcement. Thus, when police posed as gas company workers checking out a potentially hazardous gas leak, the results of their ensuing entry were suppressed.

In view of the potential for a particular approach to be unlawful, you should consult your Associate/Assistant Chief Counsel or assistant U.S. attorney before undertaking such entries.

In sum, the above listed factors are not inclusive. Every factor that bears upon the voluntariness of the consent must be considered. Courts generally balance those factors that suggest the consent was coerced against those that suggest it was voluntary.

Remember: The burden is on the law enforcement officer to show that the consent was voluntary. If the balance of factors fails to clearly show a voluntary consent, the consent is invalid.

247 *Id.* at 606.

2.6211 Consent Once Removed

Generally courts recognize a consent once removed doctrine in which an undercover officer enters with consent, though not as a law enforcement officer, and then summons other law enforcement officers once criminal activity occurs. An underlying issue in *Pearson v. Callahan*[248] was whether the consent could come from an informant not an undercover officer. In *Pearson* the Court found that the officers had qualified immunity because the illegality of the search was not clearly established at the time. The Court did not specifically indicate that an informant cannot give consent once removed, it simply acknowledged that there was conflicting authority and that the officers should therefore not be held liable. It is important to confirm with legal counsel on the status of the law in your jurisdiction.

2.622 Person With Actual or Apparent Authority

2.622a Co-occupants (Husband/Wife; paramours, etc.)
2.622b Parent-Child; Child-Parent
2.622c Host-House Guest
2.622d Joint Tenants
2.622e Hotel Guest
2.622f Landlord - Tenant
2.622g Employer - Employee
2.622h Partners
2.622i Bailor - Bailee
2.622j Limitations

Effective consent to a warrantless search may be given by anyone with a reasonable expectation of privacy in the object or place to be searched, whether such person is the suspect or a third party with equal right of access to the property or item.[249]

The reasoning behind allowing such third party consent was explained by Justice White in the *Matlock* decision:

> The authority which justifies the third party consent does not rest upon the law of property, with its attendant historical and legal refinements, ... but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.[250]

248 *Pearson v. Callahan* 129 S.Ct. 808 (2009).
249 *United States v. Matlock*, 415 U.S. 164 (1974).
250 *Id.* at 172 (1974).

Thus, consent does not depend upon the law of property but, rather, is premised upon the recognition that one who subjects his property to the joint or exclusive control of another assumes the risk that consent will be granted by the other to a search of the property.

In some cases a person may reasonably appear to have joint use or access to property, but, in actuality, may not. The Supreme Court has held that the validity of consent by one with apparent authority may be judged on the basis of whether the facts available to the officer at the moment would warrant a person of reasonable caution in the belief that the consenting party had authority over the premises.[251]

The following rules, which are based upon the relationship of the parties, provide *some* guidance on who can give a third party consent.

Caution: These rules are only generalizations. They are subject to a number of exceptions. You must always look to the facts of each case and the case law in your jurisdiction to determine if the consenting party has joint access or control with respect to the property.

2.622a Co-occupants (Husband/Wife; paramours, etc.)

A spouse cannot consent to the search of a dwelling where the other spouse is present and refuses consent.[252] The 9th Circuit Court of Appeals applied *Georgia v. Randolph* in *United States v. Brown,*[253] holding that consent given by a co-occupant was not invalid just because the police arrested the occupant and placed him in the patrol car before initiating the consent discussion since there was no showing that they intentionally removed him to avoid his objection. The logical extension of this opinion is that if law enforcement removed the occupant from the scene specifically to avoid his denying consent, the court might find the consent invalid.

2.622b Parent-Child; Child-Parent

The courts have taken different approaches to parental consent of premises occupied by a dependent child. One court ruled that although a child's parent had joint access to the child's unlocked bedroom in his house, the government must still present sufficient evidence of mutual use.[254] A different court focused on the parent-child relationship raising a presumption of control absent the child paying rent, locking the door or an explicit or implicit agreement not to enter.[255]

251 *Illinois v. Rodriguez*, 497 U.S. 177 (1990).
252 *Georgia v. Randolph*, 547 U.S. 103 (2006).
253 *United States v. Brown*, 563 F.3d 410 (9th Cir. 2009).
254 *United States v. Whitfield*, 939 F.2d 1071 (D.C. Cir. 1991).
255 *United States v. Rith*, 164 F.3d 1323 (10th Cir. 1999).

Minority of a child does not preclude authority to consent. Rather, minority is but one factor in determining the voluntariness of the consent. Thus, where a 14 year-old child is given mutual use of an area with a parent, the child can give valid consent to search.[256]

2.622c Host-House Guest

A host can generally consent to a search of premises occupied by a mere visitor. This would not extend to personal items belonging to the visitor, nor to a room occupied by a house guest that has been made available for that guest's exclusive personal use.

2.622d Joint Tenants

A joint tenant can consent to a search of jointly held portions of premises.

2.622e Hotel Guest

A hotel clerk cannot consent to the search of a room that is registered to a guest. Authorization for hotel personnel to enter rooms for purposes of cleaning and repair does not authorize entry for unrelated purposes. Of course, once the term of occupancy expires and the room is vacated or abandoned, the hotel can consent to a search.

2.622f Landlord - Tenant

A landlord cannot consent to a search of the tenant's premises unless the tenant has abandoned them or has been evicted.

2.622g Employer - Employee

An employer cannot normally consent to a search of the personal belongings of an employee in areas assigned to the employee for his exclusive use. An employer may, however, consent to a search of an employee's work computer when the employer retains access to its contents.[257]

2.622h Partners

A partner's consent to a search of the business premises is binding upon the other partners.

256 *United States v. Gutierrez*, 142 F.3d 1225 (10th Cir. 1998).
257 *United States v. Ziegler,* 474 F.3d 1184 (9th Cir. 2007).

2.622i Bailor - Bailee

A person with custody of personal property belonging to another may consent to its search if he has been given sufficient control over it to establish joint access or use.

One court has established a three-part analysis that may be helpful. First, under all the circumstances known to the officer, did the searching officer believe that the consent-giver had use of and access to or control over the area searched? Second, under the circumstances, was that belief objectively reasonable? Finally, assuming the truth of the reasonably believed circumstances, would the consent giver have had actual authority?[258]

2.622j Limitations

2.622j(1) Areas Reserved For Private Use Must Remain Private
2.622j(2) Abandoned Right to Access

The equal access, or third party consent rule, has several limitations.

2.622j(1) Areas Reserved For Private Use Must Remain Private

When a closet, a desk, a room or any other object or area is reserved by a person for his exclusive use, others, even parents, wives, or paramours, cannot consent to a search of that object or area.

2.622j(2) Abandoned Right to Access

A person with a legally recognized right to equal access who, in fact, does not normally exercise such a right, cannot consent. For example, a mother who had a right to equal access to her son's room but who had, for a lengthy period, respected the son's desire that she not enter his room could not consent to the room's search.

2.623 Scope of Consent

The search must be confined to the scope of consent that is given.

An officer cannot obtain a consent to search by representing that he intends to look only for certain items or in certain areas, and then use that consent as an excuse to conduct a general search. Both the area searched and the intrusiveness of the search must be limited to the consent given. The standard for measuring the scope of consent is "objective reasonableness."[259]

For example, if told that the reason for looking is a concern for drugs, then consent to "look in the trunk" would carry with it the authority to search any

258 *United States v. Dearing*, 9 F.3d 1428 (9th Cir. 1993).
259 *United States v. Mendoza-Gonzales*, 318 F.3d 663 (5th Cir. 2003).

containers in the trunk which could hide drugs.[260] However, when an officer asked if he could "look through the trunk and see what you got in there? I don't want to look through each item," and then told the driver he just wanted to see how things were "packed" or "packaged," a subsequent search of a black nylon bag went beyond the scope of the consent given.[261]

2.624 Revocation

A consent can be revoked at any time.

Consent can be revoked by the party who gave consent, or by any party who possesses an equal right to consent. However, all evidence found prior to the revocation may be lawfully seized and used as evidence.

2.630 Frisk/Protective Sweep

2.631 Persons
2.632 Automobiles, Handbags, Boots, etc.
2.633 Plain Feel or Plain Touch
2.634 Protective Sweeps

Although listed as an exception to the probable cause requirement, a frisk nonetheless must be supported by a reasonable suspicion based on specific and articulable facts that the suspect may gain immediate control of weapons.[262] The fact that there is reasonable suspicion to stop does not automatically give the right to frisk. In a situation presenting the possibility that if the suspect were armed, he would be dangerous, provides an insufficient legal basis for a frisk without articulable facts providing reasonable suspicion the suspect is actually armed.[263] However, the courts have held that "some crimes [large scale narcotics dealing, burglary, robbery] are so frequently associated with weapons that the mere suspicion that an individual had committed them justifies a pat down search."[264] The frisk must be independently justified and must be limited to a protective search for concealed weapons, that is, a search that is reasonably designed to discover guns, knives, clubs, or other items that reasonably could be used as a weapon.

Elements of a valid frisk:

- ✓ There must be reasonable suspicion that the suspect is involved in criminal activity; and

- ✓ There must be reasonable suspicion that the suspect is armed; and

260 *Florida v. Jimeno*, 500 U.S. 248 (1991).
261 *United States v. Elliot*, 107 F.3d 810 (10th Cir. 1997).
262 *Michigan v. Long*, 463 U.S. 1032 (1983).
263 *United States v. Flatter*, 456 F.3d 1154 (9th Cir. 2006).
264 *Id.* at 1158.

- ✓ The search must be strictly limited to a frisk for weapons or items that can be used as weapons.

2.631 Persons

Normally, a "frisk" consists of patting the outer clothing of the suspect. Ordinarily, an officer may not reach inside a suspect's clothing unless the frisk gives him reasonable grounds to believe the object felt is a weapon or it is immediately apparent (probable cause) that the object is seizable under the plain feel exception. It is also permissible to ask the suspect to lift his shirt to determine whether a weapon is present.[265]

2.632 Automobiles, Handbags, Boots, etc.

A "frisk" is not limited to the person. It may extend to any area where the suspect could reach quickly, including the passenger compartment of a car.[266]

Thus, if officers conducting a stop of an individual reasonably suspect that the person is dangerous and that a container carried by the person or in the passenger compartment of the automobile may conceal a weapon, it would be reasonable for the officer to conduct a limited examination of the container for weapons, even if locked. This could also be true of locked glove boxes.[267] Of course, if the nature of the container is such that it could be determined that it did not contain a weapon by feeling its outer surface, opening the container would be unreasonable.
As long as the stop and frisk are lawful you may seize any weapon discovered and any other evidence that comes into plain view.

In *Arizona v. Johnson*[268] officers were patrolling a neighborhood associated with gang membership. The officers had pulled over a vehicle when a license plate check revealed that its registration had been suspended for insurance-related violation. The officer wanted to question a passenger on his possible gang affiliation and asked the passenger to get out of the car. The officer did a patdown of passenger, whom she suspected was armed. The Court ruled that these actions did not violate Fourth Amendment's prohibition on unreasonable searches and seizures. For the duration of a traffic stop, a police officer effectively seized everyone in the vehicle. "In a traffic-stop setting, the first *Terry* condition-a lawful investigatory stop-is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular

265 *United States v. Reyes*, 349 F.3d 219 (5th Cir. 2003).
266 *United States v. Holmes,* 376 F.3d 270 (4th Cir. 2004) (where officers perform a lawful investigative detention of suspects in a vehicle and have reasonable suspicion that there are weapons in the vehicle and that the suspects, if not arrested could gain access to weapons in the vehicle , it was reasonable for officers to perform a protective frisk of the vehicle.)
267 *United States v. Holifield*, 956 F.2d 665 (7th Cir. 1992).
268 *Arizona v. Johnson*, 129 S.Ct. 781 (2009).

violation. The police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity. To justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous."

2.633 Plain Feel or Plain Touch

The plain feel or plain touch doctrine is applicable during frisks or consent searches of persons.

The warrantless seizure of contraband is permitted when:

- ✓ The officer conducting the search is lawfully in a position to plainly feel the object; and
- ✓ There is probable cause to believe that the object is seizable property.

Thus, where an officer has reasonable suspicion to frisk for weapons and it is immediately apparent that a felt object is evidence, the seizure of that object is permissible since it occasions no further invasion of privacy. But where an officer has reasonable suspicion to frisk and encounters an object that he knows is not a weapon but further squeezing and manipulating is necessary before it becomes readily apparent to him that it is contraband, the contraband is inadmissible since he went beyond the scope of a lawful frisk.[269]

Similarly, when a person consents to a frisk by an officer who feels bulges around the ankles and under the circumstances it was immediately apparent to the officer that they were packages of controlled substances, the plain feel doctrine allows the lifting of the pants leg and seizing the contraband without a warrant.[270]

2.634 Protective Sweeps

In the course of conducting a lawful search or arrest within a building, officers may make a quick "protective sweep" of the premises if:

- ✓ There is reasonable suspicion based on articulable facts that others are on the premises who may be a threat;
- ✓ The sweep is limited to areas, locations, and places where a person could be; and
- ✓ The sweep is not a pretext to search for evidence.

269 *Minnesota v. Dickenson*, 508 U.S. 366 (1993). See *also*, *United States v. Ashley*, 37 F.3d 678 (D.C. Cir. 1994).
270 *United States v. Croft*, 30 F.3d 1044 (8th Cir. 1994).

As with a frisk, a protective sweep is not an automatic right. You must be able to articulate facts and circumstances which give you reasonable suspicion that others could be present who might be dangerous or who might interfere with your lawful purpose.

Articulable facts that might establish reasonable suspicion might include a tip that others are on the premises; the nature of the crime; noises or movement within the premises; the at-large status of accomplices; the probable presence of a wife, lover, or others, etc.[271]

Conducting a protective sweep simply to determine if someone is present is never sufficient justification. Also, the danger posed by the arrestee is not relevant to the justification for conducting a protective sweep.[272] The existence of accomplices in a crime is likewise irrelevant if the crime occurred in the distant past, e.g., one to seven months and there is no articulable basis to suspect that they are present now.[273]

Logically, the protective sweep can include rooms and closets, cabinets and any other spaces large enough to hide a human being. But courts will not permit sweeps that exceed the scope of looking for people. For example, an FBI agent exceeded the scope of the sweep when he looked under a mattress and behind a window shade, places where a person could not hide.[274] Other courts have suppressed a checkbook found in a wastebasket and business receipts found in the defendant's closet during a protective sweep. Both courts reasoned that the evidence was located in areas that could not harbor a person.[275]

The protective sweep is also of limited duration. In *Buie*, the Supreme Court said: "The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event not longer than it takes to complete the arrest and depart the premises."

Moreover, where potentially dangerous persons are discovered during such a sweep, further protective measures may be undertaken to ensure that the person is detained in a secure area. For example, an arrestee's girlfriend, known to be hostile, was found by deputy marshals in a bedroom during a sweep conducted pursuant to the arrest. The woman was initially placed on the floor between two beds while the officers quickly felt for weapons between the mattresses of each bed before placing her on the bed pending completion of their lawful purposes.[276]

271 See, *Maryland v. Buie*, 494 U.S. 325 (1990).
272 *United States v. Calbert*, 76 F.3d 773 (6th Cir. 1996).
273 *United States v. Ford*, 56 F.3d 265 (D.C. Cir. 1995).
274 *Id.*
275 *United States v. Wilson*, 36 F.3d 1298 (5th Cir. 1994); *United States v. Noushfar*, 78 F.3d 1442 (9th Cir. 1996) amended in 140 F.3d 1244 (9th Cir. 1998).
276 *United States v. Hernandez*, 941 F.2d 133 (2d Cir. 1991)

Generally, where there is no independent authority to enter a home, the protective sweep exception will *not* apply to a search of a home. However, a protective sweep of a home may be reasonable *if* the arrest occurs just outside the home and, using the reasoning of *Buie*, the arresting officers reasonably suspect others are on the premises who may be an immediate threat.

For example, the Ninth Circuit held that a protective sweep of a home was reasonable when officers arrested a suspected drug dealer as he attempted to run back into the home. The arresting officers had information that at least five other individuals suspected of drug dealing remained unaccounted for, and that any remaining occupants of the home probably heard the officers shouting outside.[277]

Also, the Second Circuit held that a protective sweep of a hotel room was reasonable when, after arresting a suspect for being in the United States illegally because of his criminal history in Canada, Border Patrol agents heard voices coming from a nearby hotel room which was registered in the suspect's name. In that case, the Border Patrol agents had knowledge that the suspect and his acquaintances could be armed and dangerous and had extensive criminal histories of violence and illegal firearms possession. After knocking on the door of the hotel room, they recognized the person who answered as an acquaintance of the suspect and, fearing that she might retrieve a weapon or that other individuals might be hiding in the room, accompanied her while she went back into the hotel room to retrieve her identification documents. This protective sweep led to a plain view seizure of firearms used as evidence to convict the suspect and his acquaintances of various firearms violations.[278]

2.640 Routine Inventories

2.641 Lawful Impoundment
2.642 Based on Standard Criteria and Non-investigative Purpose
2.643 Scope of Inventory
2.644 "Booking" Inventories

An inventory search is the search of property lawfully seized and detained

- ✓ To protect officers from dangerous articles,
- ✓ To secure valuable items (such as might be kept in a towed car), and
- ✓ To protect against false claims of loss or damage.

Officers may conduct routine, non-investigative inventories of vehicles and other property lawfully within governmental custody. Neither probable cause to

277 *United States v. Hoyos*, 892 F.2d 1387, (9th Cir. 1989) (reversed on other grounds).
278 *United States. v. Ingram*, 164 F. Supp. 2d 310 (N.D.N.Y. 2001).

search nor a warrant is required.[279] Such searches are deemed reasonable to the extent they are conducted in accordance with established agency policy,[280] and such a policy limits the scope to the three purposes noted above.

Customs Directive 5230-14, April 17, 1991, sets forth the standard procedures to be followed by CBP officers in conducting an inventory search. This directive provides, in part, that the interior areas of a vehicle, or other conveyance, including all compartments such as glove compartments, trunks, and any locked containers found therein should be opened and the contents inventoried.

Elements of a Valid Inventory:

- ✓ A lawful basis for taking custody of the property exists;
- ✓ The inventory is conducted in accordance with standardized criteria limited to the purposes for inventory searches.

2.641 Lawful Impoundment

2.641a Forfeiture
2.641b Evidence
2.641c Abandoned or Disabled Vehicles
2.641d Driver Arrested
2.641e Motel Guest Arrested
2.641f Private Premises Unsecured

2.641a Forfeiture

A vehicle subject to forfeiture is subject to seizure and upon such can be searched under the inventory exception.

2.641b Evidence

Property that constitutes evidence of a crime is subject to seizure, pending final disposition of the criminal proceedings. Vehicles seized as evidence are lawfully impounded and are subject to an inventory search.[281]

2.641c Abandoned or Disabled Vehicles

Abandoned vehicles are subject to impoundment by state and local officers as part of their community caretaking function.

Disabled or damaged vehicles, or vehicles which are impeding traffic can also be lawfully impounded by state and local officers. Whether federal officers can routinely impound for "caretaking" functions on nonfederal property is unclear.

279 *South Dakota v. Opperman*, 428 U.S. 364 (1976).
280 *Florida v. Wells*, 495 U.S. 1 (1990).
281 *Harris v. United States*, 390 U.S. 234 (1968).

Federal officers should not impound abandoned or disabled vehicles unless the abandonment or damage was the direct result of federal investigative activity.

2.641d Driver Arrested

A vehicle being driven by a defendant who is arrested away from his home or work may generally be impounded for safekeeping by either state or federal officers, rather than leaving it unattended in a public area.

Warning: Arresting an owner-driver does not always trigger the right to impound the vehicle. Impoundment of property incident to the owner's arrest is a caretaking function. If a passenger agrees to take care of the vehicle and the driver approves, or if the arrestee can take steps to safeguard the car himself, such as by calling someone to pick it up, forced impoundment would be unreasonable.

2.641e Motel Guest Arrested

When a defendant is arrested at his motel or hotel room which is not his customary dwelling, the arresting officer may generally gather together the defendant's belongings and impound them for safekeeping.

2.641f Private Premises Unsecured

Where officers lawfully enter private premises to execute a search warrant or to make an arrest and discover very valuable or dangerous personal property, they might be justified in seizing those items for safekeeping *if* the occupants have been arrested or otherwise incapacitated *and* the premises are not secure.

2.642 Based on Standard Criteria and Non-investigative Purpose

As stated, inventories must not be conducted for investigative purposes. They must be routinely conducted based on standardized criteria and in good faith.

If there is evidence that an inventory was a pretext to conduct a more intrusive investigative search, the search will be unlawful.

For this reason, officers should conduct an inventory of all vehicles and property in accordance with established policy as soon as possible after impoundment.

2.643 Scope of Inventory

2.643a Interior
2.643b Containers Within the Vehicle
2.643c Locked Compartments and Containers

The scope of an inventory search must be limited to that authorized by agency policy, which itself must be limited to the above stated purposes of an inventory search.

Within those purposes, a policy can authorize the search of automobiles to the following extent:

- ✓ Interior
- ✓ Containers Within the Vehicle
- ✓ Locked Compartments and Containers.

2.643a Interior

The scope of the inventory may extend to all interior areas of a vehicle, and to all compartments, such as a glove compartment or trunk.

2.643b Containers Within the Vehicle

Containers within an impounded vehicle may be opened and contents inventoried as part of a routine inventory of the vehicle provided that the inventory policy of the agency authorizes an inspection of closed containers. An "all or nothing" policy is permissible as well as a policy which allows an officer latitude to determine if a particular container should be opened in light of the nature of the search and characteristics of the container.[282]

2.643c Locked Compartments and Containers

Although the Supreme Court has yet to specifically authorize inventories of locked compartments and containers, it has acknowledged that protection from hazardous materials is a purpose to be served by an inventory search. The locked or unlocked status of compartments or containers does not seem to be relevant to this purpose. Moreover, the Supreme Court has upheld the inventory search of a sealed envelope itself recovered from a container secured by straps.[283] These two considerations would seem to authorize the inventory search of locked compartments and containers where conducted routinely and in accordance with applicable directives.[284]

2.644 "Booking" Inventories

A routine inventory search of an arrestee made at the time he is booked is lawful, either as a "search incident to arrest" or as a reasonable procedure for incarceration.

282 *Florida v. Wells*, 495 U.S. 1 (1990). See also *Colorado v. Bertine*, 479 U.S. 367 (1987).
283 *Bertine*, Id.
284 See *United States v. Porter*, 859 F.2d 83 (8th Cir. 1988) (Approving the forced opening of a locked briefcase found in the trunk of the arrestee's automobile in order to inventory its contents).

2.650 Regulatory Searches

2.651 Pretextual Searches
2.652 Exceeding the Scope of Inspection
2.653 Government Licensed or Regulated Activities

A regulatory inspection is the inspection of government licensees, heavily regulated businesses, and other activities involving an urgent public interest conducted by authorities responsible for enforcing a pervasive regulatory scheme. For example, unannounced inspections of a mine for compliance with health and safety standards are commonplace.

Elements of a Valid Inspection:

- ✓ Limited in Scope;
- ✓ Non-investigative;
- ✓ Serve Important Public Interests; and
- ✓ Involve Reduced Expectations of Privacy.

The Fourth Amendment does not require the government to develop "probable cause" or to obtain a traditional search warrant to conduct "regulatory inspections."[285]

2.651 Pretextual Searches

A regulatory inspection cannot be used as a pretext to conduct a criminal, investigative search.[286]

For example, a regulatory inspection of a taxidermist was held to be unlawful because the regulatory search authority was used as a pretext for a criminal investigative search relating to the illegal importation of protected animals.[287]

2.652 Exceeding the Scope of Inspection

Exceeding the scope of an authorized inspection may result in suppression.

2.653 Government Licensed or Regulated Activities

2.653a Vessel Document Checks by Customs Officers
2.653b Government Licensed Businesses
2.653c Airport Security Searches
2.653d Heavily Regulated Industries
2.653e Military Inspections

285 *United States v. Biswell*, 406 U.S. 311 (1972).
286 *New York v. Burger*, 482 U.S. 691 (1987).
287 *United States v. Johnson*, 994 F.2d 740 (10th Cir. 1993).

2.653f Parolees and Probationers
2.653g Compulsory Drug Testing for Certain Customs Employees
2.653h Health and Safety Inspections of Homes

2.653a Vessel Document Checks by Customs Officers

See Chapter Eighteen, Extraterritorial Law Enforcement.

2.653b Government Licensed Businesses

A businessman who accepts a license to engage in a government-regulated activity is also subject to warrantless inspections as may be required by statute.[288]

2.653c Airport Security Searches

A limited search of air travelers by Transportation Security Administration (TSA) personnel is permissible without probable cause or a warrant, if the purpose of the search is to discover weapons, dangerous materials or to prevent air piracy.[289] The sole purpose must be to promote safety of flight (or, as appropriate, other modes of transportation).[290]

Any attempt by law enforcement agencies to recruit or train TSA personnel to use security searches as a tool to screen travelers for drugs or other contraband could bring the search outside the scope of a lawful regulatory search.[291] This does *not* mean, however, that law enforcement officers may not receive or use information discovered by security personnel during a routine security search.

2.653d Heavily Regulated Industries

Heavily regulated industries provide a good example of this exception. Although a government license to operate a coal mine, for example, is not needed, compliance with the many government regulations concerning that operation is required. To ensure compliance, therefore, the industry is subject to warrantless inspections by the government.

288 *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).
289 For a thorough analysis of TSA searches, see *United States v. Hartwell*, 296 F. Supp. 2d 596 (E.D. Pa. 2003). See also, *Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006) (TSA's adoption and implementation of its "identification policy," that required all U.S. airline passengers to provide identification or be subjected to a more intrusive personal search, did not violate the constitutional rights of travelers).
290 *United States v. Marquez*, 410 F.3d 612 (9th Cir. 2005) (in addition to subjecting a traveler to a walk-through magnetometer examination, TSA may also use a handheld magnetometer and not violate the 4th Amendment).
291 See, *e.g., United States v. $124,570 United States Currency*, 873 F.2d 1240 (9th Cir. 1989).

In *New York v. Burger*[292] the Supreme Court held that a New York statute authorizing warrantless inspections of automobile junkyards came within the constitutionally recognized exception to the Fourth Amendment warrant requirement for inspections of closely regulated businesses. In reaching this conclusion, the Supreme Court conducted a three-pronged analysis to determine whether the operation of a junkyard devoted in part to vehicle dismantling was a "closely regulated industry."

First, the *Burger* Court examined whether there existed a "'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made."[293] Second, the Court required that the warrantless inspection be "'necessary to further [the] regulatory scheme.'"[294] Third, the Court determined whether "the regulatory statute ... perform[ed] the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers."[295]

2.653e Military Inspections

Soldiers are subject to routine, warrantless inspections by military authorities. The need for obedience, discipline, and constant readiness in the military is an "urgent public interest." In addition, the expectation of privacy by soldiers is lower than in civilian life, and inspections are generally routine. Thus, drugs found in the course of routine inspections are admissible into evidence.

2.653f Parolees and Probationers

Probation and parole officers generally have very broad authority to conduct warrantless searches of persons subject to their supervision. Supervising persons who would otherwise be in prison is an "urgent public interest," and by virtue of their status they have a diminished expectation of privacy. Generally, the search of the person must be made by or under the supervision of the probation or parole officer.[296]

However, where the conditions of parole or probation stipulate that the search of the person and/or his dwelling, etc., can be done by law enforcement officers, as well, such is reasonable if supported by reasonable suspicion of a violation of law. In coming to this conclusion, the Supreme Court considered the urgent public interest and diminished expectation of privacy in conjunction with the probationer's consent to the stipulated condition.[297]

292 482 U.S. 691 (1987).
293 *Id.* at 2644.
294 *Id.* at 2644 (citation omitted).
295 *Id.*
296 *Griffin v. Wisconsin*, 483 U.S. 868 (1987).
297 *United States v. Knights*, 534 U.S. 112 (2001).

The Supreme Court addressed a California statute requiring prisoners eligible for release on state parole to "agree in writing to be subject to search or seizure by a parole officer or other peace officer ..., with or without a search warrant and with or without cause." An officer searched Samson, a parolee, and found methamphetamine. The Supreme Court held that the Fourth Amendment was not violated by a police officer conducting a suspicionless search of a parolee. The Court viewed the totality of the circumstances in determining whether the search was reasonable. The Court assessed the degree to which the search intruded upon Samson's privacy and the degree to which the search was needed for the promotion of legitimate governmental interests." Parolees are on a "continuum" of state-imposed punishments. Because parole is more similar to imprisonment than probation is, parolees have fewer expectations of privacy than probationers. Parole is release before the sentence completion conditioned on abiding by rules for the remainder of the sentence. Those rules or conditions show that parolees have severely diminished privacy expectations by virtue of their status as parolees. California's parole search condition were clearly expressed to Samson who agreed to the conditions. California prohibited arbitrary, capricious, or harassing searches.[298]

2.653g Compulsory Drug Testing for Certain CBP Employees

While the CBP program of suspicionless compulsory urine testing of certain employees involves a "search," such searches are reasonable under the Fourth Amendment and do not require a warrant.

The CBP testing program is not designed to serve the ordinary needs of law enforcement in that the test results may not be used in a criminal prosecution without the employee's consent. The purpose of the program is to deter drug use among those in sensitive positions, specifically, those that directly involve the interdiction of drugs or require the carrying of firearms. Thus, the government's compelling interest in safeguarding our borders and the public safety outweighs the privacy interests of those who are in those positions.

The Supreme Court held that the CBP testing program was effective and that testing CBP employees who are involved in the interdiction of illegal drugs or in positions that require the carrying of firearms is reasonable without any individualized suspicion.

> We think the Government's need to conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms.[299]

298 *Samson v. California,* 547 U.S. 843 (2006).
299 *National Treasury Employees Union v. Von Rabb*, 489 U.S. 656 (1989).

2.653h Health and Safety Inspections of Homes

Because of the high level of privacy associated with a private home, the Supreme Court has held that routine regulatory inspections of homes for fire, plumbing, electrical violations, etc., can be made only by warrant. The court did not go so far as to require inspectors to have search warrants, but the court did insist that inspectors obtain "Administrative Warrants."[300]

In a companion case, the Court established the same "Administrative Warrant" requirement for the inspection of non-licensed, non-regulated, private businesses.[301]

2.660 Special Needs and Administrative Searches

2.661 Searches of Students by School Authorities
2.662 Administrative Searches of Government Employee's Offices
2.663 Special Needs Conveyance Searches

The Supreme Court has held that when a search or seizure serves "special government needs" beyond those required for normal law enforcement, the search or seizure may be reasonable even in the absence of a warrant, probable cause or individualized suspicion.[302] In determining whether a special needs search or seizure is reasonable, the courts will balance the nature and quality of the intrusion on an individual's Fourth Amendment rights against the importance of the purported governmental interest proffered to justify the intrusion.[303] The purpose of a search or seizure done under the special needs exception cannot be for general crime control or for the specific purpose of gathering evidence to use during a criminal case. For instance, the Supreme Court held that checkpoints setup by the City of Indianapolis for the primary purpose of drug interdiction violated the Fourth Amendment because the purpose was "ultimately indistinguishable from the general interest in crime control."[304]

Only a limited number of searches or seizures fall within the boundaries of the special needs exception. One example would be certain checkpoints.[305] The Supreme Court has held that the government can establish sobriety checkpoints and seize all cars that come into those checkpoints with no suspicion because of the paramount interest in public safety.[306] Similarly, the Court has upheld immigration checkpoints because the government has an important interest in

300 *Camara v. Municipal Court*, 387 U.S. 523 (1967).
301 See *v. Seattle*, 387 U.S. 541 (1967).
302 *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1986).
303 *O'Connor v. Ortega*, 480 U.S. 709 (1987); *Cassidy v. Chertoff*, 471 F.3d 67 (2d Cir. 2006).
304 *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000).
305 See Section 2.212a(2), *supra*, for a more detailed discussion of vehicle checkpoint seizures.
306 *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990).

stopping the flow of illegal immigration.[307] In addition to checkpoints there are other areas where the courts have allowed searches or seizures pursuant to the special needs exception. The special needs exception allows the government to search an airline passenger's baggage with no suspicion, prior to allowing that baggage to be carried onto or placed on an airplane.[308] The passenger is also subject to suspicionless security screening.[309] The government in the form of public school administrators may search students. Certain government employees are subject to drug testing[310] and workplace searches.[311] DNA samples can be taken from prisoners and probationers serving felony sentences.[312] Regardless of the purpose underlying any special needs search, the scope of that search must be reasonably related to the circumstances that justified the initial intrusion.[313]

2.661 Searches of Students by School Authorities

A school child has an expectation of privacy in his personal property, but schools have an equally "legitimate need to maintain an environment in which learning can take place." A proper educational environment requires close supervision of school children and enforcement of both law and school regulations. Accordingly, school authorities who have a *reasonable suspicion* that a search will turn up evidence that a student is violating the *law* or the *rules of the school*, may conduct a warrantless search of the student. The measures adopted must be reasonably related to the objectives of the search and not be excessively intrusive in light of the age and sex of the student and the nature of the infraction.[314] If school authorities involve or permit the police to conduct such searches, then the exception no longer applies. A warrant or some other exception is then required to justify the search.

307 *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). See also *United States v. Gabriel*, 405 F. Supp.2d 50 (D. Me. 2005) (upholding stop at a checkpoint established to prevent possible terrorist activities at Democratic and Republican National Conventions).

308 *United States v. Edwards*, 498 F.2d 496 (2d Cir. 1974). It should be noted that the courts have been extremely reluctant to extend this right to other forms of mass transportation. For a more detailed discussion of Airport Security Searches, see Section 2.653c.

309 *United State v. Aukai*, 497 F.3d 955 (9th Cir. 2007)(*en banc*) (consent plays no role in legality of airport screening search. The "special needs" of safe airline travel makes these administrative searches constitutional.)

310 *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1986).

311 *O'Connor v. Ortega*, 480 U.S. 709 (1987).

312 See *United States v. Amerson*, 483 F.3d 73 (2d Cir. 2007); *United States v. Hook*, 471 F.3d 766 (7th Cir. 2006); *United States v. Conley*, 453 F.3d 674 (6th Cir. 2006).

313 See *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

314 *Id.*

In *Safford Unified School District #1 v. Redding*, the Supreme Court addressed a strip search by school officials. School officials had discovered a student's day planner containing knives, contraband, and prescription strength pain relief pills. The student denied ownership. The officials had received reports that the student was giving pills to fellow students. The student agreed to a search of her belongings. Officials found nothing and the nurse had her remove outer clothing and shift underclothing exposing breasts and the pelvic area to some degree. No pills were found. A Section 1983 civil rights suit (violation under color of state law) was filed by the parents alleging that the strip search violated the student's Fourth Amendment rights. The Court agreed that the strip search violated the student's rights. School searches must be supported by reasonable suspicion and the search must not be excessively intrusive. The Court found the search of the student's belongings and outer clothing was justified, but not the strip search. While the indignity involved in strip search does not outlaw a strip search, the intrusiveness does require that "the search [be] 'reasonably related in scope to the circumstances which justified the interference in the first place.' " The Court indicated that the content of the suspicion failed to match the degree of intrusion; a general belief that students hide contraband in their clothing falls short. The school officials were protected by qualified immunity because "clearly established law [did] not show that the search violated the Fourth Amendment.[315]

2.662 Administrative Searches of Government Employee's Offices

In the work place, government employees may or may not have a reasonable expectation of privacy in an office desk, file cabinet or similar property against intrusion by their employer. Because of the great variety of work environments in the government sector, the question of whether or not a government employee has such an expectation in a particular work place must be decided on a case-by-case basis. Factors include the level of privacy granted to the employee, whether others have access to the area, and the purpose of the search.[316]

Even where an employee has a reasonable expectation of privacy in the work place, a warrantless search by the employer on something less than probable cause may be valid nonetheless. If a search is for a non-investigatory work-related purpose (such as to retrieve a file or inventory government property) or for the purpose of investigating work-related employee misconduct (such as inefficiency, incompetence or misfeasance), probable cause and a warrant would not be required. A search by an employer of a government employee's office, which is reasonable in scope, will be justified where there is a *reasonable suspicion* that the search will turn up evidence of work-related employee misconduct or when the search is necessary for a non-investigative work-related purpose, such as to retrieve a file. If, however, the search was for evidence of a

315 *Safford Unified School Dist. No. 1 v. Redding*, 129 S.Ct. 2633 (2009).
316 *O'Connor v. Ortega*, 480 U.S. 709 (1987). See also, *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010) (discussing a government employee's expectations of privacy in text messages sent on a government-issued pager).

criminal violation, probable cause and a warrant would be required. The Supreme Court has declined to decide whether or not the reasonable suspicion must be individualized for such a search to be reasonable.[317]

2.663 Special Needs Conveyance Searches

The courts have approved the searches of certain conveyances, people, and luggage under the special needs exception to the 4th Amendment's warrant requirement under the rationale of public safety. "When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger alone meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air."[318] The Second Circuit Court of Appeals has approved random searches of luggage carried by those entering the New York City subway,[319] as well as the search of passengers, their luggage, and automobiles upon boarding certain classes of car ferries to protect against possible terrorist threats.[320] The security plan need only be reasonably designed to affect its purpose and the court will not revisit whether a less intrusive or more effective plan could be devised. Furthermore, the government need not "adduce a specific threat to demonstrate a special need."[321]

2.670 Emergency Searches

Any *bona fide emergency*, that is, the need to protect against the loss of life or property, will justify an entry or search without probable cause of criminal activity.[322] Judge Berger, later to become Chief Justice of the United States Supreme Court, summarized this exception as follows:

> A myriad of circumstances could fall within the terms' exigent circumstances' ... smoke coming out of a window or under a door, the sound of gunfire in a house, threats from the inside to shoot through the door at police, reasonable grounds to believe an injured or seriously ill person is being held within (and so forth).[323]

317 *O'Connor v. Ortega*, 480 U.S. 709 (1987).
318 *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 (1989), n. 3: *citing United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974); see also, *United States v. Hartwell*, 436 F.3d 174, 178 (3rd Cir. 2006), *cert. denied*, 549 U.S. 945 (2006) (airport search upheld under the "administrative search" doctrine.); *United States v. Skipwith*, 482 F.2d 1272, 1275-1276 (5th Cir. 1973).
319 *MacWade v. United States*, 460 F.3d 260 (2d Cir. 2006).
320 *Cassidy v. Chertoff*, 471 F.3d 67 (2d Cir. 2006).
321 *Id.* 83 (2006).
322 *Brigham City v. Stuart*, 547 U.S. 398 (2006).
323 *Wayne v. United States*, 318 F.2d 205 (D.C. Cir. 1963).

A search under this exception is limited to the need that gave rise to the emergency. Once the specific emergency passes, the officers must search, if at all, on the basis of a search warrant or other recognized exception. For example, firemen may enter a burning building to extinguish the blaze without a warrant. Also, a fire marshal or arson inspector may enter during the fighting of the fire to determine the cause of the fire or to obtain evidence of possible arson that is in danger of being destroyed. During this emergency the fire marshal may also allow or summon a law enforcement officer to the scene to make observations or secure evidence of arson or the origin of the fire. This is because certain evidence of arson has an "evanescent" quality; that is, it may change or disappear while a warrant is being obtained. Evidence of other offenses found by firemen or law enforcement officers during this entry may be seized under the plain view doctrine. However, once the fire is extinguished, and the premises are secured, then the danger to the possible evidence that may be in the premises has passed. Officers desiring to return to search for evidence must now obtain a search warrant. The Supreme Court has held that even though an individual has attempted to burn down his own property, he has not abandoned his expectation of privacy in the premises.

The Supreme Court has repeatedly rejected the argument that there was a "Crime Scene" exception to the Fourth Amendment's warrant requirement. The Court has held that one has a reasonable expectation of privacy in his premises and that this right is not forfeited merely because a crime has been committed therein.[324]

Officers arriving on the scene of a violent crime unquestionably can sweep the premises in an effort to locate other victims or the perpetrator if they reasonably suspect that either is present, or can retrieve evidence as part of the emergency if they have probable cause to believe the crime scene contains evidence that will be destroyed if not quickly recovered.[325] Problems arise, however, if an officer exceeds the scope of the emergency that justified the initial entry. Officers are authorized to do whatever is *reasonably* necessary to resolve the emergency, but once the emergency is resolved, they must have a warrant or meet one of the other exceptions to the warrant requirement to either remain on the premises or continue the search.

Likewise, the courts have rejected a "community caretaker" exception to the warrant requirement. For example, a police officer noticed a garage door was up at a small commercial building; wondering if the building might have been vandalized or burglarized, he entered the building. His entry led to the discovery of evidence. The Tenth Circuit refused to recognize a "community caretaker" exception to justify the entry and the Court suppressed the evidence.[326]

324 *Thompson v. Louisiana*, 469 U.S. 17 (1984).
325 *Buie v. Maryland*, 494 U.S. 325 (1990); *Schmerber v. California*, 384 U.S. 757 (1966).
326 *United States v. Bute*, 93 F. 3d 531 (10th Cir. 1994).

2.680 Border Searches

The subject matter of this exception is discussed in detail in the following chapter. The important thing to remember is that the border search exception is indeed an exception to the probable cause requirement of the Fourth Amendment. In other words, a CBP officer or agent may search without probable cause, just as with any other exception, when—and only when—the circumstances creating the exception exist.[327]

[327] The manner in which the border search is executed, of course, must be reasonable, as discussed further in the following chapter. See, e.g., *Refai v. Lazaro*, 614 F. Supp. 2d (D. Nev. 2009) (discussing a strip search of an arriving alien and the requirement that such a search be supported by individualized reasonable suspicion).

Chapter Three

Border Authority

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3.000 Introduction

Although the advent of the Department of Homeland Security is relatively recent, border searches are not. Courts deciding the nature of CBP's present authority continue to follow the wealth of case law that has traditionally governed border searches. This case law was formed chiefly by interpreting statutes prescribing the authority of the Customs Service and the Immigration and Naturalization Service (INS). The following examines the Nation's historical enforcement of customs and immigration laws, as well as the nature and development of the border search exception to the warrant and probable cause requirements of the Fourth Amendment.

A. Historical Overview

There exists a generally accepted notion that each sovereign nation has an inherent authority to regulate who and what may enter the nation. This precept, based upon the principle of national self-protection, serves as the cornerstone of a large body of American jurisprudence. In *Carroll v. United States,* the United States Supreme Court discussed this authority by stating: "Travelers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."[1] In *Ekiu v. United States*, the Supreme Court found that "[i]t is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."[2] In *Chae Chan Ping,* the Court further found: "That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy."[3] More recently, the Supreme Court in *United States v. Flores-Montano* emphasized: "It is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity."[4]

Acting upon its Constitutional authority to collect duties and regulate commerce with foreign nations,[5] Congress enacted statutory provisions to preserve and protect the United States from unwanted persons and goods. These statutory pronouncements vested plenary authority in the Executive to enforce revenue

[1] *Carroll v. United States*, 267 U.S. 132, 154 (1925).
[2] *Ekiu v. United States*, 142 U.S. 651, 659 (1892).
[3] *The Chinese Exclusion Case*, 130 U.S. 581, 603 (1889). See also *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909); and *Galvan v. Press*, 347 U.S. 522 (1954).
[4] *United States v. Flores-Montano*, 541 U.S. 149, 153 (2004).
[5] United States Constitution, Article I, Section 8.

laws[6] and immigration laws.[7] For example, the fifth act of Congress, passed on July 31, 1789, statutorily authorized the Secretary of the Treasury to seize and search vessels and people entering the United States for the purpose of enforcing revenue laws.[8] Since 1789, the United States Customs Service[9] has served as the arm of the Executive responsible for customs law enforcement. The current customs statutory provisions may be found primarily within Title 19 of the United States Code, and Chapter 27 of Title 18.

The first immigration statute became law on August 3, 1822, wherein Congress granted limited authority to the Secretary of the Treasury to regulate immigration into the United States.[10] Since the passage of the first immigration statute, the body of immigration law has expanded greatly, with most

6 *United States v. Boyd*, 116 U.S. 616 (1886), *overruled on other grounds, Fisher v. United States*, 425 U.S. 391 (1976).

7 The Supreme Court in *Kleindienst v. Mandel*, 408 U.S. 753, 769-770 (1972) determined that "plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established." In *The Chinese Exclusion Case*, the Supreme Court held:

> The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.

The Chinese Exclusion Case, 130 U.S. 581, 609 (1889). See *also Ekiu v. United States*, 142 U.S. 651 (1892), and *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

8 1 Stat. 29, 43 (July 31, 1789).

9 The term "Customs Service" appears to be used to identify a broad contingent of Department of the Treasury employees until approximately 1912. On August 24, 1912, Congress authorized the President to submit a Customs reorganization plan to Congress. On March 3, 1913, the President submitted the Customs reorganization plan and Congress adopted the plan by legislation on August 1, 1914 (see 19 U.S.C. § 1). The term "Customs Service" continued in effect until March 3, 1927, at which time Congress re-designated the Customs Service as the Bureau of Customs (see 19 U.S.C. § 2071). On April 4, 1973, Treasury Department Order No. 165-23, 38 F.R. 13037 abandoned the term "Bureau of Customs" and reverted back to the term "United States Customs Service." In 2002, the Customs Service was transferred to the newly created Department of Homeland Security (see P.L. 107-296, "Homeland Security Act").

10 22 Stat. 214, §§ 2 and 3 (August 3, 1822). Subsequently, a Presidential Reorganization Plan renamed the Customs Service the Bureau of Customs and Border Protection, and later by Secretarial decision the agency's name became U.S. Customs and Border Protection.

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immigration statutes now located within Title 8 of the United States Code.[11] The specific Executive branch entity responsible for immigration law enforcement has changed several times.

The United States Customs Service enforced customs *and* immigration laws until 1891.[12] From that date until passage of the Homeland Security Act of 2002,[13] the United States Customs Service enforced customs laws while enforcement of the immigration laws fell within the purview of various immigration bureaus and services.[14] As a result, before the creation of DHS, two distinct agencies performed two distinct functions at the border. Specifically, the United States Customs Service was responsible for searching merchandise subject to duty or prohibited from entry, whereas the Immigration and Naturalization Service was responsible for determining the admissibility of aliens into the country.

Regardless of the particular function performed, each agency's statutory authority was premised upon the fundamental precept that the sovereign has an inherent authority to regulate who and what may enter the country. Customs and immigration enforcement provisions constituted practical applications of the

11 8 U.S.C. §1101 *et seq.*

12 See *Lem Moon Sing v. United States*, 158 U.S. 538 (1895), wherein the Supreme Court held: "Congress has often passed acts forbidding the immigration of particular classes of foreigners, and has committed the execution of these acts to the Secretary of the Treasury, to collectors of customs, and to inspectors acting under their authority." See also, *The Chinese Exclusion Case*, 130 U.S. 581 (1889)(upholding the constitutionality of an immigration statute enforced by Customs officials at the port of San Francisco). Further, on March 3, 1891, Congress created the Office of the Superintendent of Immigration (26 Stat. 1085, § 7). Although still part of Treasury, it appears that the Customs Service no longer maintained exclusive authority over revenue and immigration law enforcement. On March 2, 1895, Congress changed Immigration's name to the Bureau of Immigration and placed it under the Commissioner General of Immigration (28 Stat. 780, § 1). On February 14, 1903, Congress transferred Immigration from the Department of Treasury to the newly formed Department of Commerce and Labor (32 Stat. 825, §4). It is during this period that the Customs Service and Immigration became two distinct entities with separate statutory responsibilities and missions.

13 6 U.S.C. § 101 *et seq.*

14 On June 29, 1906, Congress re-designated Immigration as the Bureau of Immigration and Naturalization (34 Stat. 596, § 1). On March 4, 1913, Congress created the Department of Labor and divided the Bureau of Immigration and Naturalization into the Bureau of Immigration and the Bureau of Naturalization (37 Stat. 736). By executive order, President Roosevelt consolidated the two bureaus to form the Immigration and Naturalization Service under the Commissioner of Immigration and Naturalization Service (Exec. Order No. 6166, § 14, dated June 10, 1933). On June 14, 1940, Congress transferred "INS" to the Department of Justice (54 Stat. 1238).

sovereign's inherent authority, but what made the respective enforcement authorities distinct from other agency's enforcement provisions was the fact that the person or item subjected to examination and scrutiny had crossed the border. According to the Supreme Court, "[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border."[15] Therefore, the border crossing represented the triggering event that permitted the immigration officer to stop people to determine whether they could enter and the customs officer to stop people and objects to determine whether merchandise should be permitted entry. This authority has generally been referred to as 'border search' authority.

B. Border Search Authority and the Fourth Amendment

The Executive's statutory authority to enforce customs and immigration laws naturally involves seizing people and items at the border, albeit temporarily, for the purpose of determining whether those people and items may enter the United States. As such, CBP's border enforcement efforts implicate the Constitution's Fourth Amendment prohibition against unreasonable searches and seizures.[16] Since "no Act of Congress can authorize a violation of the Constitution,"[17] the Supreme Court has addressed the constitutionality of customs and immigration statutory enforcement provisions. In a number of cases, the Court has consistently held that the United States government may, consistent with the Fourth Amendment, conduct searches and seizures at the border, without probable cause or a warrant (though certain invasive personal searches require reasonable suspicion, as described below).[18]

As the Supreme Court explained in the *Boyd* case, "[since the act of July 31, 1789, 1 Stat. 29, 43,] was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment."[19] In the *Ramsey* case, the Court found that "[b]order searches, then, from the adoption of the Fourth Amendment, have been considered to be 'reasonable' by the single fact that the person or item in question had entered

15 *United States v. Flores-Montano*, 541 U.S. 149 (2004).

16 The Fourth Amendment to the United States Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

17 *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973).

18 See*, for example, United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985).

19 *United States v. Boyd*, 116 U.S. 616, 623 (1886), *overruled on other grounds, Fisher v. United States,* 425 U.S. 391 (1976).

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into our country from outside."[20] Most recently, the Supreme Court stated in *Flores-Montano*: "Time and again, we have stated that 'searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into the country, are reasonable simply by virtue of the fact that they occur at the border.'"[21]

The Supreme Court has applied a balancing test to arrive at its conclusion that "border searches" are reasonable despite the lack of a warrant or probable cause. The standard for evaluating the reasonableness of any government search requires "balancing [the search's] intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interest."[22] In *Montoya de Hernandez* the Court explained: "[N]ot only is the expectation of privacy less at the border than in the interior, the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border."[23] Moreover, as noted previously, "the Government's interest in preventing the entry of unwanted persons and effects" is at its highest point at the international border.[24]

Nevertheless, the Supreme Court has left open the possibility that "a particular border search may be deemed unreasonable because of the particularly offensive manner in which it is carried out."[25] For personal searches, the length of time required to complete a border search is a relevant factor in this assessment,[26] as is the level of intrusiveness.[27] Based in part on prior case decisions, CBP adopted a "reasonable suspicion" standard for partial body searches, x-ray searches of persons, body cavity searches, and monitored bowel movements.[28]

20 *United States v. Ramsey*, 431 U.S. 606, 619 (1977).
21 *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004), *citing United States v. Ramsey*, 431 U.S. 606, 616 (1977).
22 *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983) (discussing border search of vessel in waters with ready access to the open sea and quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)).
23 *United States v. Montoya de Hernandez*, 473 U.S. 531, 540 (1985).
24 *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004).
25 *United States v. Ramsey*, 431 U.S. 606, n.13 (1977).
26 *United States v. Montoya de Hernandez*, 473 U.S. 531, 544 (1985).
27 *United States v. Vega-Barvo*, 729 F. 2d 1341, 1344-46 (11th Cir. 1984)("To determine the level of intrusiveness of a search, we must focus on the indignity of the search.... [T]hree factors ... contribute to the personal indignity endured by the person searched: (1) physical contact between the searcher and the person searched; (2) exposure of intimate body parts; and (3) use of force. These factors tend to control the level of insult to personal privacy visited upon the victim of a search."); see *also United States v. Ramos-Saenz*, 36 F. 3d 59, 61 (9th Cir. 1994).
28 See "Personal Search Handbook," CIS HB 3300-04B, Office of Field Operations, CBP, (July 2004). In addition, the First Circuit has said "the only types of border searches of an individual's person that have been consistently

However, "the reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person—dignity and privacy interests of the person being searched—simply do not carry over to vehicles."[29]

Prior to the creation of DHS, customs and immigration officials exercised border authority to the extent permitted by statutory provisions found in Titles 19 and 8 of the United States Code, respectively.[30] Generally speaking, the Customs officer was permitted to seize persons and items at the border in order to search for merchandise. The INS officer was permitted to seize people as they entered the United States to determine their admissibility. CBP was created as a result of the Homeland Security Act (HSA) of 2002, which transferred the Customs Service to DHS, and the President's Modified Reorganization Plan, which renamed the Customs Service and shifted some enforcement assets to CBP as well as out of CBP. The creation of CBP on March 1, 2003, combined personnel from four separate agencies (Customs, Immigration, Agriculture Border Inspectors, and the Border Patrol) from three different departments of government (Treasury, Justice and Agriculture). CBP represents the one agency charged with securing, managing and controlling the borders of the United States. Long-established border search authority is vital to accomplishing this mandate.

CBP's border search authority comes from many sources. Congress has enacted many statutes giving CBP officers and agents enforcement authority with regard to customs and immigration laws. These statutes may restrict certain conduct of CBP officers that might otherwise be permitted under the Constitution. Further, CBP policy may restrict an officer's actions that are authorized by statute and permitted by the Constitution. On the other hand, no statute or policy can authorize any action that is inconsistent with the Constitution. For example, 19 U.S.C. § 1467 authorizes the search of persons, baggage and merchandise, "whether or not any or all such persons, baggage, or merchandise has previously been inspected, examined, or searched by officers of the customs." This re-

held to be non-routine are strip-searches and body-cavity searches…. [W]e conclude that the 'reasonable suspicion' standard applies in the First Circuit to non-routine searches only…. The First Circuit standard for routine border searches is the 'no-suspicion' standard." *United States v. Braks*, 842 F. 2d 509 (1st Cir. 1988) (citing cases from a number of other circuits that reached the same conclusion). Courts have noted that the Fourth Amendment right to be free from nonroutine searches without reasonable suspicion at the border is clearly established for non-admitted aliens. *Refai v. Lazaro*, 614 F.Supp.2d 1103, 1112-13 (D. Nev. 2009).

29 *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004); *but cf., United States v. Whitted*, 541 F.3d 480 (3d Cir. 2008) (reasonable suspicion is required to justify a border search of a passenger cabin aboard a cruise ship returning from foreign because a reasonable expectation of privacy exists in that passenger cabin).

30 See 19 U.S.C. §§ 482, 1581, and 1582; 8 U.S.C. §§ 1225, 1324, and 1357.

inspection authority would only be constitutionally permitted at the border or the functional equivalent of the border.[31] Similarly, 19 U.S.C. § 1581 authorizes CBP officers to search any vehicle or vessel and its cargo wherever it may be found. Such conduct, however, is constitutional only when performed at the border, functional equivalent of the border, or extended border.[32]

The material in this chapter will equip the CBP officer to identify the requirements for a lawful border search, that is, one that is reasonable under the Fourth Amendment and consistent with applicable statutes and policies. By applying these concepts, CBP officers will be able to perform border searches lawfully and within the bounds of the United States Constitution.

3.100 Why are Border Searches Permitted?

3.110 Protect the Revenue
3.120 Reduced Expectation of Privacy at the Border
3.130 The Right to Possess Imported Merchandise until Duty is Paid
3.140 National Self-Protection
3.150 Reasons for Outbound Searches

Law enforcement officers, including CBP officers, who perform searches away from the border generally need probable cause and a warrant for their conduct to be reasonable. The courts have given several reasons, however, why a search otherwise requiring a warrant is nonetheless reasonable when conducted without a warrant or probable cause at the border.

3.110 Protect the Revenue

One of the reasons for border search authority is to protect the revenue of the United States (i.e., to collect duties and taxes owed on imported goods).[33] Although Internal Revenue officers also protect the revenue, they are not given the broad authority to search that CBP officers are given.

31 See, *e.g., United States v. Santiago*, 837 F.2d 1545, 1548 (11th Cir. 1988).
32 See *United States v. Stanley,* 545 F.2d 661, 665 (9th Cir. 1976), "A search based solely on 19 USCS § 1581(a) is unreasonable if it sweeps more broadly than the Fourth Amendment allows. In the absence of probable cause or consent, it is unreasonable unless it falls within an exception to the Fourth Amendment prohibition against unreasonable searches and seizures. A border search has been held to be such an exception."
33 See *Boyd v. United States,* 116 U.S. 616, 623 (1886), *overruled on other grounds, Fisher v. United States,* 425 U.S. 391 (1976); *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) in which the court stated: "Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country."

3.120 Reduced Expectation of Privacy at the Border

When an individual goes to another country he knows that he may be subjected to a search upon arrival. This reduces the expectation of privacy in his person or in objects he may bring into the country.[34]

3.130 The Right to Possess Imported Merchandise until Duty is Paid

Most government searches performed away from the border are searches for property not belonging to the government. During a border search, however, the government is searching for property it has a right to possess until duty is paid. This principle was set forth by the United States Supreme Court in the first search and seizure case ever decided:

> The search for and seizure of . . . goods liable to duties and concealed to avoid payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him . . . In the one case the government is entitled to the possession of the property; in the other it is not . . . The seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government.
>
> The first statute passed by Congress to regulate the collection of duties, the Act of July 31, 1789 (1 St. 43) contains provisions to this effect. . . . In the case of excisable or dutiable articles, the government has an interest in them for the payment of duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment . . .[35]

3.140 National Self-Protection

All sovereign nations exercise authority over their borders to prevent prohibited items from entering and to ensure compliance with applicable restrictions. This need to protect national security is given often as a reason for border searches.

34 See *Carroll v. United States*, 267 U.S. 132, 154 (1925): "Travelers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in and his belongings as effects which may lawfully be brought in." Also see, *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985); *United States v. Flores-Montano*, 541 U.S. 149, 154 (2004).

35 *Boyd v. United* States, 116 U.S. 616 (1886), *overruled on other grounds, Fisher v. United States,* 425 U.S. 391 (1976).

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In 2004, the U.S. Supreme Court reiterated the importance of border searches in protecting national security:

> The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border. Time and again, we have stated "searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border."[36]

Congress has also recognized the importance of national self-protection. Under the Homeland Security Act[37], CBP's primary mission is to "prevent terrorist attacks within the United States"[38] and to "reduce the vulnerability of the United States to terrorism."[39]

3.150 Reasons for Outbound Searches

The border search concept was first extended to exit searches when government official searched an outbound vessel nine miles from U.S. shore. The court found five reasons why an outgoing border crossing search was like an incoming border crossing search[40]:

(i) The government is interested in protecting some interest of U.S. citizens;

(ii) Smuggling attempts are likely at the border;

(iii) The difficulty in detecting smuggling;

(iv) The individual is on notice that his privacy may be invaded when he crosses the border; and,

(v) The individual will be searched only because of his membership in a morally neutral class.

CBP has similar authority to search any outbound person, conveyance, or cargo to enforce export-related statutes. For example, CBP has plenary authority to "stop and search, at the border and without a search warrant, any vehicle, vessel, aircraft, or other conveyance, any envelope[41] or other container, and any

36 *United States v. Flores-Montano*, 541 U.S. 149 (2004) (*quoting United States v. Ramsey*, 431 U.S. 606, 616 (1977)).
37 6 U.S.C. § 101 *et seq.*
38 6 U.S.C. § 111(b)(1)(A). See also, 6 U.S.C. § 202(1).
39 6 U.S.C. § 111(b)(1)(B). See also, 6 U.S.C. § 202(1).
40 *United States v. Stanley*, 545 F.2d 661 (9th Cir. 1976).
41 See 31 U.S.C. § 5317(b) which authorizes outbound border searches of mail, subject only to CBP regulatory restrictions on reading correspondence. Also see

person entering or departing the United States," to ensure compliance with the requirement to report the import or export of monetary instruments.[42] CBP also has authority to stop and search persons, cargo, and conveyances to enforce export laws.[43] However, there is no law requiring all persons and vehicles to exit the United States at a designated port of entry.

Although the Supreme Court has yet to consider the issue,[44] the authority of CBP to conduct outbound border searches without probable cause or a warrant has been upheld by every Court of Appeals that has considered the question.[45]

Similarly, the Supreme Court has never addressed the level of suspicion required for an intrusive outbound personal search. Nonetheless, it seems likely that the reasonable suspicion standard applicable to such searches in the inbound context would also be required for similar outbound searches.[46]

3.200 The Border Exception
3.210 Authorized Government Officer
3.220 Searching for Merchandise, Evidence of Admissibility, and Aliens
3.230 The Border, Functional Equivalent of the Border, Extended Border

The border exception to the Fourth Amendment's warrant and probable cause requirements exists only when certain conditions are present.

The border exception exists only when:

19 C.F.R. Part 145 for regulations on mail importations.
42 31 U.S.C. § 5317(b).
43 See *e.g.*, 22 U.S.C. § 401 (exports contrary to law); 22 U.S.C. § 2778 (munitions export enforcement); 15 C.F.R. § 758.7(b)(5) (inspection authority under the Export Administration regulations); 22 C.F.R. § 127.4 (inspection authority under the International Traffic in Arms regulations).
44 The Supreme Court has, however, mentioned in *dictum*: "those entering and leaving the country may be examined as to their belongings and effects, all without violating the Fourth Amendment. . ." *California Bankers Ass'n v. Shultz*, 461 U.S. 21, 63 (1974).
45 See *United States v. Beras*, 183 F.3d 22, 26 (1st Cir. 1999); *United States v. Oriakhi*, 57 F.3d 1290, 1296, n.3 (4th Cir. 1995); *United States v. Ezeiruaku*, 936 F.2d 136, 143 (3d Cir. 1991); *United States v. Berisha*, 925 F.2d 791, 795 (5th Cir. 1991); *United States v. Udofot*, 711 F.2d 831, 839-840 (8th Cir. 1983); *United States v. Aljouny,* 629 F.2d 830, 834-35 (2d Cir. 1980); *United States v. Stanley*, 545 f.2d 661, 667 (9th Cir. 1976).
46 *Cf. United States v. Ezeiruaku*, 936 F.2d 136, 140-143 (3d Cir. 1991). As CBP has authority to search any person, cargo, or conveyance in order to enforce the above laws, the Commissioner has the legal authority to direct CBP officers to search all persons, cargo, or conveyances departing the United States, subject to a reasonableness requirement for intrusive searches.

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- ✓ An authorized government officer conducts a search or seizure (See § 3.210);

- ✓ At the border, the functional equivalent of the border (FEB) or the extended border (See § 3.230).

3.210 Authorized Government Officer

3.211 Officers of U.S. Customs and Border Protection
3.212 Commissioned, Warrant or Petty Officers of the Coast Guard
3.213 Any Agent or Other Person Authorized by Law
3.214 Any Agent or Other Person Designated by the Secretary of the Treasury
3.215 Authority to Demand Assistance
3.216 Examples: Border Searches Must be Conducted by "Customs Officers"

3.211 Officers of U.S. Customs and Border Protection

The terms "officer of the Customs" and "Customs officer" are defined in 19 U.S.C. section 1401(i) to include "any officer of the United States Customs Service of the Treasury Department." This statute has not been expressly amended to reflect the transfer of authorities that followed enactment of the Homeland Security Act of 2002 (HSA). Pursuant to sections 403(1)[47] and 411[48] of the HSA, which transferred the Customs Service to DHS, and the President's Modified Reorganization Plan, which renamed the Customs Service and shifted some enforcement assets to CBP as well as out of CBP, the terms "officer of the Customs" and "customs officer" are read to include any officer of U.S. Customs and Border Protection of the Department of Homeland Security. The Commissioner of CBP is authorized to permit any officer of CBP to perform "customs officer" enforcement duties.[49] This includes CBP officers, Border Patrol agents, Air and Marine interdiction agents, Internal Affairs special agents, canine enforcement officers, CBP technicians, import specialists, agriculture specialists, mail specialists, port directors and others who may be designated as officers of CBP.[50] Under 19 U.S.C. § 1401(i), no distinction is made between the various types of "customs officers." Not all CBP personnel, however, are authorized by CBP policy to exercise the various enforcement authorities of a "customs officer."

Special Agents of ICE are also customs officers.

47 Codified at 6 U.S.C. § 203.
48 Codified at 6 U.S.C. § 211.
49 19 U.S.C. 1401(i); See 6 U.S.C. §§ 203, 211, 212, and 215; The President's Homeland Security Reorganization Plan, November 25, 2002, as modified, January 30, 2003; Delegation of Authority from the Department of the Treasury issued pursuant to 6 U.S.C. 212(a)(1), 68 Fed. Reg. 28322 (May 23, 2003).
50 See Customs Directive 1510-002A, "Personnel Designated to Act as Customs Officers," (March 31, 2000).

3.212 Commissioned, Warrant or Petty Officers of the Coast Guard

These three categories of Coast Guard officers are "Customs officers" by law. [51] Coast Guard officers also have independent statutory authority to perform enforcement duties as Coast Guard officers. If they do function as "Customs officers," under 19 U.S.C. § 1401(i), they are bound by the same rules and regulations as other "Customs officers."

3.213 Any Agent or Other Person Authorized by Law

No other law enforcement officer is currently authorized by law to be a "Customs officer." Wildlife Inspectors and Special Agents of the Division of Law Enforcement of the U.S. Fish and Wildlife Service are authorized by certain laws to conduct limited border searches in the enforcement of those laws that protect wildlife, but they are not authorized as "Customs officers" by statute.[52]

3.214 Any Agent or Other Person Designated by the Secretary of the Department of Homeland Security

The authority to designate other persons as "Customs officers" has been delegated by the Secretary of DHS to the Commissioner of CBP.[53]

Examples of persons who have been so designated are certain: Military Customs inspectors, Fish and Wildlife Inspectors, and certain foreign, state and local law enforcement officers assigned to federal task forces.

Most designations must be in writing on a CF-55 and must conform to Headquarters guidelines.

3.215 Authority to Demand Assistance

The requirement that a border search be conducted by a "customs officer" does not prevent other law enforcement personnel, or even a civilian, from assisting CBP in conducting a border search. If a border search is executed under the authority and direction of CBP officers, then the search is properly a border search.[54] This may be accomplished by virtue of the CBP officer's authority to "demand assistance" from any person.

The source of this authority is 19 U.S.C. § 507, which provides:

51 14 U.S.C. § 143.
52 See, the *Endangered Species Act* (16 U.S.C. § 1540 (e)(3)) and the *Lacey Act* (16 U.S.C. § 3375(b)).
53 See Customs Delegation No. 99-022, "Authority to Designate Customs Officers" (August 31, 1999) and Customs Directive No. 1510-002A, "Personnel Designated to Act as Customs Officers" (March 31, 2000).
54 *United States v. Alfonso*, 759 F.2d 728 (9th Cir. 1985).

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(a) Every customs officer shall -

(1) upon being questioned at the time of executing any of the powers conferred upon him make known his character as an officer of the Federal Government; and

(2) have the authority to demand the assistance of any person in making any arrest, search, or seizure authorized by any law enforced or administered by customs officers if such assistance may be necessary.

If a person, without reasonable excuse, neglects or refuses to assist a customs officer upon proper demand under paragraph (2), such person is guilty of a misdemeanor and subject to a fine of not more than $1,000.

(b) Any person other than an officer or employee of the United States who renders assistance in good faith upon the request of a customs officer shall not be held liable for any civil damages as a result of the rendering of such assistance if the assisting person acts as an ordinary, reasonably prudent person would have acted under the same or similar circumstances.

This section may be employed in a wide variety of circumstances. For example, officers may obtain the assistance of doctors in conducting those searches required by law or policy to be conducted by a physician (e.g., a body cavity search) or may obtain the assistance of airport employees, state and local law enforcement officers, or other persons in conducting patdown and body searches. This section has been used when aircraft or boats subject to a border search are discovered, but when CBP officers are not present. State and local officers could perform a border search pursuant to a request by a CBP officer.[55] Alternatively, local law enforcement officers could be requested to detain a conveyance until CBP officers arrive.

Under 19 U.S.C. § 507(b), any person other than an employee of the federal government who renders such assistance is shielded from liability if the person acts reasonably under the circumstances.

3.216 Examples: Border Searches Must be Conducted by "Customs Officers"

Example: An FBI agent is conducting an inspection to locate stolen vehicles. He is inspecting automobiles as they enter the United States from Mexico through the commercial gate at the port of entry at Calexico, California. He selected late model pickups, especially Fords and Chevrolets, as being likely to have been stolen in the United States and transported to Mexico. Soto-Soto arrives at the port of entry in a late model Chevrolet pickup. The FBI agent stops Soto-Soto

[55] *United States v. Victoria-Peguero*, 920 F.2d 77 (1st Cir. 1990).

and asks him to park in a designated area. Soto-Soto hands over the vehicle's registration papers. The registration number on the papers is identical to the number on the safety sticker on the doorpost.

The FBI agent, without Soto-Soto's consent, then lifts the hood of the truck to check the confidential serial number stamped on the truck frame. Upon lifting the hood, he observes packages of marijuana. Is this marijuana admissible in court against Soto-Soto?

Analysis: Is this a Fourth Amendment search, i.e., is the government (FBI) intruding into a reasonable expectation of privacy? Soto-Soto has a reasonable expectation of privacy under the hood of his vehicle; therefore, the FBI agent's conduct is a search.

Does the FBI agent have a warrant supported by probable cause? No. Is any exception beyond a border exception to the warrant and probable cause requirement present? Since the agent does not have probable cause, the search cannot be justified under the mobile conveyance exception and no exception beyond the border exception appears applicable.

Was the search a border search? To be a valid border search, the searching officer must be a "Customs officer." Did the FBI agent fall within one of the three categories of "Customs officer"? No. Did the agent conduct the search at the direction of and under the supervision of a Customs officer? No.

Result: The search by the FBI agent was not authorized by a warrant or any exception thereto. The marijuana discovered during the search was suppressed.[56]

3.220 Conducts a Search or Seizure

While CBP officers perform two traditionally discrete functions at the border (customs and immigration processing), these functions are now a part of CBP's unified mission to protect the nation's borders and prevent terrorism.[57] The CBP officer's exercise of border search and seizure authority supports the agency's primary anti-terrorism mission.[58]

Policies governing the performance of border searches and seizures recognize the agency's broad anti-terrorism mission. For example, the policy governing border searches of information states that the agency "is responsible for ensuring compliance with customs, immigration, and *other federal laws* at the border"

56 *United States v. Soto-Soto*, 598 F.2d 545 (9th Cir. 1979).
57 See 6 U.S.C. §§ 202(1), 111(b)(1); CBP Directive, 3340-021B, "Responding to Potential Terrorists Seeking Entry into the United States," (September 2006).
58 See Office of Chief Counsel memorandum, "Unified Border Authority Position Paper," (October 13, 2004).

(emphasis added).[59] Thus, for example, when border searching information, officers are searching for "evidence relating to terrorism and other national security matters, human and bulk cash smuggling, contraband, and child pornography" in addition to more traditional customs and immigration violations.[60]

To this end, officers rely on many statutory provisions granting authority to conduct border searches and seizures.[61] A number of statutes specifically authorize searches for "merchandise," which is defined in 19 U.S.C. § 1401(c) as "goods, wares, and chattels of every description, and includes merchandise the importation of which is prohibited, and monetary instruments as defined in section 5312 of Title 31, United States Code." A *chattel* is any "article of personal property," that is property other than land, buildings or others things annexed to land.[62] Because the term "merchandise" is defined so broadly, a CBP officer's border search authority is similarly broad. A border search is thus not limited to searches for contraband, but in fact is applicable to all types of personal property including electronic devices and other sources of information.[63]

Congress has also authorized border searches for aliens and evidence of admissibility.[64] Evidence of a person's admissibility is anything that is relevant to determining whether the person may be lawfully admitted to the United States. Such evidence may include: documents, including evidence of citizenship, any item inconsistent with an alien's authorized purpose for seeking entry into the United States, and any items that tend to prove an alien is subject to the grounds of inadmissibility. A search for evidence of a person's admissibility would, therefore, include searches of electronic devices and other sources of information.[65]

59 CBP Policy, "Policy Regarding Border Search of Information," (July 16, 2008).
60 Id.
61 See, *e.g.*, 19 U.S.C. §§ 482 (search of vehicles and persons), 1461 (inspection of merchandise and baggage), 1496 (examination and baggage), 1499 (examination of merchandise), 1581 (boarding and searching of vessels), 1582 (search of persons and baggage), 1583 (examination of outbound mail), 1589a(general law enforcement authority, and 1595 (searches and seizures); 8 U.S.C. § 1357 (powers of immigration officers).
62 *Black's Law Dictionary*, 236 (6th Ed. 1990).
63 CBP Policy, "Policy Regarding Border Search of Information," (July 16, 2008); CBP Directive 3340-049, "Border Search of Electronic Devices Containing Information" (August 20, 2009).
64 8 U.S.C. § 1225; See also CBP "Personal Search Handbook," CIS HB 3300-04B (July 2004) (Glossary), defining "admissibility" as: "the determination that such alien is ineligible to receive a visa and ineligible to be admitted to the United States." Citing § 212(a) of the INA. The Handbook authorizes searches at the border for "material evidence" relating to such admissibility determinations.
65 CBP Policy, "Policy Regarding Border Search of Information," (July 16, 2008); CBP Directive 3340-049, "Border Search of Electronic Devices Containing Information" (August 20, 2009).

While the traditional role of the CBP officer at the border has been to search for immigration-and customs-related matters, the CBP officer's border search authority is not strictly limited to those matters. Courts have long recognized that an officer's subjective intent when performing a search (i.e what the officers is looking for and why) is not relevant when assessing whether the search was lawful. As long as the officer has authority to conduct the search and performs the search in a Constitutionally reasonable manner, the search will likely be deemed lawful.[66] Therefore, the appropriate focus is on whether or not the officer had the authority to perform a border search or seizure and not on the officer's subjective reason for doing so.

A CBP officer's authority to perform border searches and seizures is based on his or her designation as a government officer with border authority (see § 3.210 above) operating at "the border" (see §3.230 below). A CBP officer's use of border search and seizure authority supports CBP's primary mission of protecting the borders and would naturally include ensuring that:

- Terrorist attacks are prevented by detecting terrorists and their funding, weapons and instruments of terrorism;
- Suspected terrorists are prevented from entering the United States;
- Persons or goods entering or leaving the country comply with the laws and regulations of the United States;
- Unlawfully imported or exported goods are seized for forfeiture;
- Duties are collected; and
- Fruits, instrumentalities or evidence of federal crimes are seized.

3.230 The Border, Functional Equivalent of the Border, Extended Border

3.231 The Border
3.232 The Functional Equivalent of the Border (FEB)
3.233 The Extended Border

Border searches may only be performed at the border, the functional equivalent of the border (FEB), or the extended border.

3.231 The Border

3.231a The Land Border
3.231b The Sea Border
3.231c The Air Border

[66] See *United States v. Robinson*, 414 U.S. 218 (1973) (arrest motivated by desire to search defendant for narcotics, and subsequent search incident to arrest not motivated by officer safety concerns, were nonetheless reasonable); *Whren v. U.S.*, 517 U.S. 806 (1996) (seizure made upon probable cause is reasonable regardless of subjective intent of the officer); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983) (an ulterior motive does not strip an officer of his legal authority).

Searches may be conducted at the border when CBP officers are reasonably certain of nexus (connection) with the border. The "border" refers to the territorial boundaries of the United States that exist on land, sea and air.

3.231a The Land Border

The land border is the actual dividing line between the United States and Canada or Mexico. When a person or object crosses that line, the nexus requirement for a border search is established. The location of the CBP office or station does not have to be on the border line. Moreover, the fact that the person is refused entry to this country or decides not to remain here does not defeat a CBP officer's authority to detain the person in order to conduct a border search once nexus is established.[67]

3.231b The Sea Border

The sea border of the United States lies at the edge of the "territorial sea" which is a belt of sea adjacent to the coast of the United States. The normal baseline for measuring where the territorial sea begins is the low-water line along the coast. Where bays and estuaries are involved, a line is drawn from headland to headland and the territorial sea is measured from this "baseline." The sea border is marked on nautical charts and CBP officers should consult the charts if a question arises as to whether they are within the territorial sea. United States domestic law is fully effective in the territorial sea and any crime committed in this area is committed within the United States and the state to which the waters belong.

The boundary line in the Great Lakes, which divides Canadian and United States waters, is also found on the various nautical charts of the Great Lakes. This boundary line generally divides the Great Lakes in half and is often physically identified by a buoy line.

For a more detailed discussion of territorial seas, see Chapter 18, "Extraterritorial Law Enforcement."

3.231c The Air Border

The air border extends directly upward from the land or sea border.

3.232 The Functional Equivalent of the Border (FEB)

3.232a FEB Inbound
3.232b FEB Inbound Applications
3.232c FEB Outbound

A border search need not take place at the actual border and, in fact, rarely does outside of the land border environment. It may be conducted at a place

[67] *United States v. Cascante - Bernitta*, 711 F.2d 36 (5th Cir. 1983).

considered the "functional equivalent of the border,"[68] such as the port where a ship docks after entering U.S. territorial waters from abroad,[69] the airport where an international flight lands,[70] or a private airstrip where a private airplane lands after crossing the border.[71]

3.232a FEB - Inbound

In order to establish that a location has become the "functional equivalent of the border," circumstances must exist to demonstrate that the location *works just like the border*. When a person or object enters the United States and is stopped and inspected before there is an opportunity to be assimilated into domestic commerce (i.e., any merchandise present at the time of the inspection was present at the time of entry across the physical border) the circumstances are essentially identical to those that would exist had the person or object been stopped and inspected at the border itself. Moreover, the higher expectation of privacy that generally accompanies one's entry into the stream of domestic activity has not yet developed when the search occurs at the first practicable detention point after a border crossing.[72]

The circumstances, therefore, that create an inbound functional equivalent of the border are:[73]

1. Reasonable certainty that there has been NEXUS with the border.[74] The term "nexus" means a special connection with or to something (in this case, the border). The kind of connection contemplated is either:

 (i) A border crossing;

 ** or **

 (ii) Meaningful contact with that which has crossed the border but not yet been subject to inspection.[75]

68 See *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).
69 *United States v. Prince*, 491 F.2d 655 (5th Cir. 1974).
70 *United States v. Klein*, 592 F.2d 909 (5th Cir. 1979); *United States v. Richards*, 638 F.2d 765, 771 (5th Cir. 1981).
71 *United States v. Emmens*, 893 F.2d 1292 (11th Cir. 1990).
72 *United States v. Garcia*, 672 F.2d 1349 (11th Cir. 1982).
73 See, *Garcia,* 1363-64.
74 See, *e.g.*, *United States v. Niver*, 689 F.2d 520 (5th Cir. 1982); *United States v. Ramos,* 645 F.2d 318 (5th Cir. 1981); *United States v. Ivey*, 546 F.2d 139 (5th Cir. 1977).
75 See, *e.g., United States v. Markham,* 440 F.2d 1119 (9th Cir. 1971); *United States v. Weil*, 432 F.2d 1320 (9th Cir. 1970).

An aircraft, for example, that flies nonstop from Mexico City, Mexico to San Francisco has border nexus. A person who enters a CBP bonded warehouse that contains un-inspected foreign merchandise has had contact with that which has crossed the border, and thus has border nexus.

2. Reasonable certainty that there has been no material change since border nexus (i.e., any merchandise present now was present at time of border nexus)[76];

3. The seizure occurs at the first practicable detention point since border nexus.[77]

The most common applications of the "FEB" concept are arrivals by air and sea. An aircraft, for example, may originate in London, England and fly nonstop to St. Louis, Missouri. That aircraft and everything on board meets the requirements noted above when it lands at St. Louis. CBP can therefore conduct a border search of that particular aircraft in St. Louis.

The fact that an airport is called an "international" airport, however, does not mean that every plane, passenger or object at the airport is subject to a border search. Most so-called "international" airports have many domestic flights as well. The elements noted above must exist with respect to the particular object or person to be searched for the search to be at the FEB.

The FEB is not limited to aircraft arriving at international airports or vessels arriving at seaports. If an aircraft comes from a foreign country and lands in a pasture in South Georgia, that aircraft is at the FEB. Similarly, a vessel that enters from beyond the territorial sea and ties up at a private dock behind a house is at the FEB.

Example: On October 3, 1979, between 4:30 and 5:00 a.m., United States Customs received a report of a near collision between two aircraft over foreign airspace. One of the pilots involved had informed the FAA that his craft was almost hit by another plane at an altitude of about 10,000 feet in airway Amber 16 over Andros Island in the Bahamas. Responding to this information, Roy Weaver, the Customs duty air officer, monitored the area on raw radar. He spotted a plane headed in a north-northwesterly direction on Amber 16 above Andros Island.

76 See, *e.g., United States v. Gaviria*, 805 F.2d 1108 (2d Cir. 1986); *United States v. Caminos*, 770 F.2d 361 (3d Cir. 1985); *United States v. Niver*, 689 F.2d 520 (5th Cir. 1982);*United States v. Gallagher*, 557 F.2d 1041 (4th Cir. 1977).
77 See, *e.g., United States v. Cardenas*, 9 F.3d 1139 (5th Cir. 1993); *United States v. Puig*, 810 F.2d 1085 (11th Cir. 1987); *United States v. Caminos*, 770 F.2d 361 (3d Cir. 1985); *United States v. Strmel*, 574 F.Supp. 793 (E.D. LA 1983, *aff'd* 744 F.2d 1086 (5th Cir. 1983); *United States v. Stone*, 659 F.2d 569 (11th Cir. 1981);*United States v. Potter*, 552 F.2d 901 (9th Cir. 1977).

Weaver directed the pilot of a United States Customs pursuit plane in the vicinity to intercept the craft. By means of infrared radar on board the Customs chase plane, the target was identified as a small twin-engine Beechcraft airplane. Radar and visual contact with the target was maintained until it approached Bimini. Since the initial chase plane was low on fuel, surveillance was then assumed by another Customs craft. As this second plane neared interception of the target, the latter turned off its lights. Visual contact was lost because of the ensuing darkness; however, radar observation of the target was continued without a break. Mechanical difficulties subsequently forced the second pursuit plane to return to base. Customs Officer Weaver maintained constant radar surveillance of the plane until it dropped off the radar screen southeast of Orlando. At that point, an FAA air traffic controller stationed in Orlando took over surveillance of the plane (which Weaver had identified for him according to the craft's location, altitude, tail number and type) until its landing at Orlando International Airport. Having been alerted by Customs, Orlando police officer David Goode spotted the craft and followed it to a terminal, approached the defendant and another individual as they exited the plane, and told them he was detaining them for Customs purposes. Customs Agent Malley arrived ten minutes later.

Malley opened the plane and immediately detected the odor of marijuana and observed a plastic bag containing white pills. The ensuing search yielded 200 pounds of marijuana and 671 pounds of methaqualone.

Analysis: Did the Customs officers have a reasonable certainty of border nexus regarding the aircraft? Did the facts establish that there was no time or opportunity for the aircraft contents to change materially between the time of nexus and the search? Did the officers conduct the search at the first practicable detention point after nexus?

Result: In finding this search to have occurred at the functional equivalent of the border, the court stated:

> On these facts, we hold that the airport inspection of the craft constituted a valid border search. Where an airplane or, for that matter, a person, vessel, object or vehicle has been sighted over foreign land, air or water and has been monitored continuously thereafter as it crosses the boundary of this country, its inspection by Customs at the first point it touches land is fully valid as a border search.[78]

Example: On December 13, 1971, Ingham, using the alias of Dennis Kaufman, purchased the 42-foot M/V Nurmi for $55,000 cash. Customs agent William Norsworthy initiated a search to ascertain where the vessel was berthed. On January 11, 1972, and again on January 12 she was located at the dock behind the residence at 240 Golden Beach Drive.

78 *United States v. Stone*, 659 F.2d 569 (5th Cir. 1981).

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Several further sightings of M/V Nurmi occurred:

Jan. 25 and 26: by a private citizen (a government witness), that he saw M/V Nurmi in Cartagena, Colombia, and that the Appellant was on board;

Feb. 6, 1972 at 1:00 p.m. by Customs agent Lynch in Bahamian waters near Cat Cay;

at 2:30 p.m. by Customs agent Lynch about 15 miles west of Bimini heading toward the Florida coast;

at 7:25 p.m. by Customs agent Walsh as it entered inland waters from the Atlantic Ocean through Baker's Haulover Cut, then turned north and headed up the intracoastal waterway (ICW);

at 7:45 p.m. by Customs agent Burton traveling north on the ICW as it passed under the Sunny Isles Boulevard Bridge;

at 8:00 p.m. by Customs agents Lynch and Norsworthy as it left the ICW, entered a canal at the north end of South Island, and docked behind the residence at 240 Golden Beach Drive.

On February 6, at approximately 8:05 p.m. the agents went to the M/V Nurmi where the agents detected the odor of marijuana and observed burlap bags in the after cabin. The agents subsequently discovered 79 such burlap bags on board containing 4,000 pounds of marijuana, which were seized.

Analysis: Did the Customs officers have a reasonable certainty of border nexus regarding the M/V Nurmi? Did the facts establish that there was no time or opportunity for the M/V Nurmi to change materially between the time of nexus and the search? Did the officers conduct the search at the first practicable point of detention after nexus?

Result: All three elements were present. In particular regard to the required nexus the court found that:

> [t]he law—indeed criminal law—allows for common sense. And common sense allows persons in their affairs to draw inferences from circumstances. If credited, as was obviously done by the jury's verdict, the events detailed above ... revealed that both vessel and Ingham were in a foreign port and within a few hours time proceeded from international waters into domestic coastal waters and within less than an hour she was alongside the dock where the search took place. She could not have been both near Cat Cay and at the Florida dock on the same day unless she had made a voyage from outside the United States to the Florida dock. Just as did the jury, the Judge on the suppression motion could add up all these factors to conclude that the officers had ample grounds for believing that entry from international waters had just been

made. . . . For such a vessel under such a situation they need not be searching for anything more noxious than a bottle of Chanel No. 5.[79]

Example: On April 22, Drug Enforcement Administration (DEA) agent Fitzgerald received a telephone call from Dufresne, a Pan American World Airways pilot. Dufresne told Fitzgerald that he had information leading him to suspect that one Brennan "was going to engage in some smuggling activities into the Melbourne Regional Airport." Over the next several days Dufresne provided information that he had obtained from Brennan and matters of his own knowledge concerning Brennan, as well as some of his own inferences regarding the anticipated activity.

On April 28, Dufresne called Fitzgerald and reported that he had recently talked to Brennan by phone and inferred from the conversation that the smuggling trip would take place within the next two or three weeks. Dufresne stated to Fitzgerald that this inference was based on (1) Brennan's purchase of a plane and insurance for it in the amount of $95,000 at a time when he, Dufresne, had personal knowledge that Brennan was experiencing great difficulty in meeting the day-to-day living expenses of his family, and (2) Brennan's request that Dufresne try to locate a secondhand loran, an over water navigational device used by ships and aircraft.

On May 17, at approximately 11:00 a.m., Fitzgerald received word that Brennan's aircraft had taken off from Melbourne and was headed in a southwesterly direction. Radar contact with the plane was lost when it entered the air traffic pattern over Miami. Two Customs officers were dispatched to the Melbourne airport. At approximately 1:30 a.m. on the morning of May 18, the Customs officers sighted an aircraft taxiing toward the hangar normally occupied by the Brennan plane and identified it as Brennan's. The plane taxied into the hangar, at which time the agents drove their van to another location near the hangar.

One officer entered the hangar through its partially open door and approached the plane. Observing through the window of the airplane a number of tightly wrapped packages characteristically used to transport marijuana, he conducted a full search of the plane, which disclosed 60 packages of marijuana totaling approximately 1600 pounds and one bundle containing 466 grams of hashish.

Analysis: Was this a valid border search? If so, it must have taken place at the border or its functional equivalent. Since Melbourne airport is not at the border, the Customs officers must have had a reasonable certainty of border nexus (border crossing or contact with that which has crossed the border) in order for this to have been a search at the FEB. What facts did the officers possess which would make them reasonably certain Brennan's aircraft had crossed the border?

79 *United States v. Ingham*, 502 F.2d 1287 (5th Cir. 1974). See also, *United States v. Bennett*, 363 F.3d 947 (9th Cir. 2004).

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Result: This search was not conducted at the FEB, thus it was not a border search. Note, however, that the officers' observations in combination with the prior information constituted probable cause. Since the aircraft was a "mobile conveyance," the search was nonetheless reasonable as being within a well-defined exception to the warrant requirement.[80]

Not discussed in the opinion was the issue of the hangar search. On what basis did the officers "search" the hangar, in order to do the *Carroll* doctrine search of the aircraft? As it happened, Brennan was using the hangar without authority from its owner, and thus the officer's entry into the hangar did not intrude upon any legitimate expectation of privacy by Brennan.

3.232b Inbound FEB Applications

3.232b(1) Foreign Mail
3.232b(2) Bonded Areas
3.232b(3) Bonded Shipments
3.232b(4) Foreign Trade Zones

3.232b(1) Foreign Mail

CBP and the U.S. Postal Service have agreed on certain designated places where mail coming into the United States will be placed for CBP to inspect and search. For the incoming mail items arriving from foreign, these places are the FEB.[81] CBP has such mail branches in Buffalo, Chicago, Dallas, Detroit, Honolulu, JFK New York, Los Angeles, Miami, New Jersey, San Francisco/Oakland, San Juan, Seattle, and Virgin Islands.

3.232b(2) Bonded Areas

Sometimes merchandise arrives from foreign and is placed under bond in a warehouse, where it will remain until undergoing inspection. These bonded warehouses may be near the border or a considerable distance from the border. Wherever they are located, they become the FEB. Persons who have come in contact with the (un-inspected) bonded merchandise may be border searched. As in all cases of searches at the FEB, the CBP officer must be reasonably certain that an individual has had contact with un-inspected merchandise that has crossed the border (nexus); that there has been no material change in the person or object to be searched since that nexus; and the search must take place at the first practicable point of detention following the nexus.

3.232b(3) Bonded Shipments

Merchandise often enters the United States at one port or place and is placed under Customs seal and transported to its final destination elsewhere within the country, where it will then undergo inspection. In such circumstances, the

80 *United States v. Brennan*, 538 F.2d 711 (5th Cir. 1976).
81 *United States v. Ramsey*, 431 U.S. 606 (1977).

merchandise may be border searched at its final destination (but before delivery to the addressee) as being at the FEB. By virtue of being under Customs bond at all times, there is a reasonable certainty that the merchandise has not materially changed since nexus. Moreover, the fact of being under Customs bond (seal) establishes that the merchandise has not entered "into the mainstream of domestic activities" which would otherwise preclude application of the FEB principle.[82]

3.232b(4) Foreign Trade Zones

Foreign Trade Zones (FTZ's) are areas established within the territory of the United States for the purpose of holding foreign merchandise for certain purposes without becoming subject to the Customs laws of the United States respecting duty and certain other matters.[83] As such, FTZ's are restricted sites associated with CBP ports of entry that operate to facilitate trade. Domestic and foreign merchandise may be admitted into the FTZ for operations such as storage, exhibition, assembly, manufacture and processing, without being subject to formal Customs entry procedures and payment of duties, unless and until the foreign merchandise enters Customs territory for domestic consumption.[84]

FTZ's, however, are not part of the "Customs territory" of the United States respecting foreign merchandise brought into the FTZ as long as it is for one or more of the specific purposes enumerated in the Foreign Trade Zones Act of 1934 (FTZA).[85] Foreign merchandise, then, brought into an FTZ for an authorized purpose is not subject to the Customs laws of the United States, and retains its status as foreign merchandise as fully as if it were still beyond the borders of the United States.

On the other hand, foreign merchandise brought into FTZ's for purposes other than those enumerated in the FTZA is deemed to have been introduced into the Customs territory of the United States and is fully subject to the Customs laws. Once entered (or introduced), such the merchandise loses its character as foreign merchandise.[86]

82 *United States v. Gaviria*, 805 F.2d 1108 (2d Cir. 1986); *United States v. Caminos*, 770 F.2d 361 (3rd Cir. 1985); *United States v. Sheikh*, 654 F.2d 1057 (5th Cir. 1981), *overruled on other grounds United States v. Zuniga-Salinas*, 952 F.2d 876 (5th Cir. 1992); *United States v. Gallagher*, 557 F.2d 1041 (4th Cir. 1977).

83 *Foreign Trade Zone Act of 1934*, 19 U.S.C. § 81c(a).

84 *Id.*

85 See *Nissan Motor Manufacturing Corp., USA v. United States*, 884 F.2d 1375 (Fed. Cir. 1989).

86 *Id.*

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Businesses or entities interested in taking advantage of zone benefits (the "grantee"[87]) are required to apply for and receive authority from the Foreign Trade Zone Board (the "Board"[88]) to operate FTZ's. Once the Board grants authority to establish, operate, and maintain an FTZ, the grantee may contract with another party (the "Operator"[89]) for operational running of the zone. In turn, the space within the zone may be leased to tenants or users (the "User"[90]) for the purpose of conducting trade.

CBP's primary concerns with FTZ's include: 1) controlling merchandise movement to and from the zone; 2) ensuring that all revenue is collected properly; and 3) ensuring that there is no violation of U.S. laws and regulations governing merchandise. Generally speaking, CBP officers are required to enforce Customs laws and regulations (19 U.S.C. § 1646a) and CBP officers are charged with supervising the activities within the FTZ.[91] Zone operators and users are obligated to maintain zone records through an appropriate inventory control and recordkeeping system.[92] CBP officers monitor zone activities and are specifically authorized to supervise any transaction or procedure at a zone.[93] CBP "supervision may be performed through a periodic audit of the operator's records, quantity of goods in a zone inventory, spot check of selected transactions or procedures, or review of recordkeeping, security, or conditions of storage in a zone."[94]

Merchandise admitted into the FTZ is subject to the provisions of the *Foreign Trade Zone Act of 1934*[95] and upon admission into a zone the merchandise assumes a legal status known as "zone status."[96] Merchandise found within the zone that is prohibited by law or pending a final determination of its admissibility is in the zone without zone status. Otherwise, merchandise found in the zone falls into one of four categories.

87 Defined in 19 U.S.C. § 81a(h) as "a corporation applying for the right to establish, operate, and maintain a foreign-trade zone."
88 Defined in 19 U.S.C. § 81a(b) as "the Board which is hereby established to carry out the provisions of this Act [19 U.S.C. §§ 81a et seq.]. The Board shall consist of the Secretary of Commerce, who shall be the chairman and executive officer of the Board, and the Secretary of the Treasury."
89 Defined in 19 C.F.R. § 146.1(b) as a "corporation, partnership, or person that operates a zone or subzone under the terms of an agreement with the zone grantee. Where used in this part, the term 'operator' also applies to a 'grantee' that operates its own zone."
90 Defined in 19 C.F.R. § 146.1(b) as "a person or firm using a zone or subzone for storage, handling, or processing of merchandise."
91 19 C.F.R. § 146.3.
92 19 C.F.R. § 146.4(d).
93 19 C.F.R. § 146.3(b).
94 *Id.*
95 19 U.S.C. §§ 18a et seq.
96 Defined in 19 C.F.R. 146.1(b) as "the status of merchandise admitted to a zone, *i.e.*, nonprivileged foreign, privileged foreign, zone restricted, or domestic."

1. Privileged Foreign Status is a status assignment requested by the importer or user of the zone. Privileged Foreign Status merchandise has not been manipulated or manufactured in the zone and the classification is not changed from that assigned upon entry into the zone.[97] Hence, the user chooses to have the merchandise treated, for tariff purposes, in its condition at the time of admission to the zone. Applicants usually choose Foreign Privileged Status when the rate of the duty on a product manufactured in a zone is higher than the rate of duty on some or all of the components introduced into the zone.

2. Nonprivileged Foreign Status (NPF Status) is assigned to merchandise that has been admitted to a zone, but has been sent to Customs territory and subject to the laws and regulation of the United States affecting imported merchandise.[98] NPF Status merchandise is subject to tariff classification in accordance with its character, condition, and quantity as constructively transferred to Customs territory at the time the entry or entry/entry summary is filled with CBP.[99] This status applies to foreign merchandise properly in a zone that is not Privileged Foreign Status merchandise or Zone-Restricted merchandise.

 The user will opt for NPF Status in those situations where the merchandise is not admissible in its current form in the commerce of the United States. Specifically, the merchandise may be manipulated, marked, repackaged, or manufactured so that it may enter the stream of commerce for consumption. The clear advantage to choosing NPF Status arises when merchandise manipulated or altered within the zone changes classification, and thereby, reduces the duty amount due based on the new classification. NPF Status merchandise may also be transferred to Customs territory for warehousing, exportation, vessel or aircraft supply use, or transfer to another zone or port.

 NPF Status merchandise also includes two other types of merchandise. Waste from the manipulation or manufacture of merchandise in a zone will be considered NPF Status merchandise.[100] Certain domestic merchandise can be classified as NPF Status merchandise, as well.[101] Specifically, NPF Status merchandise includes domestic merchandise in a zone that by reason of noncompliance with Customs regulations has lost its identity as Domestic Status merchandise. In such a case, the merchandise will be treated as NPF Status merchandise and, thus, subject to Customs regulations. Title 19 C.F.R. § 146.42(c) states in pertinent part:

97 19 C.F.R. § 146.41(a).
98 19 C.F.R. § 146.42(a).
99 19 U.S.C. § 81c and 19 C.F.R. § 146.65(a)(2).
100 19 C.F.R. § 146.42(b).
101 19 C.F.R. § 146.42(c).

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> Any domestic merchandise will be considered to have lost its identity if the port director determines that it cannot be identified *positively* by a Customs officer as domestic merchandise on the basis of an *examination of the articles or consideration of any proof* that may be submitted promptly by a party-in-interest. [Emphasis added].

Therefore, such merchandise found within a FTZ will be treated as NPF Status and subject to Customs laws and regulations.

3. The third status recognized within a FTZ is Domestic Status. According to 19 C.F.R. § 146.43(a) this status applies to articles, which are:

 - "The growth, product, or manufacture of the U.S. on which all internal revenue taxes, if applicable, have been paid;
 - Previously imported and on which duty and tax has been paid; or
 - Previously entered free of duty or tax."

 Such merchandise may be admitted to the zone without an application or permit. "No application or permit is required for the manipulation, manufacture, exhibition, destruction, or *transfer* to Customs territory of domestic status merchandise."[102] [Emphasis added].

 Although Domestic Status merchandise may enter the zone without an application or permit, an appropriate inventory control must be in place to account for the merchandise.[103] Specifically, there must be a mechanism in place to quantify or identify the merchandise entering and leaving the zone. CBP recognizes several standard inventory systems.[104] "All merchandise will be recorded in a receiving report or document using a zone lot number or unique identifier."[105] Under a zone lot number system, each article receives an identification number. The unique identifier system does not require segregation of the merchandise, but operates on a first in/first out (FI/FO) basis.

 CBP does not require use of any particular method, as long as the method employed is consistently applied and accurately reflects the merchandise in the zone. According to 19 C.F.R. § 146.24(a)(2), "the inventory control and recordkeeping system for the merchandise transfers must have the capability to trace all transfers back to a zone admission under a Customs authorized inventory method." For instance, Customs Bulletin, Vol. 15, Customs Service Decision 81-67, p. 867, held that privileged domestic crude oil could be combined with non-privileged foreign crude oil within the FTZ, and each of the component

102 19 C.F.R. § 146.43(b).
103 19 C.F.R. § 146.21.
104 19 C.F.R. §§ 146.21 and 146.26.
105 19 C.F.R. § 146.22(a).

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parts could retain their respective status for Customs purposes, as long as the user and operator of the FTZ utilized an appropriate volumetric measurement system to account for the percentages incorporated in the end product. Through inspection of the zone and supervision of the process utilized by the user and operator Customs could "positively" identify the status of the products (pursuant to the standard of 19 C.F.R. § 146.42(c)). Customs found that the domestic crude oil retained its status and the system employed by the user and operator of the FTZ complied with Customs regulations.

Otherwise, merchandise found within a FTZ that cannot be positively identified as domestic merchandise will lose its status and become Non-privileged Foreign Status merchandise. "If domestic merchandise is properly in a zone, and loses its identity as domestic merchandise within the meaning of section [146.42(c)], it will be considered as foreign merchandise and will be dutiable as such."[106] Reversion to such a status will subject the merchandise to Customs laws and regulations as if they had never been in domestic status.

4. Zone Restricted Status applies to articles taken into a zone from Customs territory for the purpose of exportation, destruction, or storage.[107] Zone Restricted Status merchandise cannot return to Customs territory for domestic consumption except upon receipt of approval from the Board. Non-tax paid tobacco products may be admitted into a zone only in Zone Restricted Status.[108] Giving Zone Restricted Status to non-tax paid tobacco products prevents misuse of the FTZ. Therefore, proof of tax payment is required when moving tobacco products into and out off FTZ's.

Zone users and operators are permitted to transfer merchandise from one zone to another. Merchandise may be transferred pursuant to 19 C.F.R. §§ 146.66 and 146.68.[109] When merchandise is transferred from one zone to another, there exists an opportunity to misuse the FTZ. For instance, it is possible that merchandise may be entered into a zone with a Zone Restricted Status for export only. However, the merchandise is actually transferred to another zone under a different Status classification (e.g., NPF Status). Accordingly, Customs regulations specifically address those instances where merchandise moves from zone to zone. The concern is entering merchandise in a zone under one of the

106 Customs Bulletin, Vol. 16, Customs Service Decision 82-112, p.891, at p.894.
107 19 C.F.R. §§ 146.44(a) and (b).
108 See, Customs Bulletin, Vol. 16, Customs Service Decision 18-112.
109 19 C.F.R. § 146.1(b) states that transfer means "to take merchandise with zone status from a zone for consumption, transportation, exportation, warehousing, cartage, or lighterage, vessel supplies and equipment, admission to another zone, and like purposes."

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above stated forms, then transferring the merchandise into another zone, but without payment of appropriate duties and tax.

CBP officers may conduct administrative inspections inside a Foreign Trade Zone without a warrant and without probable cause.[110] These administrative searches must be conducted in a reasonable manner with regard to time and place and must be reasonably related to ensuring compliance with regulations governing the Foreign Trade Zones.[111] Administrative search authority does not provide any authority to search persons with the Foreign Trade Zone.

However, this does not mean that a border search involving an FTZ can never be done. Since the movement of foreign merchandise out of the FTZ would, of necessity, involve an introduction of that merchandise from outside the Customs territory, a functional equivalent of the border (FEB) circumstance might be presented. Where, for example, a CBP officer is reasonably certain that a person has had an opportunity to acquire foreign merchandise (nexus) and is reasonably certain that the person leaving the FTZ has had no opportunity to acquire domestic merchandise since that nexus, and the officer's contact with the person is the first practicable detention point upon leaving the FTZ, then such circumstances would establish the FEB. The same is true for circumstances creating the extended border (see below).

CBP officers should consult their CBP Associate/Assistant Chief Counsel regarding matters pertaining to any enforcement actions within Foreign Trade Zones.

3.232c FEB - Outbound

Persons and objects leaving the country can be searched when CBP is searching at the functional equivalent of the border (FEB) outbound.[112]
The factors that create an outbound functional equivalent of the border are:

110 *United States v. 4,432 Mastercases of Cigarettes*, 448 F.3d 1168 (9th Cir. 2006).
111 See 19 C.F.R. §§ 146.3, 146.10.
112 See *California Bankers Ass'n v. Schultz,* 416 U.S. 21, 63 (1974) (dicta)("those entering and leaving the country may be examined as to their belongings and effects, all without violating the Fourth Amendment."); *United States v. Seljan,* 547 F.3d 993 (9th Cir. 2008); *United States v. Abbouchi,* 502 F.3d 850 (9th Cir. 2007) *cert. denied* 128 S.Ct. 1462 (2008); *United States v. Odutayo*, 406 F.3d 386 (5th Cir. 2005); *United States v. Boumelhem*, 339 F.3d 414 (6th Cir. 2003); *United States v. Oriakhi*, 57 F.3d 1290 (4th Cir. 1995); *United States v. Ezeiruaku*, 936 F.2d 136 (3d Cir. 1991); *United States v. Berisha*, 925 F.2d 791 (5th Cir. 1991); *United States v. Udofot*, 711 F.2d 831 (8th Cir. 1983); *United States v. Duncan*, 693 F.2d 971, 977 (9th Cir. 1982) ("a person leaving the United States may be stopped and searched, without probable cause or any suspicion, pursuant to border search principles"); *United States v. Ajlouny,* 629 F.2d 830 (2d Cir. 1980); *United States v. Stanley*, 545 F.2d 661 (9th Cir. 1976).

1. Reasonable certainty that:

 a. There will be border NEXUS[113]; and

 b. There will be no material change before border nexus, i.e., any merchandise present now will be present at the time of border nexus;[114]

2. The seizure occurs at the last practicable detention point before border nexus.[115]

For example, Customs inspectors were examining luggage at LaGuardia Airport and discovered $501,818 hidden inside toys in duffel bags checked through to Cali, Colombia. The search of the bags, which were checked through to a foreign destination, was held to be a lawful outbound border search at the "functional equivalent of the border."[116] Similarly a cargo container scheduled to be shipped abroad that is in a CBP controlled area at a Brooklyn pier is at the FEB (outbound).[117] In addition, the United Parcel Service sorting hub in Louisville, Kentucky operates as the FEB for outbound packages because it is the last practical detention point for CBP to conduct an inspection, even though the package might be routed through a domestic airport on its way across the border.[118] Courts have found reasonable outbound searches of persons boarding

113 See *United States v. Udofot*, 711 F.2d 831, 840 (8th Cir. 1983) ("By checking his luggage through to Calabar, Nigeria, Udofot made it a virtual certainty that a border crossing would take place . . ."); *United States v. Ajlouny,* 629 F.2d 830, 834-35 (2d 1980) ("the imminent crossing of the border alone makes the search of the container reasonable.").

114 See *United States v. Udofot,* 711 F.2d 831, 840 (8th Cir. 1983) (by checking luggage to foreign destination "*Udofot* made it a virtual certainty . . . that nothing about the object of the search would change in the course of crossing the border.") *United States v. Stanley*, 545 F.2d 661, 667 (9th Cir. 1976) ("a search in customs waters is a functional border search when the vessel has crossed from territorial waters of the United States and there is sufficient evidence to convince a fact finder, to a reasonable certainty that any contraband which might be found at the time of the search was also aboard at the border crossing.").

115 See *United States v. Abbouchi*, 502 F.3d 850 (9th Cir. 2007) *cert. denied* 128 S.Ct. 1462 (2008) ("The [UPS hub] represents the last practicable opportunity for Customs officers to inspect international packages before UPS places them into sealed containers for departure from the United States."); *United States v. Duncan,* 693 F.2d 971, 977 (9th Cir. 1982) ("It is enough that the passenger manifest a definite commitment to leave the United States and that the search occur in reasonable temporal and spatial proximity to the departure.").

116 *United States v. Bareno-Burgos*, 739 F. Supp. 772 (E.D. N.Y. 1990).

117 *United States v. Ajlouny*, 629 F.2d 830 (2d Cir. 1980). See also *United States v. Boumelhem*, 393 F.3d 414 (6th Cir. 2003); *United States v. Oriakhi*, 57 F.3d 1290 (4th Cir. 1995).

118 *United States v. Abbouchi*, 502 F.3d 850 (9th Cir. 2007), *cert. denied* 128

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international flights,[119] luggage on international flights,[120] vessels in customs waters,[121] and packages being shipped through FedEx.[122]

3.233 The Extended Border

Under certain circumstances, a CBP officer may conduct a "border search" even after a person or object has left the border or FEB and entered the "mainstream of domestic activity." The critical factors that permit the border or FEB circumstance to be extended are the basic border nexus conditions (border nexus and no material change since the border nexus) plus the existence of a reasonable suspicion of criminal activity (the courts impose this second requirement in lieu of the first practicable detention point).[123]

Thus, the factors that create an extended border are:[124]

1. Reasonable certainty that there has been border NEXUS;

2. Reasonable certainty that there has been no material change since border nexus (i.e., any merchandise present at the time of the search was present at time of border nexus);

3. Reasonable suspicion of criminal activity.[125]

An extended border search is permitted when these elements are present even though the search is purposely delayed or an earlier search at the border or FEB has already been conducted.[126] The extended border search rationale is usually relied upon for one of two purposes.

First, officers armed with a reasonable suspicion of criminal activity may wish to conduct surveillance of a person, conveyance, or object to its destination in order to identify other persons involved in criminal activity.

S.Ct. 1462 (2008).
119 See *United States v. Berisha,* 925 F.2d 791 (5th Cir. 1991); *United States v. Duncan*, 693 F.2d 971 (9th Cir. 1982).
120 See *United States v. Ezeiruaku*, 936 F.2d 136 (3d 1991); *United States v. Udofot*, 711 F.2d 831 (8th Cir. 1983).
121 See *United States v. Stanley,* 545 F.2d 661 (9th Cir. 1976).
122 See *United States v. Seljan*, 547 F.3d 993 (9th Cir. 2008).
123 *United States v. Garcia*, 672 F.2d 1349 (11th Cir. 1982).
124 See *United States v. Cardenas*, 9 F.3d 1139, 1148 (5th Cir. 1993).
125 *United States v. Sahanaja*, 430 F.3d 1049 (9th Cir. 2005) (odor of imported USPS package, label discrepancy, inquiries by non-addressees and nausea of those handling parcel sufficient to equate to reasonable suspicion of criminal activity).
126 See*, e.g., United States v. Perez Rivera*, 247 F. Supp. 2d 108 (D.P.R. 2003).

Second, officers might rely upon the extended border search rationale to authorize an additional or further search where reasonable suspicion of criminal activity is developed after a person has left the border or the FEB.[127]

As with searches at the FEB, there must have been a lack of time or opportunity for the object to have changed materially between the time of border nexus and the time of the search. This means that there must be a substantial likelihood that any merchandise present at the time of an anticipated search was present on the person, conveyance, or object when it crossed the border. Ordinarily, this requirement is met by continuous surveillance from the border crossing to the time of the search. However, even with gaps in surveillance, officers may demonstrate by other facts that the merchandise was present at the time of the border crossing. For example, the time elapsed during a gap in surveillance may have been so brief that it provided no reasonable opportunity for the object to have changed materially,[128] or the suspect may be in a location where it is unlikely that the suspect could have obtained additional merchandise.[129]

An extended border search may occur in an outbound context as long as the search occurs in the United States and all three conditions are met.[130]

Example: Caicedo arrived at the New Orleans International Airport on September 10, traveling on a round trip ticket from Bogota, Colombia to Houston, Texas. He passed through the primary U.S. Customs inspection station around 4:30 P.M. and then moved on to the secondary inspection area. He appeared to be about thirty years old, and well dressed; was traveling alone, carrying only one suitcase, and had paid for his ticket in cash. Since Caicedo exhibited the characteristics of an internal carrier/drug smuggler, he was questioned in detail.

127 See *United States v. McGinnis*, 247 Fed. Appx. 589 (6th Cir. 2007). In *McGinnis*, the defendant was inspected and released after arriving on an international flight. Her traveling companion was subsequently found to be transporting unreported currency. Thirty-five minutes later the defendant was located in the terminal and returned to the inspection area where she was subjected to a lawful extended border search in which unreported currency was found.

128 See *United States v. Cardenas*, 9 F.3d 1139 (5th Cir. 1993) ("continuous surveillance is not a requirement of an extended border search"). See also *United States v. Yang*, 286 F.3d 940 (7th cir. 2002); *United States v. Caicedo-Guarnizo*, 723 F.2d 1420 (9th Cir. 1984); *United States v. Mejias*, 425 F.2d 1190 (9th Cir. 1971).

129 See *McGinnis*, 595.

130 *United States v. Cardona*, 769 F.2d 625 (9th Cir. 1985)(outbound parcel could be searched in California, even though FedEx would send it to Miami before it left the country, since government has reasonable suspicion of criminal activity and parcel was committed to foreign; photocopying checks not subject to seizure was unjustified).

He told the inspector that he was on vacation, that he planned to meet a friend at the Houston Marriott Hotel, and that he intended to buy more clothes in Houston. He was not carrying a wallet; instead, he carried $1200 in cash in his airline ticket folder. On the strength of the inspector's suspicions, Caicedo was escorted to another room for further interrogation. He stated that he was a self-employed economist; however, he was unable to give a satisfactory answer when asked to explain the theory of supply and demand. The inspectors also noted that his airfare was equivalent to about two months of Caicedo's stated income. Moreover, he was carrying a packet of stomach tablets, a practice typical of internal drug smugglers. Caicedo was asked if he would consent to an X-ray examination; he replied that he would, but that he would file a complaint afterwards. Because of the lack of X-ray facilities in the inspection area, Caicedo was released about fifteen minutes before the departure of his Houston flight, or about 5:15 P.M. The inspectors studied a copy of Caicedo's passport and concluded that it might be falsified and contacted Houston authorities to request that they keep Caicedo under surveillance.

Caicedo arrived at Houston international Airport at about 6:30 P.M., where two U.S. Customs officers maintained constant surveillance. He bought a ticket to Los Angeles International Airport (LAX) and boarded the flight at 7:55 P.M. The Houston officers determined that there were no reservations for either Caicedo or his alleged friend at two local Marriott Hotels and then alerted officers at LAX.

Caicedo arrived at LAX at about 9:40 P.M., or almost six and one-half hours after being released from his initial interrogation in New Orleans. He was immediately confronted by two Customs officers, who escorted him a short distance to a secondary inspection area. Eventually, he was taken to a local hospital where, pursuant to his consent, an x-ray was taken. Based on the results of the x-ray Caicedo was arrested and over the next three days passed eighty-five oval shaped balloons containing about 576.2 grams of cocaine.

Analysis: Did the Customs officers have a reasonable certainty of border nexus? Were they reasonably certain that there was a lack of opportunity for Caicedo to materially change (i.e., reasonable certainty that whatever he had in LAX was present at the time of border nexus)? Did the officers have a reasonable suspicion of criminal activity? Was the seizure in LAX a valid border detention?

Result: In finding that the detention took place at the extended border, and that the subsequent consent x-ray was therefore lawful, the court stated:

> The validity of such a search depends on whether the fact finder, viewing the totality of the circumstances, is reasonably certain that the suspected smuggler did not acquire the contraband after crossing the border. . . . Some of the circumstances that the fact finder should consider include the time and distance between the border crossing and the search, and the continuity of surveillance over the suspected smuggler. This circuit has upheld an extended border search of an automobile seven hours and 105 miles from the border. . . . It has also upheld a search fifteen hours and twenty miles from the border. . . .

> Furthermore, an extended border search can be valid even where the suspect was already searched at the initial border crossing. . . . We do not find the time and distance intervals between New Orleans and Los Angeles, or the interruptions in the surveillance of appellant to be significant, inasmuch as the District Court was able to find with reasonable certainty that appellant had the contraband on his person at the time he entered the country. The facts of this case amply support that conclusion.[131]

Example: Government agents received a tip that an orange colored 1969 International flat bed truck would enter the United States from Mexico at Laredo, Texas and would be carrying approximately 600 pounds of marijuana in a secret compartment. Two days later the truck crossed the border exactly as predicted. It was not inspected at that time and was allowed in the country. By the time surveillance began, thirty-five minutes had passed before the truck was found parked at a Laredo cafe four miles from the border. The surveillance officers were able to determine that the driver had entered the cafe, ordered a meal, eaten, and was leaving the cafe when they first arrived. The truck was then kept under constant surveillance for the next six days, a period during which it traveled more than three hundred miles from place to place in south Texas until Customs officers stopped it. The subsequent search produced 628 pounds of marijuana.

Analysis: Did the Customs officers have a reasonable certainty of border nexus? Were they reasonably certain that the truck had not materially changed from the time of nexus to the point of the search? Did they have a reasonable suspicion of criminal activity?

Result: Although the time and distance involved were great, the fact of constant surveillance nullifies these two factors. The 35-minute break in surveillance given the events that took place in this period was too brief to be of any consequence. The surveillance assured the likelihood that the truck was in the same condition as it was at the time of border nexus. The tip provided reasonable suspicion. The search was therefore a search at the extended border.[132]

3.300 Preclearance in Foreign Countries[133]

Section § 1629 of Title 19 authorizes CBP officers to be stationed in a foreign country for the purpose of examining persons and merchandise prior to their arrival in the United States. All matters of inspection, search, seizure, or arrest will be governed by any treaty or agreement between the United States and the

131 *United States v. Caicedo-Guarnizo*, 723 F.2d 1420 (9th Cir. 1984).
132 *United States v. Martinez*, 481 F.2d 214 (5th Cir. 1973).
133 See 19 C.F.R. § 24.18(a) which defines preclearance as "the tentative examination and inspection of air travelers and their baggage at foreign places where U.S. Customs personnel are stationed for that purpose."

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foreign government or any law that may apply which has been adopted by the foreign country. The Secretary of the Treasury (now, the Secretary of Homeland Security) is authorized to extend U.S. Customs laws to foreign locations with the consent of the country concerned. Any search, seizure, or arrest in the foreign country must also be reasonable under the Fourth Amendment unless applied to a person who has no substantial connection to the United States and is thus not protected by the Fourth Amendment.[134]

The fact that a search takes place at a preclearance facility does not prevent a subsequent search at the point of entry (border or FEB) into the United States or one conducted after entry under extended border principles. Such secondary searches are authorized by law and require no suspicion of illegal activities.[135]

CBP has nine preclearance offices in Canada (Calgary, Edmonton, Halifax, Montreal, Ottawa, Toronto, Vancouver, Victoria, Winnipeg), four offices in the Caribbean (Aruba, Bermuda, Freeport, Nassau), and two offices in Ireland (Dublin and Shannon).[136]

3.400 Border Search and Seizure of Persons

3.410 Use of Force at the Border
3.420 Personal Searches and Seizures
3.430 Personal Searches and Seizures Summarized
3.440 Restrictions on Duty-Free Entry and Expedited Customs Examinations

As discussed above, in border search situations there is no requirement for particularized suspicion in order to seize a person or thing to conduct a border examination. The primary statutory authority for Customs and Border Protection officers to search and seize (detain) persons at the border, or its functional equivalent (FEB), is found at 19 U.S.C. § 1582. Similar authority is found in 8 U.S.C. § 1225 for purposes of detention of persons to determine their admissibility into the United States.

3.410 Use of Force at the Border

Clearly, CBP officers may, incident to their inspectional authority, take reasonable steps to carry out their inspectional duties, such as having travelers stand in line, or instructing them where to sit or stand while being detained for CBP clearance. Further, CBP officers have the authority to use reasonable force—force that is both reasonable and necessary for the purpose—to overcome resistance to a lawful search. Apart from such restraint as may be necessary to conduct personal searches, physical restraint of the person during a CBP detention is permissible only where a CBP officer reasonably believes such is

134 *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).
135 19 U.S.C. § 1467; *United States v. Santiago*, 837 F.2d 1545 (11th Cir. 1988).
136 This list is current as of July 28, 2009.

necessary for self-protection, to prevent destruction of evidence, or to prevent the person from fleeing.[137]

See Chapter 5 for a more detailed discussion on use of force.

3.420 Personal Searches and Seizures

Removal of an outer garment, such as a sport jacket or suit coat, or the examination of a handbag are not considered searches of the person and are treated as searches of containers. By the same token, a traveler can be asked to remove the contents of his pockets as part of a routine search, but any further search of the clothing or body of the person will be treated as a personal search.[138]

The *Personal Search Handbook* (PSH)[139] governs all aspects of personal searches conducted as part of a border inspection. By thoroughly understanding the principles and procedures set forth in the PSH, and by meticulously adhering to them, the CBP officer is benefited in two significant ways. First, the conduct of the search will be both professional and appropriate. Second, the officer's conduct will be "at the direction of a supervisor," which entitles him to certain benefits in the unlikely event of a personal lawsuit.

See Chapter Seventeen, Personal Lawsuits.

Important personal search principles are summarized as follows:

1. Immediate Patdown is defined as a "search necessary to ensure officer safety."[140] To conduct an immediate patdown, a CBP officer or agent must have some or mere suspicion that the person is armed. Supervisory approval is not needed to conduct the immediate patdown. In addition, there are no gender limitations in conducting the immediate patdown.[141] For example, a male officer may conduct an immediate patdown of a female traveler.

137 Chief Counsel Memo, En-89-1213; dated August 11, 1989. Recognizing the unique nature of the border environment, courts have held that "an individual is not arrested but merely detained when, at the border, he is asked to exit his vehicle, briefly handcuffed while escorted to the security office, uncuffed, patted down, and required to wait while his vehicle is searched." *United States v. Nava*, 363 F.3d 942 (9th Cir. 2004), *cert. denied, Nava v. United States*, 543 U.S. 973 (2004); *United States v. Bravo*, 295 F.3d 1002 (9th Cir. 2002).
138 "Personal Search Handbook," CIS HB 3300-04B, Office of Field Operations, CBP, (July 2004), 8.
139 "Personal Search Handbook," CIS HB 3300-04B, Office of Field Operations, CBP, (July 2004).
140 *Id.,* 15.
141 *Id.*

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2. Patdown Search is defined as "a law enforcement tool used to search for merchandise (including contraband) . . . [or] material evidence hidden on a person's body."[142] A CBP officer or agent must be able to identify one articulable fact suggesting that there is merchandise, contraband or material evidence on the person. Supervisory approval is required prior to the patdown search.[143] Both the searching officer and a witness must be the same gender as the person being searched.[144] A patdown search must precede more intrusive searches.[145]

3. Partial Body Search is defined as the "removal of some of the clothing by a person to recover material evidence reasonably suspected to be concealed on the body."[146] A partial body search may only be conducted when an officer can articulate reasonable suspicion that material evidence is being concealed. Supervisory approval is required prior to conducting a partial body search.[147] Both the searching officer and a witness must be the same gender as the person being searched.[148]

4. Medical Exams include three specific types of searches: (1) X-rays, which are defined as the "use of medical X-ray by medical personnel to determine the presence of material evidence within the body;"[149] (2) Body Cavity searches, which are defined as "any visual or physical intrusion into the rectal or vaginal cavity;"[150] and (3) Monitored Bowel Movements, which are defined as "the detention of a person for the purpose of determining whether contraband or other material evidence is concealed in the alimentary canal."[151] All of these medical exams require that the CBP officer or agent articulate reasonable suspicion that material evidence may be concealed inside the body. The Port Director must give approval prior to the medical exam being conducted. A two-officer team will transport the subject of the search to an approved medical facility and at least one officer of the transport team must be the same gender as the person to be searched.[152]

3.500 Border Searches and Seizures of Containers

3.510 Outer Garments, Suit Coats, Jackets, etc.
3.520 Baggage
3.530 Envelopes

142 *Id.*, 16.
143 *Id.*, 5.
144 *Id.*, 6.
145 *Id.*, 17.
146 *Id.*,19.
147 *Id.*
148 *Id.*, 6.
149 *Id., 27.*
150 *Id.*, 35.
151 *Id.*
152 *Id.*, 23.

3.540 Customs Searches of Foreign Mail
3.550 Cargo
3.560 Beasts
3.570 Corpses and their Coffins

Section 1461 of Title 19 authorizes CBP to search containers arriving at the border from contiguous countries. Authority to search containers at the FEB or extended border is found in 19 U.S.C. § 1581. Merchandise discovered during the search that is reasonably believed to have been entered without payment of duty or otherwise entered contrary to law may be seized and forfeited. Moreover, every vessel, vehicle, aircraft or "other thing" that is used, aids or facilitates the unlawful importation may be seized and forfeited.[153]

Based on these authorities, suspicionless container searches routinely take place at the border. Some circuits have held that destructive (sometimes referred to as non-routine) searches, *i.e.*, drilling into containers, require reasonable suspicion that hidden merchandise is in the container to be reasonable under the Fourth Amendment.[154] Some examination techniques, such as using a drill to probe certain containers or conveyances, are restricted by CBP policy. [155]

The law concerning searches using drills and other devices remains in flux due to a 2004 U.S. Supreme Court decision, *United States v. Flores-Montano.*[156] In this case, CBP officers at a port of entry conducted a thorough search of a vehicle, which included tapping on the gas tank. Because the tank sounded solid, CBP requested that a mechanic (who was under contract with the agency) come to the port and remove the gas tank. The mechanic did remove the gas tank and CBP discovered 37 kilograms of marijuana concealed inside. Based on the lesser expectation of privacy at the border and the fact that the technique used did not cause any permanent damage to the safety or operation of the vehicle, the Court held "that the Government's authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank."[157]

Due to the contradictory circuit court opinions on the use of drills during a border search (pre and post *Flores-Montano)*[158], officers and agents should

153 19 U.S.C. § 1595a.
154 See *United States v. Rivas*, 157 F.3d 364 (5th Cir. 1998); *United States v. Robles*, 45 F.3d 1 (1st Cir. 1995); *United States v. Carreon*, 872 F.2d 1436 (10th Cir. 1989).
155 Customs Directive No. 3340-019A, "Use of Drills to Inspect Conveyances and Containers" (2004).
156 *United States v. Flores-Montano*, 541 U.S. 149 (2004).
157 *Id.*, at 155.
158 See *United States v. Chaudhry*, 424 F.3d 1051 (9th Cir. 2005) (holding that reasonable suspicion not required for use of a drill during border examination of container under *Flores-Montano*); *United States v. Nieves*, 609 F.2d 642 (2d Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980) (holding no elevated level of suspicion

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consult their local Associate or Assistant Chief Counsel for guidance on such searches in a particular jurisdiction.[159]

3.510 Outer Garments, Suit Coats, Jackets, etc.

Outer garments, suit coats, jackets, etc. are containers that can be searched without any suspicion.[160]

3.520 Baggage

Section 1496 of Title 19 authorizes the examination of baggage of any person "arriving in the United States" without any suspicion.[161] "Arriving" includes intermediate stops of commercial airplanes regardless of the passenger's final destination. The term also includes involuntary arrivals, such as an unscheduled stop of an aircraft due to adverse weather, even when the passenger has no intent to unload. [162]

3.530 Cargo

CBP is authorized to retain custody of imported cargo until it has been inspected and found to be correctly invoiced pursuant to 19 U.S.C. § 1499. Removing goods from CBP custody or breaking seals prior to release by CBP is a crime defined in 18 U.S.C. § 549.

3.540 Beasts

The search of beasts, e.g., horses, is specifically authorized by 19 U.S.C. § 482.

3.550 Corpses and their Coffins

Corpses and their coffins are exempt from payment of duty under General Note 3(e)(i)[163] of the Harmonized Tariff Schedule of the United States, the HTSUS, but

required to use a drill to probe a shoe); *United States v. Lawson*, 374 F.Supp. 2d 513 (E.D. Ky. 2005), *aff'd, 461 F.3d 697 (6th Cir. 2006)* (exploratory cutting and drilling of luggage requires no particularized level of suspicion); but see *United States v. Rivas*, 157 F.3d 364 (5th Cir. 1998) (pre-*Flores-Montano* case holding reasonable suspicion required to use a drill to inspect a car carrier); *United States v. Robles*, 45 F.3d 1 (1st Cir. 1995); *United States v. Carreon*, 872 F.2d 1436 (10th Cir. 1989); *United States v. Villabona-Garnica*, 63 F.3d 1051 (11th Cir. 1995) (holding officers had reasonable suspicion to conduct searches disassembling merchandise or using drills).

159 See also discussion at Section 3.710.

160 "Personal Search Handbook," CIS HB 3300-04B, Office of Field Operations, CBP, (July 2004), 8.

161 See discussion at Sections 3.600 and 3.900.

162 See *United States v. McKenzie*, 818 F.2d 115 (1st Cir. 1987).

163 Per the 2009 HTSUS. See www.usitc.gov for updated HTSUS information.

this does not restrict CBP border search authority. Officers should be considerate of family members when it is deemed necessary to conduct searches of corpses and their coffins.

3.600 Border Searches of Information

3.610 Documents and Papers
3.620 Electronic Devices
3.630 Specific Types of Information

Border searches and seizures of information fall within the general border search authority and thus are exempt from the general Fourth Amendment requirements of a warrant or probable cause. Therefore, authorized government officers who are performing searches at the border may initially seize and search all sources of information. This initial border search and seizure may be reasonably done without any individualized suspicion.

Once the search and seizure of information extends beyond the initial border search, however, the requirements for continuing to seize and search are not well defined by the courts. The U.S. Supreme Court in *Flores-Montano*, made clear that border searches of property are entirely different from border searches of people.

Following is a discussion of the specific legal and policy requirements for performing border searches of information in both paper and electronic form.

3.610 Documents and Papers

Many courts have considered CBP's examination of documents and papers during a border search. In all of these cases, the courts did not question that the examination of documents discovered during a border search was reasonable, even absent individualized suspicion.[164]

CBP policy provides specific and detailed guidance for border searches of documents and papers discovered during a border inspection. For example, if a CBP officer or agent wishes to detain documents discovered during a border search in order to receive subject matter assistance in determining if the information is relevant to the laws enforced or administered by CBP, the officer

164 See *United States v. Seljan*, 547 F.3d 993 (9th Cir. 2008), *cert. denied* 2009 U.S. LEXIS 1336 (2009) (search of a FedEx package and the opening of an envelope containing personal correspondence, reasonable during a border search); *United States v. Abbouchi*, 502 F.3d 850 (9th Cir. 2007) (reasonable border search of a FedEx package revealing fraudulent documents); *United States v. Gurr*, 471 F.3d 144 (D.C. Cir. 2006) (reasonable border search of luggage revealed financial documents); *United States v. Tsai*, 282 F.3d 690 (9th Cir. 2002) (reasonable border search of briefcase and its contents); *United States v. Grayson*, 597 F.2d 1225 (9th Cir. 1979) (reasonable border search of papers in shirt pocket).

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or agent would need to articulate reasonable suspicion of activities in violation of the laws enforced by CBP.[165]

For further guidance on border searches of documents, please see CBP Policy, "Policy Regarding Border Search of Information" (July 16, 2008).

3.620 Electronic Devices

As with documents and papers, CBP officers may conduct an initial border search of electronic devices[166] absent individualized suspicion.[167] However, as with border searches and seizures of documents and papers, if a CBP officer were to engage in a border search in a particularly offensive manner or in a way that caused damage to the electronic device, then reasonable suspicion may be required to support the search. CBP has taken steps to limit certain borders searches and seizures of electronic devices that extend beyond the initial border search. For example, if a CBP officer or agent wishes to detain an electronic device in order to receive subject matter assistance in determining if the information contained in the device is relevant to the laws enforced or administered by CBP, then the officer or agent would need to articulate reasonable suspicion of activities in violation of the laws enforced by CBP.[168]

165 CBP Policy, "Policy Regarding Border Search of Information" (July 16, 2008).
166 CBP defines "electronic device" to "include[] any device[] that may contain information, such as computers, disks, drives, tapes, mobile phones and other communication devices, cameras, music and other media players, and any other electronic or digital devices." CBP Directive 3340-049, "Border Search of Electronic Devices Containing Information" (August 20, 2009).
167 See *United States v. Arnold*, 533 F.3d 1003 (9th Cir. 2008) *cert. denied*, 129 S.Ct. 1312 (2009) (examination of electronic contents of laptop without reasonable suspicion was reasonable during border search); *United States v. Hilliard*, 289 Fed. Appx. 239 (9th Cir. 2008) (based on *Arnold* decision, no reasonable suspicion necessary to border search laptop); *United States v. Romm,* 455 F.3d 990 (9th Cir. 2006) (border search of laptop was reasonable); *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005) (border search of video camera, computer and 75 disks was reasonable); *United States v. McAuley*, 563 F.Supp.2d 672 (W.D. Tx. 2008) (border search of laptop and external hard drives does not require reasonable suspicion. But see, *United States v. Irving*, 452 F.3d 110 (2d Cir. 2006) (border search of a disposable camera and two computer disks were based on reasonable suspicion; court declined to rule on "routine" versus "non-routine" border searches of these items because reasonable suspicion was already present); *United States v. Roberts*, 274 F.3d 1007 (5th Cir. 2001) (outbound border search of computer and six disks were based on reasonable suspicion).
168 See CBP Directive 3340-0049, "Border Search of Electronic Devices Containing Information," (August 20, 2009).

As with any other electronic device, mobile telephones and pagers can be physically inspected during a border search.[169] Moreover, since "clone phones" (mobile telephones that have been modified to permit billing to a number not assigned to the user) are prohibited,[170] CBP may want to examine mobile telephones specifically to determine whether they are legitimate.

The question that naturally follows is whether the telephone can be answered by an officer should it ring during such an examination. There is no reasonable expectation on the part of a caller that only the person with whom he wishes to speak will answer the phone.[171] Similarly, because the phone is in the lawful custody and control of a CBP officer, a traveler cannot have any reasonable expectation that the officer would not answer it if it rings. This is analogous to the situation where officers executing a search warrant may lawfully answer a ringing telephone in the premises being searched.[172] See Chapter Twelve, Electronic Surveillance, for a discussion of alternative authorities to search pagers and similar devices.

For further guidance on border searches of electronic devices, please see CBP Directive 3340-049, "Border Search of Electronic Devices Containing Information," (August 20, 2009).

3.630 Specific Types of Information

3.631 Attorney Client Privilege and the Work Product Rule
3.632 Seditious Materials
3.633 Pornographic Materials
3.634 Envelopes
3.635 International Mail

3.631 Attorney-Client Privilege and the Work Product Rule

Occasionally, an attorney will claim that the "attorney-client privilege"[173] or the "work product rule"[174] prevents the search of documents, papers or electronic devices in his or her possession at the border. In some limited circumstances,

169 CBP Policy, "Policy Regarding Border Search of Information" (July 16, 2008).
170 18 U.S.C. § 1029.
171 See, *United States v. Meriwether*, 917 F.2d 955 (6th Cir. 1990).
172 See, *e.g., United States v. Stiver*, 9 F.3d 298 (3d Cir. 1993); *United States v. Passarella*, 788 F.2d 377 (6th Cir. 1986); *United States v. Ordonez*, 737 F.2d 793 (9th Cir. 1984); *United States v. Vadino*, 680 F.2d 1329 (11th Cir. 1982); *United States v. Camagniolo*, 592 F.2d 852 (5th Cir. 1979); *United States v. Ferrone*, 438 F.2d 381 (3d Cir. 1971).
173 "Attorney client privilege" is a privilege that "protects communications between attorney and client made for purpose of furnishing or obtaining professional legal advice or assistance." Black's Law Dictionary, 6th edition, 129.
174 "Work product" materials include "any notes, working papers, memoranda or similar materials prepared by an attorney in anticipation of litigation" and are "protected from discovery." Black's Law Dictionary, 6th Ed., 1606.

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these privileges will prevent government officers from searching documents (paper or electronic) in an attorney's possession during a border inspection. Not all documents in an attorney's possession, however, are protected by these privileges. And even as to documents that are legally privileged, CBP officers or agents may conduct a limited "scan" of the documents to ensure that contraband or other prohibited materials are not included in the contents of the document. When such claims are made, careful review of agency policies governing border searches of information and consultation with the local CBP Assistant or Associate Chief Counsel are recommended.[175]

3.632 Seditious Materials

The importation of matter advocating or urging treason or insurrection against the United States, or containing any threat to take the life of or inflict bodily harm upon any person in the United States is prohibited by 19 U.S.C. § 1305.

Seditious matter is a printed or graphic exhortation to the reader that encourages or promotes *imminent* acts of armed or other violence against constituted government and military authorities and institutions, or disruption of utility and similar public services, by specifically suggested acts of vandalism, arson and the like; and subversion of members of military and associated organizations of the defense establishment.[176]

Prohibited seditious matter does *not* include abstract teaching that promotes violence and other illegal acts. Rather, prohibited materials are those directed to inciting or producing imminent lawless action and which are likely to incite or produce such action.[177]

3.633 Obscene Materials

CBP officers conducting border searches of baggage, cargo, and sources of information are to seize all material that they have probable cause to believe is obscene, a violation of 19 U.S.C. § 1305. CBP has defined "obscene" materials to include, but not be limited to:[178]

1. "Material depicting persons appearing to be under the age of 18 engaged in sexual intercourse, masturbation, sexual violence, or lascivious exhibition of the genitals or pubic area;

175 See CBP Policy, "Policy Regarding Border Search of Information" (July 16, 2008) and CBP Directive 3340-049, "Border Search of Electronic Devices Containing Information," (August 20, 2009).
176 Customs Directive, 2210-001A, "Restrictions on Importation of Seditious Matter" (July 27, 2001).
177 *Id.*
178 CBP Directive, 4410-001B, "Guidelines for Detention and Seizures of Pornographic Materials," (June 28, 2004).

2. Material depicting persons of any age engaged in sexual conduct with animals (bestiality);

3. Material depicting persons engaged in sadomasochism or other forms of sexual violence;

4. Material depicting persons engaged in sexual activity involving excrement or excretory functions;

5. Material depicting explicit sexual activity between adults (both homosexual and heterosexual). Note that depictions of explicit heterosexual or homosexual conduct without the degree of deviance set forth in other subsections may not necessarily be obscene, depending upon the community standards;

6. Material depicting nudity where, to arouse prurient interest, the models are shown in unnatural or exaggerated positions."

For further guidance, the policy does state that "[m]aterial of a type that is widely available throughout the community (e.g., *Playboy* and *Penthouse* magazines) should not be seized or detained. Availability in geographically defined areas commonly referred to as 'red light districts' does not necessarily indicate community tolerance or acceptance and does not provide an adequate basis by which to judge community standards."[179]

If problems develop where the U.S. Attorney refuses to forfeit these items, contact your Associate/Assistant Chief Counsel.

3.634 Envelopes

Envelopes carried by persons or found in their baggage or effects are not mail, even if stamped, and can be searched without any suspicion.[180]

3.635 International Mail

3.635a Inbound Searches of International Mail
3.635b Outbound Searches of International Mail
3.635c Reading Correspondence in “LC” Mail

There are two main classes of international mail: "parcel post" and "postal union mail."[181]

179 *Id.*
180 To be considered "mail," the article needs to be in the possession and control of the United States Postal Service. See 19 C.F.R. § 145.1 for a detailed definition.
181 See 19 C.F.R. Part 145 Appendix.

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Parcel Post is not permitted to contain correspondence but is to be used for the transmission of merchandise and is fully subject to CBP examination in the same manner as other merchandise shipments.

Postal Union mail is further divided into "LC" mail and "AO" mail. LC mail, (from the French, "Lettres et Cartes") "consists of letters, packages paid at the letter rate of postage, post cards and aerogrammes."[182] AO mail (from the French "autres objets" meaning "other objects") "is to be treated in the same manner as Parcel Post mail."[183]

All mail arriving from outside the United States is subject to examination simply because it arrived from a foreign country, except mail known to contain official documents addressed to U.S. government officials, mail addressed to Ambassadors and Chiefs of Diplomatic Missions, in-transit international mail, and certain “LC” mail.[184]

3.635a Inbound Searches of Mail

CBP divides imported mail into three categories:

(1) "*Mail article*. 'Mail article' means any posted parcel, packet, package, envelope, letter, aerogramme, box, card, or similar article or container, or any contents thereof, which is transmitted in mail subject to customs examination."[185]

(2) "*Letter class mail*. 'Letter class mail' means any mail article, including packages, post cards, and aerogrammes, mailed at the letter rate or equivalent class or category of postage."[186]

(3) "*Sealed letter class mail*. 'Sealed letter class mail' means letter class mail sealed against postal inspection by the sender. Sealed letter class mail can include a package if it is mailed at the express rate, the highest rate of postage available."[187]

No suspicion is required to open the first two categories, i.e., a “mail article” or “letter class mail.”[188]

Sealed letter class mail, *which appears to contain only correspondence*, cannot be opened unless a search warrant is obtained or the sender or addressee has given

182 *Id.*
183 *Id.*
184 19 C.F.R. § 145.2.
185 19 C.F.R. § 145.1(a).
186 19 C.F.R. § 145.1(b).
187 19 C.F.R. § 145.1(c).
188 19 U.S.C. § 1582; 19 C.F.R. § 145.2(b).

written authorization for the opening.[189] However, sealed letter class mail that "appears to contain matter in addition to, and other than, correspondence..." may be examined "provided [officers] have *reasonable cause* to suspect the presence of merchandise or contraband" (emphasis added).[190] "Reasonable cause" is a standard similar to "reasonable suspicion."[191]

The Appendix to 19 C.F.R. Part 145 contains suggestions for determining whether there is "reasonable cause to suspect" that merchandise or contraband is contained in sealed letter class mail. However, the decision to search sealed letter class mail is ultimately a matter of judgment for each CBP official, based on all relevant, articulable facts and circumstances.

According to the Appendix to 19 C.F.R. Part 145, the following circumstances can provide "reasonable cause to suspect" that sealed letter class mail contains matter other than correspondence:

1. A detector dog has alerted to the presence of narcotics or explosives in a specific mail article.

2. X-ray or fluoroscope examination indicates the presence of merchandise or contraband.

3. The weight, shape, feel, or sound of the mail article or its contents may indicate that merchandise or contraband (e.g., a hard object which may be jewelry, a stack of paper which may be counterfeit money, or coins) could be in the mail article. Contents of a mail article that feel lumpy, powdery, or spongy may, for example, indicate the presence of narcotics.

4. Information from a source previously shown to be reliable indicates that an identifiable mail article contains merchandise or contraband.

5. The mail article is insured.

6. The mail article is a box, carton, or wrapper other than a thin envelope.

7. The sender or addressee of the mail article is known to be fictitious.

The Appendix goes on to list certain facts which, by themselves, will not provide "reasonable cause to suspect" the presence of merchandise or contraband:

1. The mail article is registered.

189 19 C.F.R. § 145.3(b).
190 19 C.F.R. § 145.3(a).
191 *United States v. Taghizadeh*, 87 F.3d 287 (9th Cir. 1996), *amended at* 1996 U.S. App. LEXIS 20316.

2. The feel of a letter size envelope suggests that it contains one or a limited number of photographs.

3. The mail article appears to be part of a mass mailing.

4. The mail article is from a particular country, whether or not a known source country of contraband.

5. A detector dog has alerted to the presence of narcotics or explosives somewhere within a tray of mail (the individual articles of mail must then be examined individually).

6. The sender or the addressee of the mail article is known to have mailed or received contraband or merchandise in violation of law in the past.

7. The wrapper contains writing or typing similar to that previously found on articles of mail that contained contraband or merchandise in violation of law.

3.635b Outbound Searches of Mail

The authority to examine outbound mail is set forth in 19 U.S.C. § 1583. CBP may examine domestic mail transmitted for export by the United States Postal Service to ensure compliance with United States law. As with inbound mail search authority, the scope of an outbound mail search is determined by the type of mail article encountered.

1. No suspicion is required to border search outbound mail that bears a Customs declaration, or that has not been sealed against postal inspection[192], i.e., sealed letter class mail. See § 3.635a above for a discussion of sealed letter class mail.

2. For mail that is sealed against inspection and weighs more than sixteen (16) ounces, a CBP officer may search the mail if he has reasonable suspicion that the mail contains one of the following:[193]

 a. Monetary instruments as defined in 18 U.S.C. § 1956;

 b. A weapon of mass destruction as defined in 18 U.S.C. § 2332a(b);

 c. A drug or controlled substance listed in schedule I, II, III or IV of 21 U.S.C. § 812;

192 19 U.S.C. § 1583(b).
193 19 U.S.C. § 1583(c).

d. National defense or related information transmitted in violation of 18 U.S.C. §§ 793-798;

e. A firearm or injurious material mailed in violation of 18 U.S.C. §§ 1715, 1716;

f. Material related to obscenity, 18 U.S.C. §§ 1460-1470; or related to sexual exploitation of a child, 18 U.S.C. §§ 2251 - 2260;

g. Merchandise mailed in violation of the Export Administration Act (50 U.S. App. §§ 2401-2420);

h. Merchandise mailed in violation of the Arms Export Control Act (22 U.S.C. § 2778);

i. Merchandise mailed in violation of the International Emergency Economic Powers Act (50 U.S.C. §§ 1701 - 1706);

j. Merchandise mailed in violation of the Trading with the Enemy Act (50 U.S.C. App. §§ 1 - 44); or

k. Merchandise subject to any other law enforced by the CBP.

3. Outbound sealed mail that weighs sixteen (16) ounces or less may not be border searched.[194]

3.635c Reading Correspondence in Sealed Mail

According to relevant statutes and agency policy, reading correspondence contained in sealed mail (articles in the custody of the postal system), inbound or outbound, is prohibited unless authorized by a search warrant, or the written consent of the sender or the addressee.[195]

3.700 Border Searches and Seizures of Conveyances

3.710 Searches of Conveyances
3.711 Searching Vehicles
3.712 Searching Vessels
3.720 Preventing Departure of Carriers

3.710 Searches of Conveyances

A CBP officer's authority to stop (seize) and search conveyances at the border, FEB or extended border is based on a variety of statutes, the primary ones being 19 U.S.C. §§ 482 and 1581. The fact that both statutes authorize CBP to stop

194 19 U.S.C. § 1583(d).

195 See CBP Policy, "Policy Regarding Border Search of Information" (July 16, 2008); 19 U.S.C. § 1583(c)(2); and 19 C.F.R. § 145.3(c).

and examine vehicles has created some uncertainty regarding which governs a particular type of border search. The courts that have addressed the issue have held that "[t]he general border search statute is 19 U.S.C. § 1581, [whereas] … 19 U.S.C. § 482 is a more specialized statutory provision designed to combat smuggled goods already introduced into the United States."[196] In other words, those courts determined that conveyance searches at the border and FEB are governed by 19 U.S.C. § 1581, which requires no particularized suspicion, while conveyance searches at the extended border are subject to the "reasonable cause to suspect"[197] standard of 19 U.S.C. § 482.[198]

3.711 Searching Vehicles

The removal, disassembly, and search of a vehicle's fuel tank during a border search require no particularized suspicion.[199] In *United States v. Flores-Montano*, 541 U.S. 149 (2004), the Supreme Court unanimously approved of the disassembly of a vehicle's fuel tank as part of a border search without particularized suspicion. Specifically, the Court admonished that whether a search is "non-routine," as that term is used in analyzing intrusive border searches of people, has no place in analyzing the border searches of property. The Court stated, "[c]omplex balancing tests to determine what is a 'routine' search of a vehicle, as opposed to a more 'intrusive' search of a person, have no

196 *United States v. Glasser*, 750 F.2d 1197 (3rd Cir. 1984) (quoting Judge Kilkenny's dissent in *DeVries v. Acree*, 565 F.2d 577, 580 (9th Cir. 1977); *United States v. Taghizadeh*, 41 F.3d 1263 (9th Cir. 1994), *amended at* 1996 U.S. App. LEXIS 20316 (which overruled *DeVries* and adopted Judge Kilkenny's analysis regarding 19 U.S.C. §§ 482 and 1581 set forth above). More recently in *United States v. Flores-Montano*, 424 F.3d 1044 (9th Cir. 2005), on remand from the Supreme Court in which on appeal the defendant abandoned the destructive force argument and instead argued that 19 U.S.C. § 482 imposed a "good faith" suspicion standard on the officers, attempting to draw on prior decisions of the court of appeals that suggested some level of subjective suspicion was required to conduct a border search. The court rejected those arguments relying on its more recent decision in *United States v. Taghizadeh*, 41 F.3d 1263 (9th Cir. 1994) *amended at* 1996 U.S. App. LEXIS 20316, holding that 19 U.S.C. § 1581 governed the border search at issue (which defendant conceded was applicable), not 19 U.S.C. § 482. Of some concern, however, is the court's broader statement (and one that CBP disagrees with) that 19 U.S.C. § 482 does not apply to searches at the border at all, potentially complicating the use of the good faith immunity defense in 19 U.S.C. § 482(b), elevating a statement from *Taghizadeh* that was unnecessary to that holding.

197 *United States v. Taghizadeh*, 87 F.3d 287 (9th Cir. 1996), *amended at* 1996 U.S. App. LEXIS 20316.

198 *United States v. Sutter*, 340 F.3d 1022 (9th Cir. 2003) *reprinted as amended* 2003 U.S. App. LEXIS 22634 (holding vehicle search conducted in secondary inspection area is a lawful routine border search governed by 19 U.S.C. § 1581).

199 *United States v. Flores-Montano*, 541 U.S. 149 (2004).

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place in border searches of vehicles."[200] Several decisions by lower courts have applied this "no suspicion" standard for vehicle searches at the border since *Flores-Montano*.[201]

Refer to CBP policy regarding exploratory drilling as part of a search of commercial vehicles for further guidance on this issue. [202]

With regard to other types of potentially damaging search techniques used to inspect vehicles, the Ninth Circuit has put the burden of proving damage to the vehicle on the defendant. Specifically, the court held that a defendant who challenges the admission of evidence found during a border search of his vehicle based on alleged damage to the vehicle caused by the search bears the burden of proving, by a preponderance of the evidence, that the border search damaged the vehicle in a manner that affects its safety or operability.[203]

3.712 Searching Vessels

While CBP's border authority certainly applies to vessels which cross the border, the vessels may contain certain areas (passenger and crew cabins) where a person could arguably have a high expectation of privacy even at the border. When the Third Circuit Court of Appeals addressed the issue, the court decided that reasonable suspicion was required to conduct a border search of a passenger cabin of a cruise ship arriving from a foreign port.[204] However, the Eleventh Circuit Court of Appeals has decided that while a crew member's cabin may act as the "home," the crew member's individual privacy interest is not greater than the government's interest in protecting national security. Therefore, a suspicionless search of a crew member's cabin at the border was reasonable.[205]

An officer or agent in the field must conduct operations based on the legal precedent established in the circuit where he or she operates. It is the opinion of

200 *Id.* at 152.
201 *United States v. Hernandez*, 424 F.3d 1056 (9th Cir. 2005) (removal of an interior door panel); and *United States v. Chaudhry*, 424 F.3d 1051 (9th Cir. 2005) (exploratory drilling of a bed of a truck); *United States v. Cortez-Rocha*, 394 F.3d 1115 (9th Cir. 2005) (cutting open a spare tire); *United States v. Camacho*, 368 F.3d 1182 (9th Cir. 2004) (use of "density buster"); *United States v. Lawson*, 374 F. Supp. 2d 513 (E.D. Ky. 2005), *aff'd*, 461 F.3d 697 (6th Cir. 2006) (exploratory cutting and drilling of luggage). But see these pre-*Flores-Montano* cases: *United States v. Robles*, 45 F.3d 1 (1st Cir. 1995); *United States v. Rivas*, 157 F.3d 364 (5th Cir. 1998); *United States v. Carreon*, 872 F.3d 1436 (10th Cir. 1989); and *United States v. Villabona-Garnica*, 63 F.3d 1051 (11th Cir. 1995).
202 See CBP Directive, No. 3340-019A, (April 20, 2004) "Use of Drills to Inspect Conveyances and Containers."
203 *United States v. Cortez-Rivera*, 454 F.3d 1038 (9th Cir. 2006), *cert. denied*, 549 U.S. 1299 (2007).
204 *United States v. Whitted*, 541 F.3d 840 (3rd Cir. 2008).
205 *United States v. Alfaro-Moncado*, 607 F.3d 720 (11th Cir. 2010).

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the Office of Chief Counsel that the Third Circuit decision is limited to those areas within the Third Circuit: New Jersey, Pennsylvania, Delaware, and the U.S. Virgin Islands. Outside of the Third Circuit, the Eleventh Circuit decision sets forth the correct analysis regarding border searches of passenger or crew cabins on vessels arriving in the United States.

3.720 Preventing Departure of Carriers

CBP is authorized to seize and detain, either before or after clearance, any vessel, vehicle or aircraft that has been or is being used in exporting or attempting to export any item being exported in violation of the Export Administration Regulations (EAR).[206]

3.800 Border Searches of Buildings Other than Dwellings

Buildings, other than dwellings, may be border searched to the extent they are at the FEB or the Extended Border.[207]

Example: Emmens crossed the border in his small airplane and was tracked continuously to his landing at a private airstrip that abuts his home in Florida. Customs agents allowed him to land and park the plane in a private hangar adjacent to his house before landing their helicopter and approaching Emmens.

A Customs agent entered the hangar by means of the open door and searched the plane. Twelve duffel bags of cocaine were found.

Analysis: Was the search of the hangar to access the plane in the hangar a border search at the functional equivalent of the border?

Result: In order to have a border search at the functional equivalent of the border, there must be: 1) reasonable certainty of a nexus with the border; 2) reasonable certainty that there has been no time or opportunity for the object to have changed materially since nexus; and 3) performance of the search at the first practicable detention point after nexus. All three of these elements were present with respect to the hangar in this case. Thus, the search of Emmens' hanger and airplane was a lawful border search at the functional equivalent of the border.

The court declined to base its ruling on 19 U.S.C. § 1595(b), which authorizes CBP officers and any person assisting them (e.g., under 19 U.S.C. § 507) to enter into or upon, or pass through lands, enclosures and buildings, *other than dwellings*, in the discharge of official duties. If entry into the hangar was unconstitutional, the statute could not authorize such conduct. Since the entry was lawful as a border search, the statutory authority was not necessary. Further, since no statute can authorize an officer to do what the constitution

206 15 C.F.R. § 758.7(b)(7).
207 19 U.S.C. § 1595(b).

forbids, section 1595(b) essentially is protection against charges of trespass where entries into private places otherwise comply with constitutional requirements.[208] Thus, it authorizes access to areas where CBP officers normally perform CBP duties, e.g., piers, cargo warehouses for international carriers, etc., or whenever needed in the performance of official duties.

Reminder: entries into DWELLINGS can never be justified by the border exception.[209]

Example: J. and V. jointly own a combination personal residence and commercial pet store. The property is completely fenced with barbed wire, with gates that allow access to the property from two sides. There are several buildings in the compound, together with a swimming pool and some permanent animal cages. None of the cages or anything other than the tops of the buildings is visible from the public roads. A van suspected of smuggling parrots crossed the border, was kept under constant surveillance, and entered J. and V.'s property. Customs officers enter the property from two sides. The gates were closed at the time the officers made their entry. It was dark. One officer went directly to the van, and found no birds in it. He and another officer encountered J. and V. near the bird cage area and arrested them. The officers then found two small cages within the large animal cages on the premises containing 154 parrots that were seized. Are the seized parrots admissible?

Analysis: Can the search of the van be justified as an extended border search? Was the entry onto J. and V.'s property therefore done "in the discharge of official duties" as required by 1595(b)?

Result: The court noted that 19 U.S.C. § 482 authorizes a Customs officer to "stop, search, and examine ... any vehicle ... *wherever found* ... and that 19 U.S.C. § 1595(b) authorizes entry upon "the lands, enclosures and buildings ... in the discharge of official duties." Based on these laws and the location of the birdcages, the court found the entry reasonable. The birds are admissible as the result of an extended border search.[210]

3.900 Special Circumstances and Border Searches
3.910 Certain Diplomats and Diplomatic Bags
3.920 Foreign Military Vessels and Aircraft
3.930 International Boundary Commission

3.910 Certain Diplomats and Diplomatic Bags

See Chapter 4, Diplomatic Immunity.

208 *United States v. Emmens*, 893 F.2d 1292 (11th Cir. 1990).
209 See 19 U.S.C. § 1595.
210 *United States v. Jacobson*, 647 F.2d 990 (9th Cir. 1981).

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3.920 Foreign Military Vessels and Aircraft

By international agreement, foreign military vessels and aircraft are usually exempt from border search. In some instances, the State Department will condition their arrival here on their consent to a border search.[211] Of course, any person who enters the United States from a foreign military vessel or aircraft and any merchandise discharged from the conveyance are subject to border search.

3.930 International Boundary Commission

Certain persons who are members or part of the field crew of the United States-Canadian International Boundary Commission cross and recross the border in the course of their field operations. Local port policy governs how any reporting obligations are dealt with for crossings in the course of their Commission activities. Similarly, the members and staff of the United States-Mexico International Boundary and Water Commission may also engage in multiple crossings and policies of the local ports govern reporting requirements.

Any article brought into the United States which is to be retained in this country must be declared to CBP officers as soon as practical in order that its tariff status may be determined.

3.1000 Reporting Requirements – Vessels, Vehicles, Aircraft and People

3.1010 (b) (7)(E)
3.1020 Reporting Requirements – Vessels
3.1030 Reporting Requirements – Vehicles
3.1040 Reporting Requirements – Aircraft
3.1050 Reporting Requirements – People
3.1060 Requiring Persons to Identify Themselves

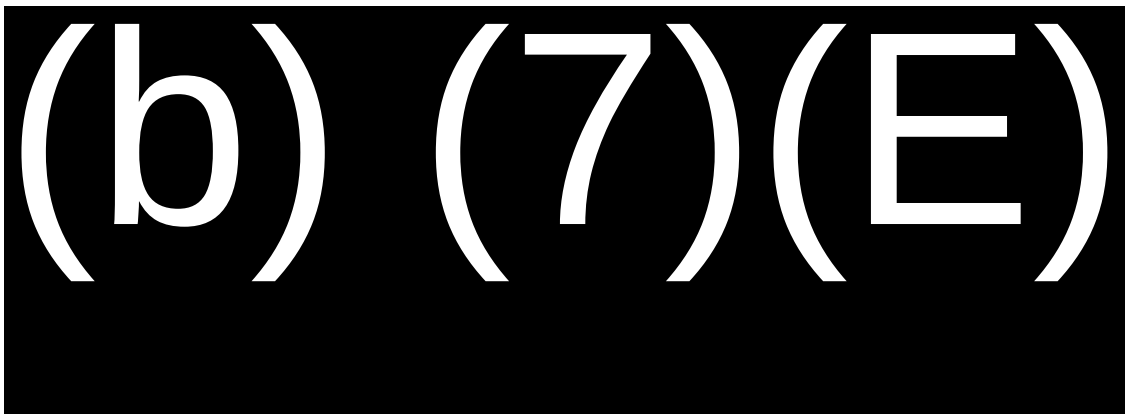
3.1010 (b) (7)(E)

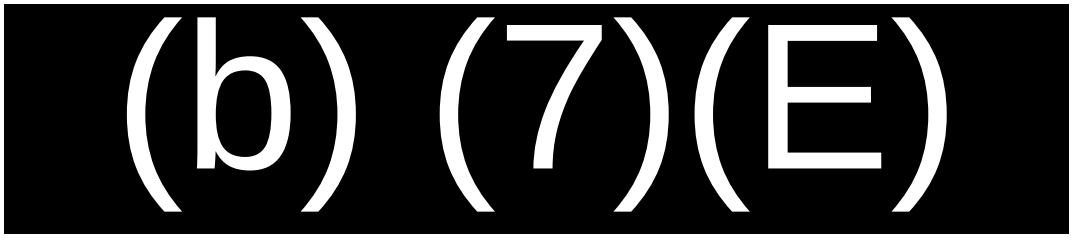
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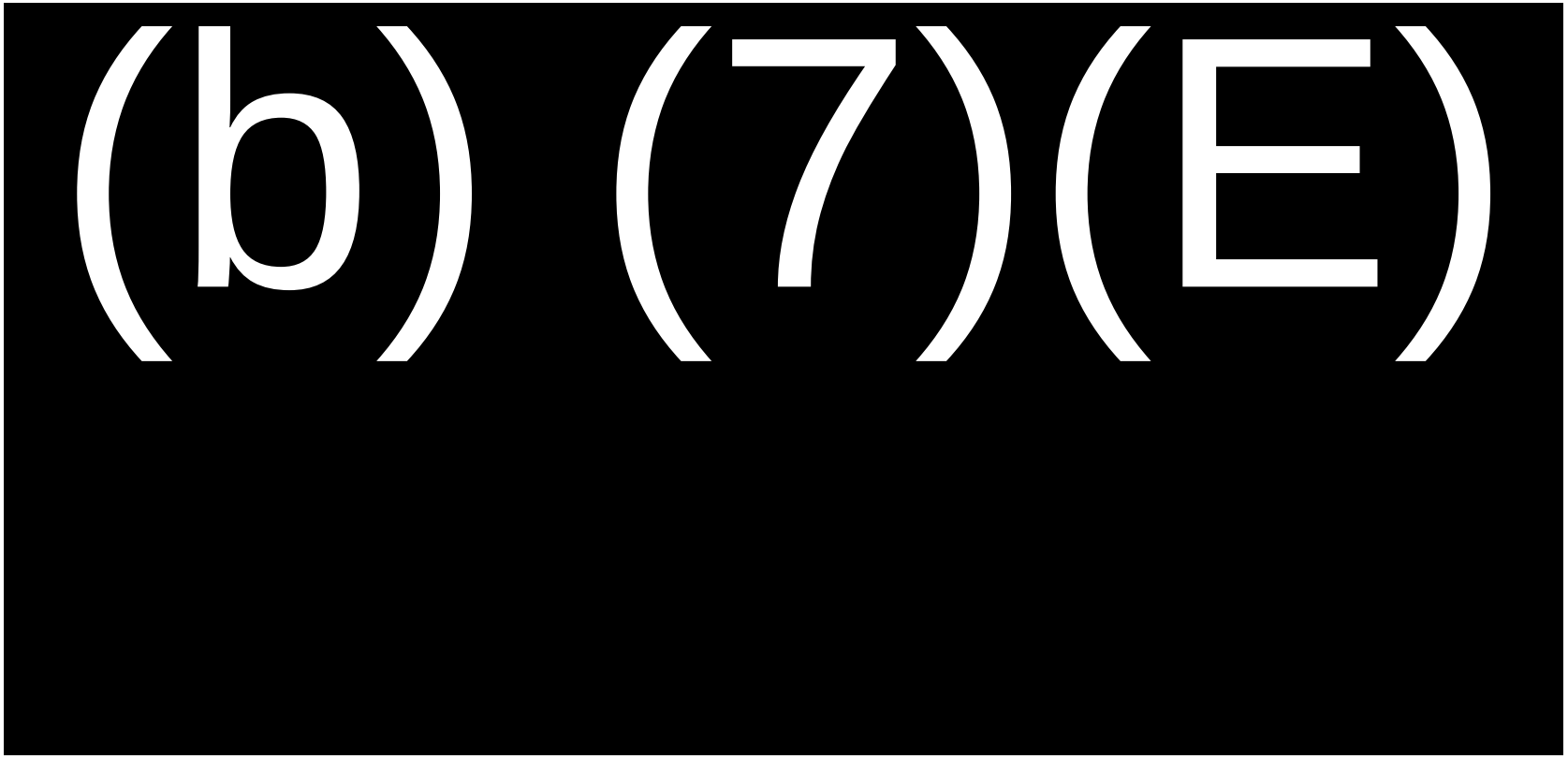
[211] See Customs Directive, 3120-015B, "Customs Treatment of Vessels Controlled and Managed by Foreign Nationals" (September 1999).

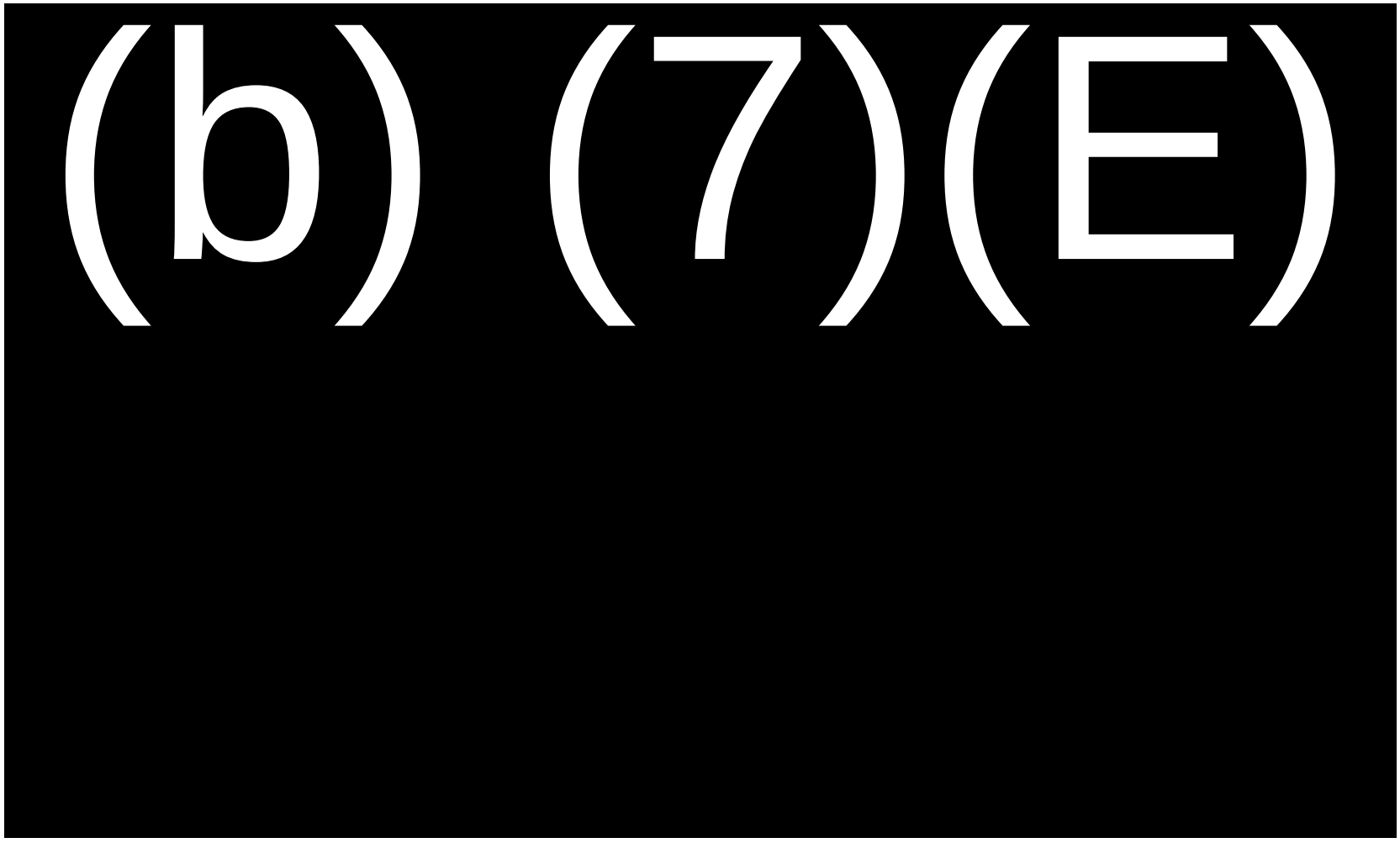
[212] [213] [214] (b) (7)(E)

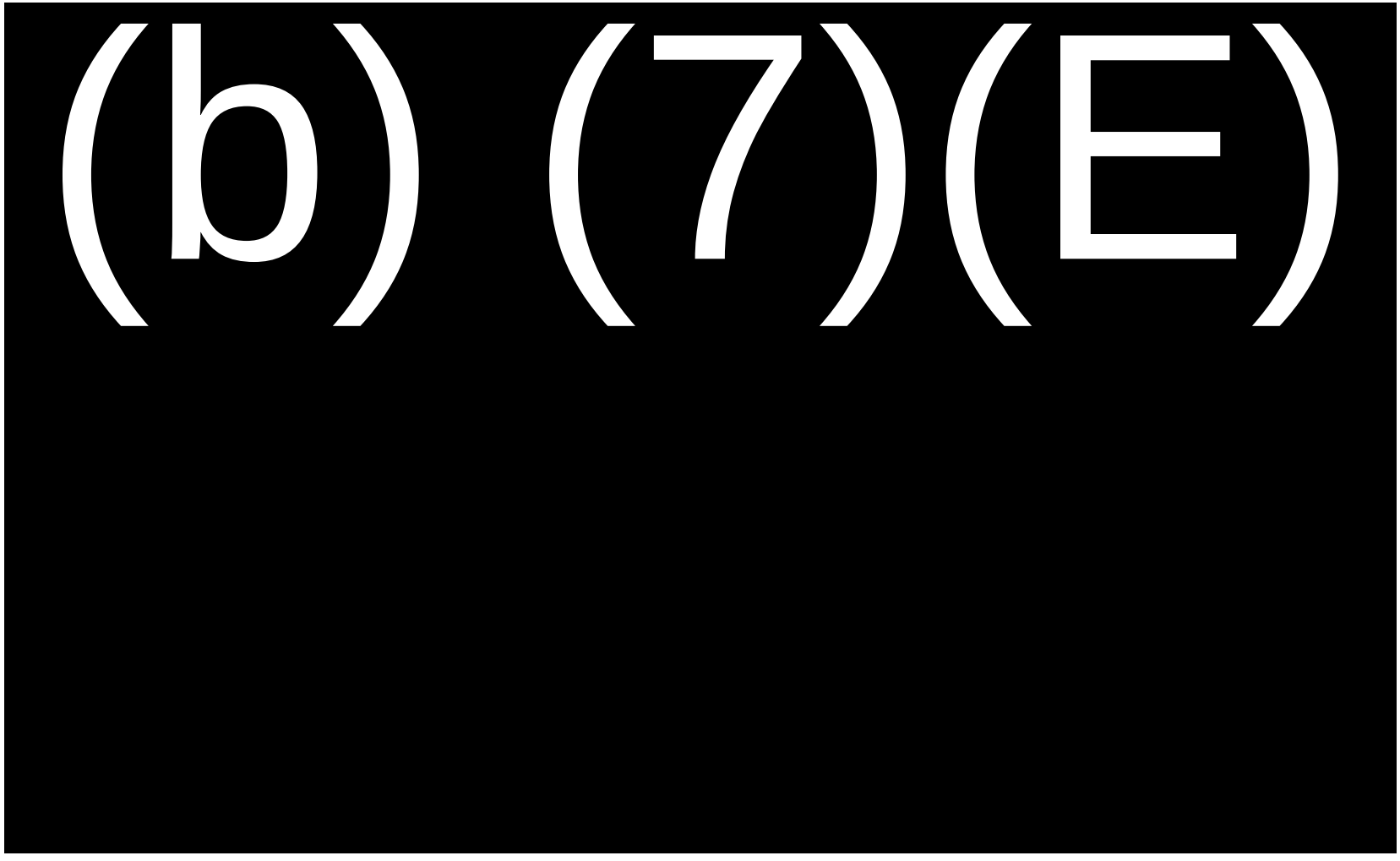
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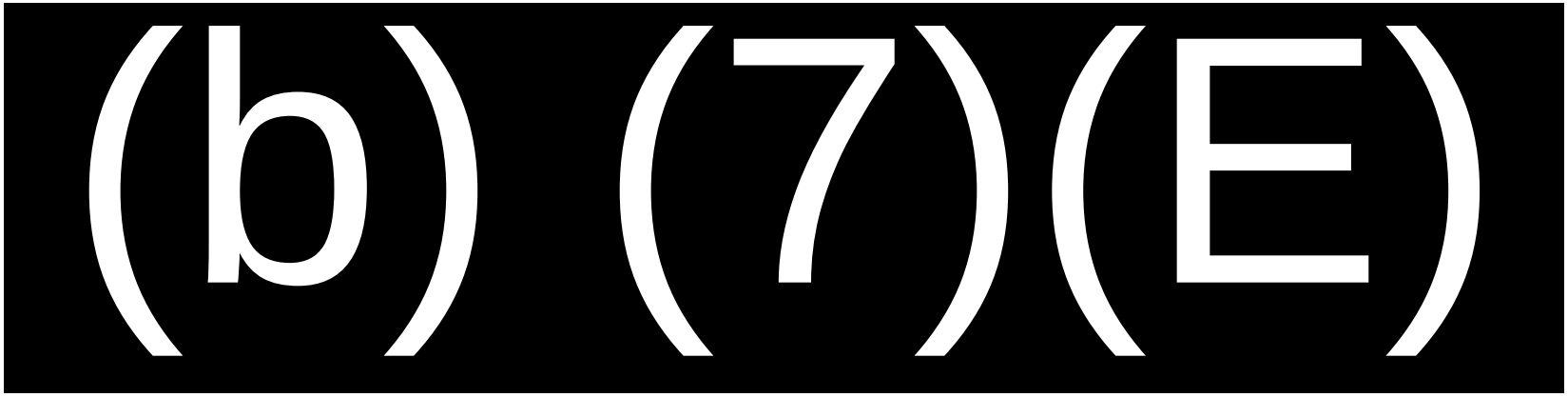

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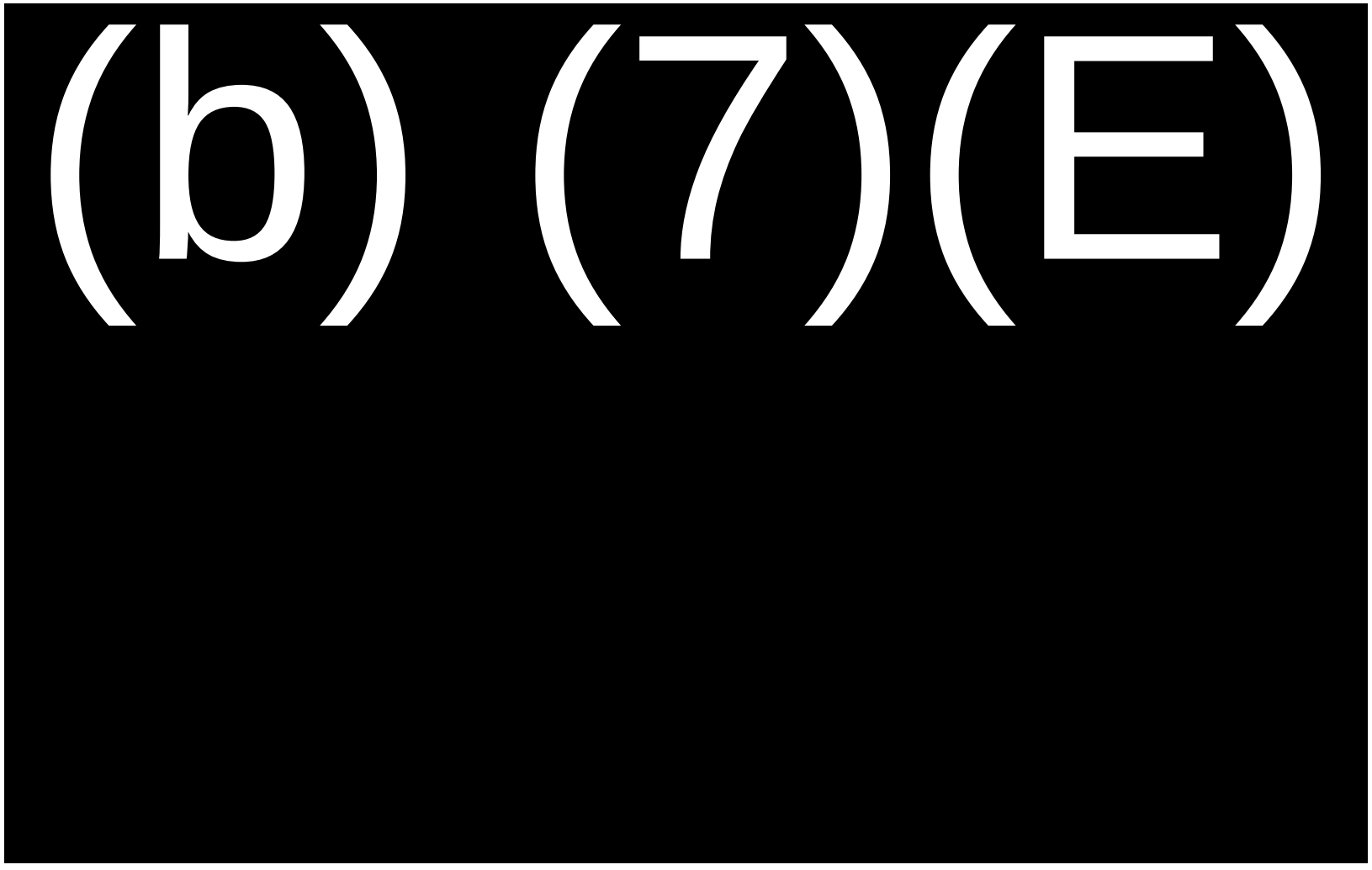

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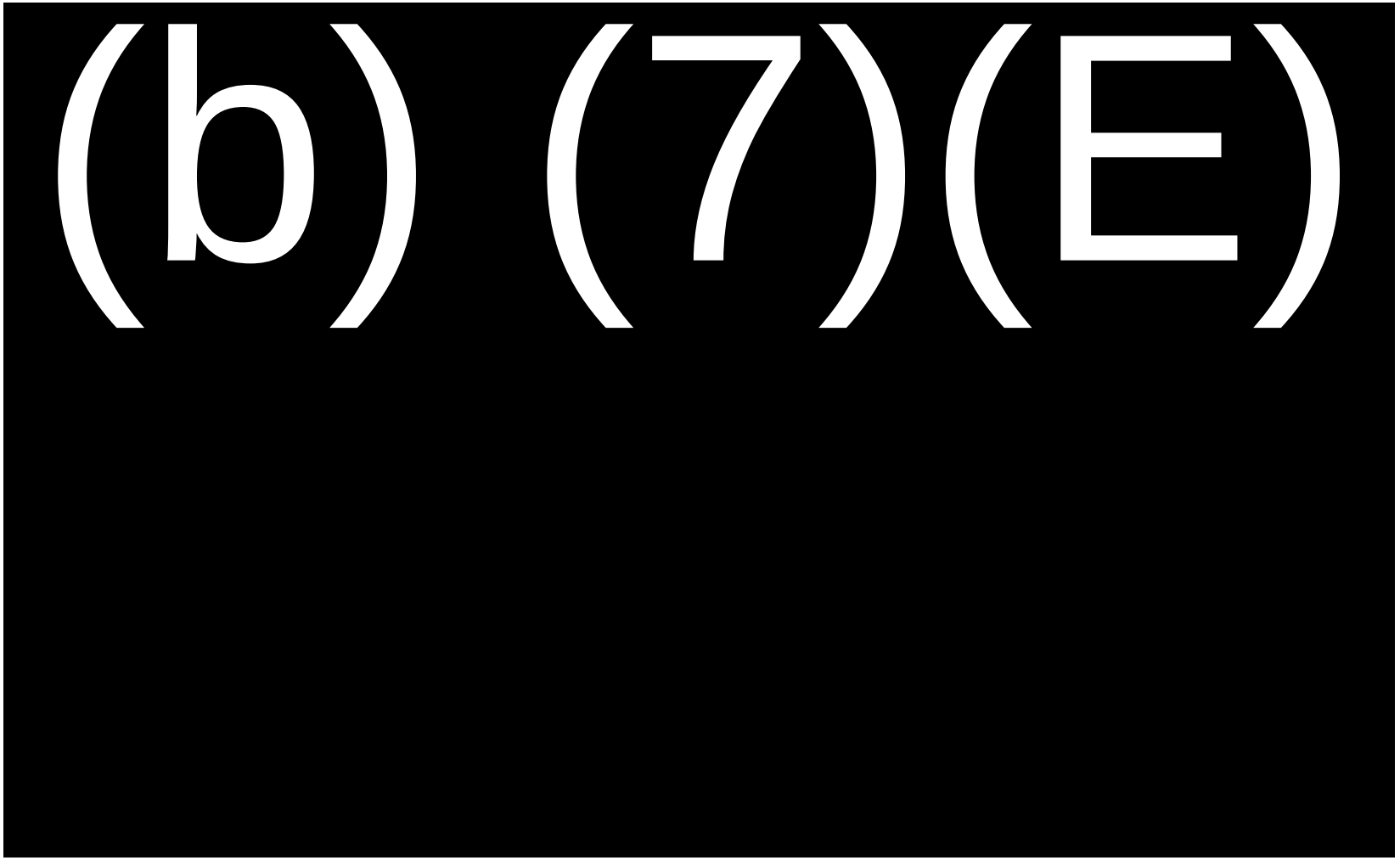

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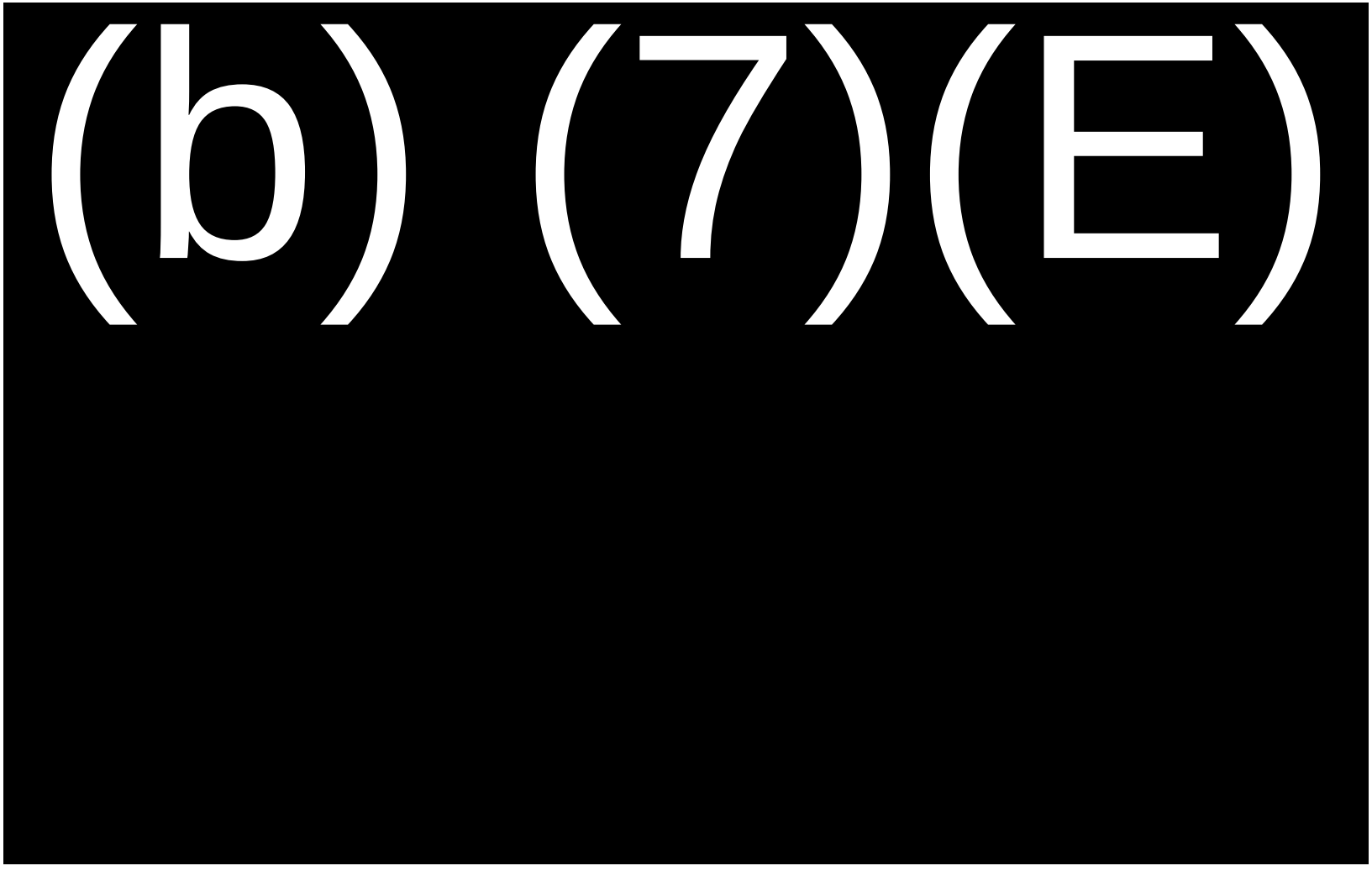

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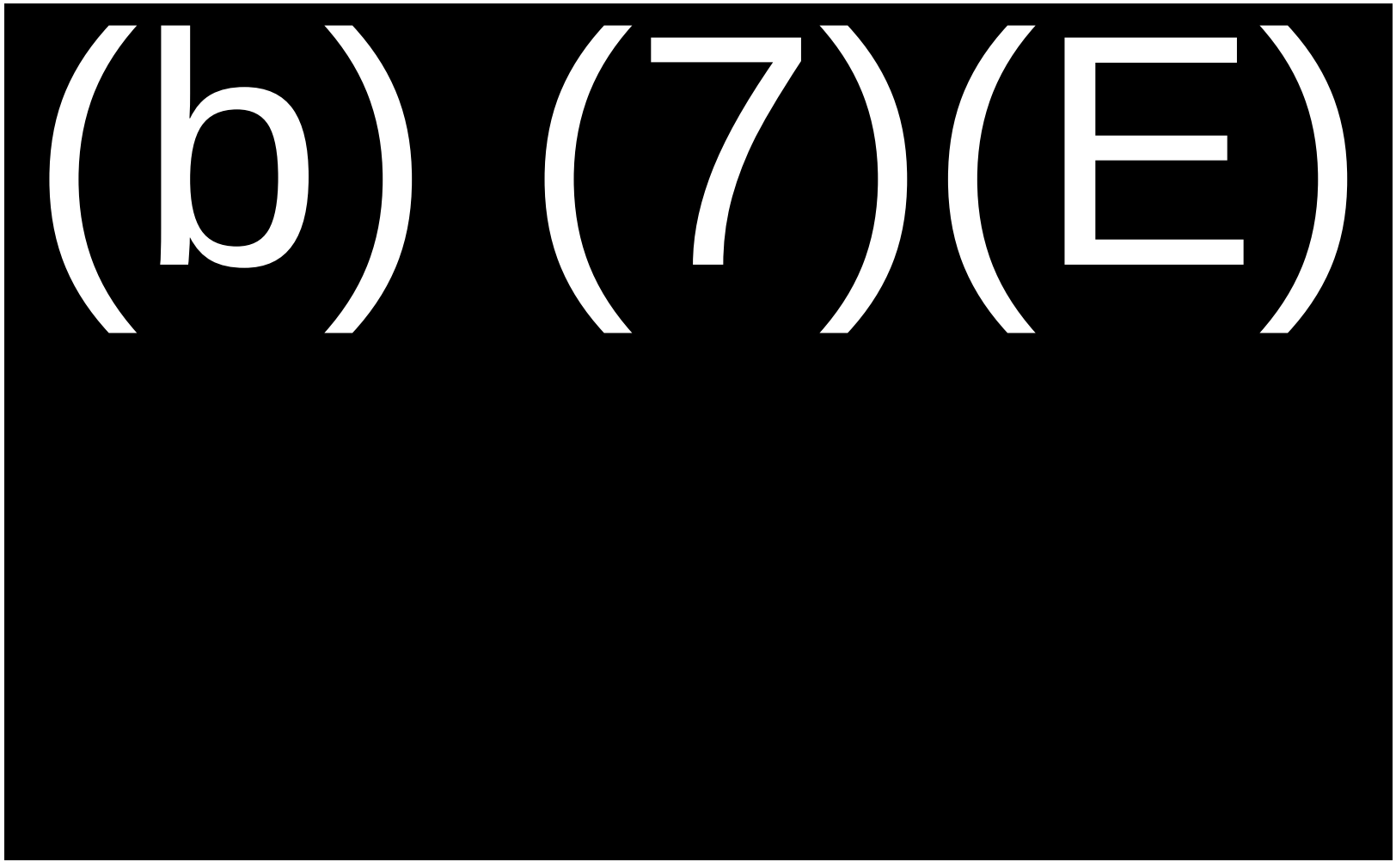

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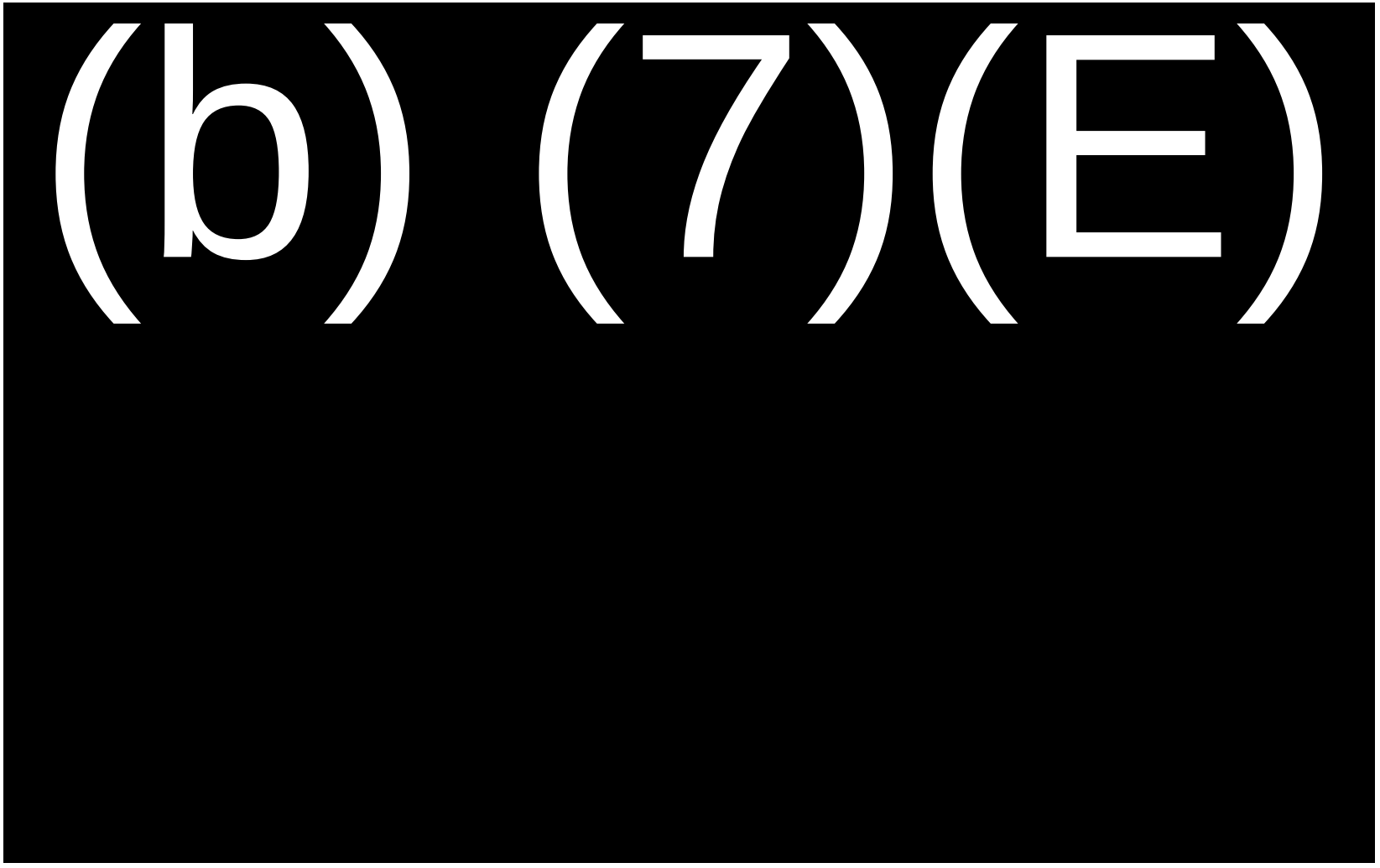

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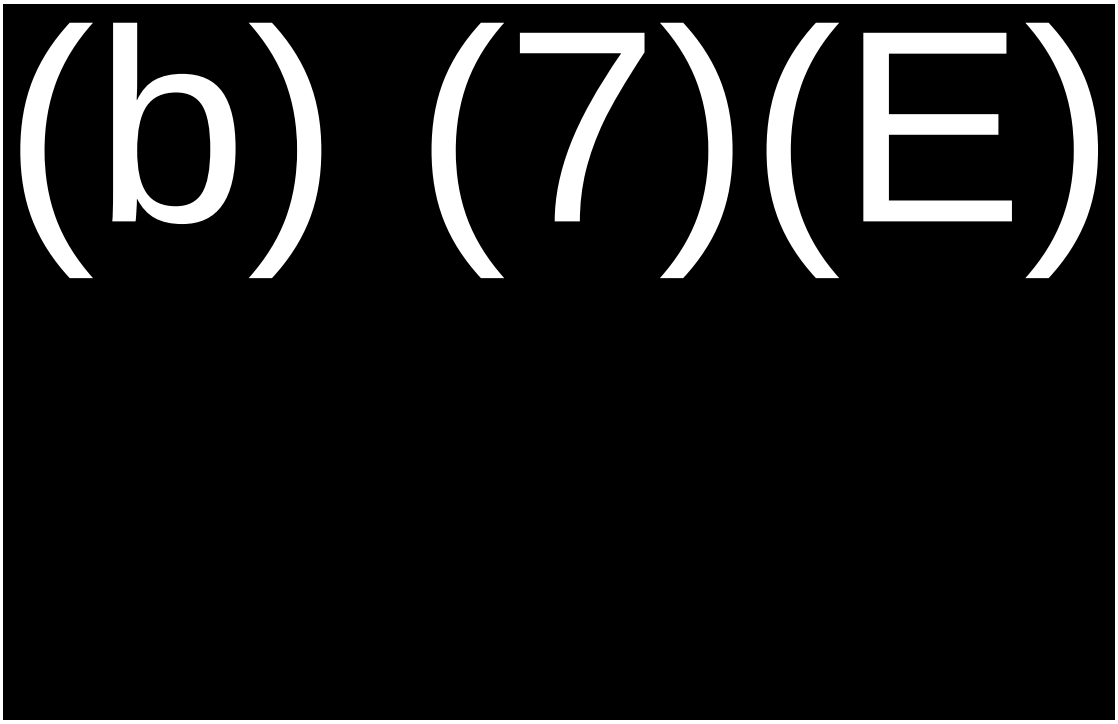

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3.1020 Reporting Requirements - Vessels

CBP requires that each vessel bound for the United States and required to make entry have a manifest on board which must be produced by the master of the vessel.[219] CBP has the discretion to define the content of the information to be contained in the manifest and the Secretary of DHS has the authority to prescribe the manner of production for electronic transmission of the manifest.[220] Masters of vessels are subject to penalties if there is no manifest, or if the information in the manifest is false.[221]

The master of any vessel coming from foreign, any foreign vessel from a domestic port and any vessel of the United States carrying bonded merchandise or foreign merchandise not yet entered must immediately report the vessel's arrival at the nearest CBP facility.[222] This requirement applies without regard to the size of the vessel and includes those vessels operating on the Great Lakes.[223]

217
218 (b) (7)(E)
219 19 U.S.C. § 1433(d).
220 19 U.S.C. § 1431(d).
221 19 U.S.C. § 1584(a).
222 19 U.S.C. § 1433(a).
223 19 U.S.C. § 1433(a).

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The civil penalties for failing to report are $5,000 for the first violation and $10,000 for each subsequent violation. Any conveyance used in connection with any such violation is subject to seizure and forfeiture.[224] The master can be criminally charged with a misdemeanor unless the vessel has prohibited merchandise in which case he can be charged with a felony.[225]

In addition to reporting arrival, vessels are also required to make a formal entry[226] into the United States, and CBP has the authority to adopt regulations for the manner and format of the entry which CBP has done at 19 C.F.R. § 4.3(a).[227] The statute also provides CBP the authority to allow preliminary entry of a vessel in lieu of, or prior to, a formal entry.[228]

CBP has issued guidance on reporting requirements for pleasure vessel. A pleasure vessel is only required to report their arrival if they have touched foreign soil, had contact with a hovering foreign vessel, or received merchandise outside territorial seas.[229]

3.1030 Reporting Requirements – Vehicles

Pursuant to 19 U.S.C. § 1433(b)(1), vehicles may only arrive in the United States at designated border crossings. In addition, the person in charge of the vehicle must immediately report the arrival, unless otherwise authorized by CBP, and present the vehicle and all persons and merchandise, to include baggage, for inspection.[230]

There are civil and criminal penalties for failure to comply with 19 U.S.C. § 1433.[231] It is also a federal felony for anyone to flee or evade a federal law enforcement checkpoint in excess of the legal speed limit.[232] A person cannot be charged with violating both Section 1459 (reporting requirements for individuals, see § 3.1050 below) and 1433 (reporting requirements for vehicles). For example, the driver of a vehicle who is the sole occupant can only be convicted under § 1433.[233]

224 19 U.S.C. § 1436(b).
225 19 U.S.C. § 1436(c).
226 19 U.S.C. § 1434(a).
227 19 U.S.C. § 1434(c).
228 19 U.S.C. § 1434(b).
229 See, Memorandum "Clarifying pleasure vessel reporting" (TC# APP08-0857) by Paul M. Morris, Executive Director, Admissibility and Passenger Programs, OFO (May 16, 2008).
230 19 U.S.C. § 1433(b)(2).
231 19 U.S.C. § 1436.
232 18 U.S.C. § 758.
233 *United States v. Caldera-Herrera*, 930 F.2d 409 (5th Cir. 1991).

3.1040 Reporting Requirements – Aircraft

The pilot of an aircraft arriving in the United States or the United States Virgin Islands from any foreign airport or place shall comply with the advance notification, arrival reporting, and landing requirements prescribed by the Secretary of the Treasury.[234] For private aircraft, these requirements appear in 19 C.F.R. Part 122. Aircraft must provide notice of arrival far enough in advance to allow inspecting officers to reach the place of first landing for the aircraft.[235]

There are several elements of information regarding arrival of aircraft that must be conveyed to CBP. Those are[236]:

(1) Type of aircraft and registration number;(2) Name of aircraft commander;(3) Place of last foreign departure;(4) International airport of intended landing or other place at which landing has been authorized by CBP;(5) Number of alien passengers;(6) Number of citizen passengers; and(7) Estimated time of arrival.

There are criminal and civil penalties for failing to comply with the advance notice of arrival and reporting requirements set forth in 19 U.S.C. § 1433 and 19 C.F.R. § 122.[237] As noted in the chart above (section 3.1010), aircraft in the Western Hemisphere above the equator must provide notice when wheels are up, in all other locations four hours advance notice of arrival is required.[238]

3.1050 Reporting Requirements – Persons

Section 1459 of Title 19 sets forth the reporting requirements for pedestrians, passengers and crew members arriving on conveyances that have been reported, and for individuals arriving aboard unreported conveyances. Pedestrians may only enter the United States at border crossing points designated by CBP[239] and unless otherwise authorized, individuals may not depart until cleared.[240]

Section 1459 also prescribes civil and criminal penalties for failure to comply with these provisions. The civil penalty for the first violation is $5,000 and $10,000 for each subsequent violation.[241] The criminal penalty is imprisonment for not more than 1 year and/or a $5000 fine.[242]

While there are no comparable reporting and clearance provisions for persons leaving the country, if a person impeded by force or intimidation a lawful

234 19 U.S.C. § 1433(c).
235 19 C.F.R. § 122.31(e).
236 19 C.F.R. § 122.31(d).
237 19 U.S.C. §§ 1436, 1644a.
238 19 C.F.R. § 122.48a(b).
239 19 U.S.C. § 1459(a).
240 19 U.S.C. § 1459(d).
241 19 U.S.C. § 1459(f).
242 19 U.S.C. § 1459(g).

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outbound border detention/search, he could be charged with violating 18 U.S.C. § 111 (Assaulting, resisting or impeding certain officers or employees). A civil penalty could not be assessed however.

3.1060 Requiring Persons to Identify Themselves

A person's identity is an integral part of a CBP examination and inspection. Thus, a person can be detained under 19 U.S.C. § 1582 until his identity has been established. Under 8 C.F.R. § 235.1, any individual who wishes to lawfully enter the United States must apply in person to a CBP officer at a port of entry.[243] A U.S. citizen must establish citizenship, generally through the presentation of a passport. If the person fails to satisfy the officer that he is a citizen, the person may be inspected as an alien.[244] An alien seeking admission must present whatever documents the CBP officer requires to show that the alien is not subject to removal and is entitled to enter the United States.[245]

In addition, the master of a vessel and a pilot of an aircraft are required to present appropriate licenses and papers on demand.[246]

3.1100 Substantive Immigration Laws

See Chapter 19, "Immigration Crimes"

3.1200 Substantive Customs Laws

3.1210 Customs Crimes in Title 18 United States Code
3.1220 Particular Customs Crimes
3.1230 Customs Crimes in Title 19, United States Code
3.1240 Civil Offenses in Title 19, United States Code
3.1250 Particular Civil Offenses

3.1210 Customs Crimes in Title 18 United States Code

18 U.S.C. § 541 Entry of goods falsely classified.
18 U.S.C. § 542 Entry of goods by means of false statements.
18 U.S.C. § 543 Entry of goods for less than legal duty.
18 U.S.C. § 544 Relanding of goods.
18 U.S.C. § 545 Smuggling goods into the United States.
18 U.S.C. § 546 Smuggling goods into foreign countries.
18 U.S.C. § 547 Depositing goods in buildings on boundaries.
18 U.S.C. § 548 Removing or repacking goods in warehouses.
18 U.S.C. § 549 Removing goods from customs custody; breaking seals.
18 U.S.C. § 550 False claim for refund of duties.
18 U.S.C. § 551 Concealing or destroying invoices or other papers.

243 8 C.F.R. § 235.1(a).
244 8 C.F.R. § 235.1(b).
245 8 C.F.R. § 235.1(f).
246 19 U.S.C. § 1581(a) and 14 C.F.R. § 61.3(l).

18 U.S.C. § 552 Officers aiding importation of obscene or treasonous books and articles.
18 U.S.C. § 553 Unlawful importation or exportation of stolen motor vehicles, off highway mobile equipment, vessels, or aircraft.

All of the foregoing except §§ 545, 552, and 553 are felonies punishable by not more than two years imprisonment and a maximum fine of $250,000. Section 545, the general smuggling statute, is punishable by a maximum fine of $250,000 or imprisonment for not more than twenty years or both. Sections 552 and 553 each carry a $250,000 maximum fine and imprisonment for not more than ten years, or both. All fines can be increased to twice the gross loss of revenue to the government.[247]

Other federal crimes in Title 18 which may also be charged for Customs violations, include:

18 U.S.C. § 2 Aiding and Abetting.
18 U.S.C. § 371 Conspiracy.
18 U.S.C. § 1263 Marks and Labels on Packages.
18 U.S.C. § 1301 Importing or Transporting Lottery Tickets.
18 U.S.C. § 1716 Mailing Injurious Articles.
18 U.S.C. § 1761 Importation of Products Made By Convicts or Prisoners.
18 U.S.C. § 1952 Foreign Travel or Transportation in Aid of Racketeering Enterprises.
18 U.S.C. § 1956 Laundering of Monetary Instruments.
18 U.S.C. § 1957 Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity.
18 U.S.C. § 2231 Assault or Resistance of Person Making Searches.
18 U.S.C. § 2232 Destruction or Removal of Property to Prevent Seizure.
18 U.S.C. § 2233 Rescue of Seized Property.
18 U.S.C. § 2275 Firing or Tampering with Vessels.
18 U.S.C. § 2277 Explosive or Dangerous Weapons Abroad Vessels.
18 U.S.C. § 2279 Boarding Vessels Before Arrival.
18 U.S.C. § 2312 Transportation of Stolen Vehicles.
18 U.S.C. § 2318 Trafficking in Counterfeit labels, Illicit labels, or Counterfeit documentation or packaging.
18 U.S.C. § 2319 Criminal Infringement of a Copyright.
18 U.S.C. § 2320 Trafficking in Counterfeit Goods or Services.

3.1220 Particular Customs Crimes

3.1221 18 U.S.C. §§ 541, 542, 545
3.1222 Removing Goods From Customs Custody; Breaking Seals - 18 U.S.C. § 549
3.1223 Sexual Exploitation of Children - 18 U.S.C. §§ 2251 - 2255

[247] 18 U.S.C. § 3571.

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3.1221 18 U.S.C. §§ 541, 542, 545

See Chapter 8, Trade Enforcement.

3.1222 Removing Goods From Customs Custody; Breaking Seals – 18 U.S.C. § 549

Unlawful removal of merchandise "otherwise in Customs custody or control" is the most frequently used provision of § 549. Under 19 U.S.C. § 1499 all imported goods are deemed to be in CBP custody until cleared (whether in actual physical custody or not), so any unauthorized removal of such goods is a potential violation of § 549.[248] In a related case, the government forfeited defendant's car under l9 U.S.C. § 1595a(a) (facilitating an importation contrary to law) because he used the car to transport the stolen imported goods.[249]

3.1223 18 U.S.C. §§ 2251 – 2260 – Sexual Exploitation of Children

Section 2252 of the Title 18 prohibits the knowing transportation, shipment or receipt of visual depictions of minors engaged in "sexually explicit conduct" through interstate or foreign commerce by any means, including computer or the mail. "Sexually explicit conduct" includes such behavior as actual or simulated sexual intercourse, oral-genital contact, bestiality, masturbation or lascivious exhibition of the genitals or pubic area.[250] The Supreme Court has held that the law requires knowledge by the defendant that one of the performers in such a visual depiction is a minor.[251] This required element would be missing in the case of "virtual" pornography, i.e., visual depictions that are digitally created, rather than being images of real people.[252] Sections 2252 provide for imprisonment of up to 20 years and a fine of up to $ 250,000 for the first offense and enhanced penalties if the person has a prior conviction under either Chapter 109A (Sexual abuse), 110 (Sexual exploitation and other abuse of children, or 117 (Transportation for illegal sexual activity and related crimes) of Title 18, relating to sexual abuse, sexual exploitation or abuse of children, or transportation for illegal sexual activity.

3.1230 Customs Crimes in Title 19, United States Code

19 U.S.C. § 283 Duty on saloon stores.

248 See, *e.g.*, *United States v. Harold*, 588 F.2d 1136 (11th Cir. 1979) where defendant's theft of goods not yet inspected resulted in his conviction under this provision.

249 See *United States v. One 1976 Mercedes*, 667 F.2d 1171 (5th Cir. FL 1982), *superceded by statute*; see *United States v. Lehman*, 225 F.3d 426 (4th Cir. 2000).

250 18 U.S.C. § 2256(2)(A).

251 *United States v. X-Citement Video Inc., et. Al.*, 513 U.S. 64 (1994).

252 *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) and 18 U.S.C. § 2256(8)(B).

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19 U.S.C. § 1304 Marking of imported articles and containers.
19 U.S.C. § 1341 Interference with functions of the U.S. International Trade Commission.
19 U.S.C. § 1436 Penalties for violations of the arrival, reporting, entry, and clearance requirements.
19 U.S.C. § 1459 Reporting requirements for individuals.
19 U.S.C. § 1464 Penalties in connection with sealed vessels and vehicles.
19 U.S.C. § 1586 Unlawful unlading or transshipment.
19 U.S.C. § 1590 Aviation smuggling.
19 U.S.C. § 1620 Acceptance of money by United States officers.
19 U.S.C. § 1629 Inspections and pre-clearance in foreign countries.
19 U.S.C. § 1919 Penalties (False statements made to influence the Secretary of Commerce).

3.1240 Civil Offenses in Title 19, United States Code

Although the Customs crimes in Title 19 may involve civil penalties in addition to or in lieu of the criminal penalties, the following sections impose only fines or penalties for the conduct described:

19 U.S.C. § 58b User fees for customs services at certain small airports and other facilities.
19 U.S.C. § 60 Penalty for extortion.
19 U.S.C. § 70 Obstruction of revenue officers by master of vessels.
19 U.S.C. § 81s Offenses (Foreign Trade Zone).
19 U.S.C. § 469 Dealing in or using empty stamped imported liquor containers.
19 U.S.C. § 507 Assistance for customs officers.
19 U.S.C. § 1337 Unfair practices in import trade.
19 U.S.C. § 1438 Unlawful return of foreign vessel's papers.
19 U.S.C. § 1453 Lading and unlading of merchandise or baggage; penalties.
19 U.S.C. § 1454 Unlading of passengers; penalties.
19 U.S.C. § 1455 Boarding and discharging inspectors.
19 U.S.C. § 1508 Recordkeeping.
19 U.S.C. § 1627a Unlawful importation or exportation of certain vehicles; inspections.
19 U.S.C. § 1671 Countervailing duties.
19 U.S.C. § 1673 Antidumping duties.
19 U.S.C. § 1581(c) Penalty for presenting forged, altered or false vessel documents.
19 U.S.C. § 1584 Falsity or lack of manifest; penalties.
19 U.S.C. § 1587 Examination of hovering vessels.
19 U.S.C. § 1592 Penalties for fraud, gross negligence, and negligence.
19 U.S.C. § 1595a Forfeitures and other penalties.
19 U.S.C. § 1599 Officers not to be interested in vessels or cargo.

3.1250 Particular Civil Offenses

3.1251 19 U.S.C. § 1497 - Penalties for Failure to Declare

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3.1252 19 U.S.C. § 1584 - Falsity or Lack of Manifest; Penalties
3.1253 19 U.S.C. § 1627a - Unlawful Importation or Exportation of Certain Vehicles

3.1251 Penalties for Failure to Declare - 19 U.S.C. § 1497

This section is used at the border or the FEB for seizure and forfeiture of undeclared items. It is one of the civil counterparts to criminal smuggling, 18 U.S.C. § 545.

The only elements necessary to seize and forfeit are:

- ✓ The article was brought into the country; and,
- ✓ The article was not included in the declaration.

A statement by a passenger that a suitcase is his is not a declaration of its contents.[253]

The penalty for a violation is loss of the goods plus a penalty equal to the value of the goods.[254] In the case of controlled substances the penalty is 1,000 percent of its value.[255] The value is the price for which the controlled substance is likely to be illegally sold.[256]

Guidelines for disposition of property seized under § 1497 are found in Part 171, 19 C.F.R., Appendix A. Also, see Chapter 15 for a discussion of forfeiture authority and procedures.

3.1252 Falsity or Lack of Manifest; Penalties - 19 U.S.C. § 1584

3.1252a Common Carrier § 1584 Penalties
3.1252b Aircraft § 1584 Penalties
3.1252c Vehicle or Aircraft § 1584 Penalties for Failure to Report

This penalty provision can be applied in a variety of ways, as described below.

3.1252a Common Carrier § 1584 Penalties

In addition to penalizing for violations relating to merchandise of any description not listed on the manifest or falsely described therein, this provision provides another enforcement tool in the CBP arsenal that can be used against owners/operators of common carriers that do not exercise the highest degree of care and diligence in keeping drugs from being transported by their

253 *United States v. 66 Pieces of Jade and Gold Jewelry*, 760 F.2d 970 (9th Cir. 1985).
254 19 U.S.C. § 1497(a)(2)(B).
255 19 U.S.C. § 1497(a)(2)(A).
256 19 U.S.C. § 1497(b)(1).

conveyances. This statute enables CBP to impose severe penalties against such owners/operators of common carriers used to transport drugs as well as other persons with cargo manifest responsibilities: $1000.00 per ounce for cocaine; $500.00 per ounce for marihuana.[257] The regulations impose these penalties without regard to negligence or responsibility, shifting the burden to the owners/operators of common carrier to prove they exercised the highest degree of care and diligence.[258]

3.1252b Aircraft § 1584 Penalties

Under the Customs Air Commerce Regulations, 19 C.F.R. Part 122, and 49 U.S.C. § 46306, heavy civil penalties are applicable to the owner or person in charge of any aircraft subject to the entry and clearance requirements of 19 C.F.R. Part 122 if any controlled substance described in 19 U.S.C. § 1584 is found on board or was unladed from such aircraft.

3.1252c Vessel, Vehicle or Aircraft § 1584 Penalties for Failure to Report

The penalties for violations of the arrival, reporting, and entry requirements found in 19 U.S.C. § 1436 include additional civil penalties for any controlled substance found on any vessel, vehicle or aircraft which has not properly reported or entered as required by 19 U.S.C. § 1584. Liability for a penalty under 19 U.S.C. § 1584(a)(2) is not conditioned upon the government making a demand for a vessel's manifest when the master responsible for producing the manifest has fled the vessel. The collection of duties is not the only purpose of the manifest. "[A] government wants to know, without being put to a search, what articles are brought into the country, and to make up its own mind not only what duties it will demand but whether it will allow the goods to enter at all."[259]

3.1253 Unlawful Importation or Exportation of Certain Vehicles – 19 U.S.C. § 1627a

Title 19 U.S.C. § 1627a, makes it unlawful to knowingly import, export or attempt to import or export any self-propelled vehicle, vessel, aircraft or any of these self-propelled vehicles from which the identification number has been removed, tampered or altered. A similar criminal provision, 18 U.S.C. § 553, specifically requires the element of knowledge and applies to importation and exportation of stolen motor vehicles.

257 19 U.S.C. § 1584(a)(2).

258 19 C.F.R. § 162.65. See *United States v. Kafleur*, 168 Fed. Appx. 322, 327 (11th Cir. 2006) (a court is not obligated to rule on the common carrier defense unless the defendant raises the issue).

259 See *United States v. Kafleur,* 168 Fed. Appx. 322, 326 (11th Cir. 2006), citing *United States v. Sischo*, 262 U.S. 165, 167 (1923).

3.1300 Export Control Laws

3.1310 *The Export Administration Act* - 50 U.S.C. App. §§ 2401-2420
3.1320 *The Trading With the Enemy Act* - 50 U.S.C. App. §§ 1-44
3.1330 The International Emergency Economic Powers Act - 50 U.S.C. §§ 1701-1706
3.1340 Customs and Commerce Export and Enforcement Responsibilities
3.1350 The *Arms Export Control Act* - 22 U.S.C. § 2778
3.1360 Other Commonly Charged Offenses in Export Cases
3.1370 Jurisdiction and Venue in Export Cases
3.1380 Investigative Tools in Export Cases (Subpoenas)
3.1390 Special Sanctions in Export Cases

CBP has traditionally been concerned with regulating the introduction of merchandise *into* the United States. From 1789, when the first border search statute was enacted, CBP officers have been examining persons, baggage and vessels to determine if merchandise is concealed that is subject to duty or can be legally imported into the United States

The submission of export (outbound) manifests and the verification requirements enforced by CBP are presently found in 46 U.S.C. § 60105. This dates from § 23 of the Act of August 20, 1789, which required Customs officers to obtain sworn statements from masters that export documentation was accurate prior to granting outbound clearances.

CBP has been required to examine export shipments, to verify export documentation and collect the documents for statistical purposes since at least 1892 (see Art 1268 - 1274, Customs Regulations of 1892). This was prior to the formation of the Department of Commerce.

Title 19 U.S.C. § 1484(f) (Statistical Enumeration) added the statutory responsibility of CBP in collecting and insuring the accuracy of export documentation for statistical purposes.

The export enforcement functions of the Department of Commerce (regarding licenses) have been performed by CBP since at least 1917 when regulations authorized and directed Customs to enforce the Commerce Department and Export Administrative Board export licensing requirements during World War I.

The Illegal Export of War Material law (22 U.S.C. § 401) enacted in 1917, granted export seizure authority to Treasury/Customs. This law is still the general basis for seizures for violation of *all* export laws.

The *Arms Export Control Act* (22 U.S.C. §§ 2751 et seq.) has been enforced by CBP since a delegation of authority by the Secretary of State in 1968.

The *Trading With the Enemy Act* (TWEA) (50 U.S.C. App. §§ 1 et seq.) enforcement functions were first delegated to Treasury/Customs by the President in 1917. Currently, in cooperation with the Treasury Department

Office of Foreign Assets Control (OFAC), CBP enforces this law and various other economic sanctions against hostile targets to further U.S. foreign policy and national security objectives, including those contained in *The International Emergency Economic Powers Act* (50 U.S.C. §§ 1701-1707).

3.1310 *The Export Administration Act* - 50 U.S.C. App. §§ 2401-2420

3.1311 In General
3.1312 Violations
3.1313 Penalties for Violations

3.1311 In General

The *Export Administration Act of 1979* (the EAA) regulates the export of merchandise, including strategic dual-use goods and technologies from the United States for national security and foreign policy reasons. The EAA lapsed in 2001.[260] In Executive Order (EO) 13222,[261] the President invoked the *International Emergency Economic Powers Act* (IEEPA) and has continued in effect, to the extent permitted by law, the provisions of the EAA and the Export Administration Regulations (EAR) published by the Commerce Department.[262] These regulations are found in 15 C.F.R. Parts 730-774.

With certain exceptions, the EAR governs the movement of all items from the U.S. moving in transit and all U.S. origin items wherever located or incorporated abroad into foreign made products.[263] Certain goods are regulated for reasons of foreign policy (including chemical, biological and, nuclear nonproliferation, crime control, anti-terrorism and regional stability),[264] or national security. [265]

These regulated goods include:

- "Dual-use" goods and technologies are those that have both military and civilian applications.[266]

- A "good" is defined as "any article, natural or manmade substance, material, supply or manufactured product, including inspection and test equipment, and excluding technical data."[267]

260 50 U.S.C. App. § 2419.
261 66 F.R. 44025 (August 18, 2001) extended by Presidential Notice, 67 F.R. 53721 (August 14, 2002).
262 The Act contains a sunset provision that causes it to periodically expire. During these lapses, the enforcement provisions contained in the Export Administration Regulations are continued in effect by Executive Orders issued under IEEPA. See E.O. 13222, 66 F.R. 44025 (August 18, 2001) extended by Presidential Notice, 67 F.R. 53721 (August 14, 2002).
263 15 C.F.R. § 734.3.
264 15 C.F.R. Part 738.
265 See 50 U.S.C. App. §§ 2402(2)A, 2402(2)B, 2402(2)C and 15 C.F.R. § 730.6.
266 15 C.F.R. § 730.3.

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- A “technology” is defined as "information and know how (whether in tangible form, such as models, prototypes, drawings, sketches, diagrams, blueprints, or manuals, or in intangible form, such as training or technical services) that can be used to design, produce, manufacture, utilize, or reconstruct goods, including computer software and technical data, but not the goods themselves."[268]

The primary regulatory tool established by the EAA is the export license. The EAA authorizes the Secretary of Commerce (Commerce) to require licenses for specific exports.[269] In addition, Commerce is to establish and maintain a Commerce Control List (CCL) of goods and technologies that require export licenses and issue regulations implementing the EAA.[270] For updates on the latest regulations or for regulations applicable to a particular violation, call the Office of Chief Counsel (Enforcement) at headquarters.

The EAR sets forth export license requirements and procedures. License applications must particularly describe the equipment to be exported, the ultimate consignee and country of ultimate destination, and contain such additional supporting documentation as required by the Commerce Department, Bureau of Industry and Security (BIS).[271]

CBP’s enforcement role with respect to the EAA is assisted by the Shipper’s Export Declaration (SED) form or electronically through the Automated Export System (AES). When required, this declares that the export is authorized under the “No License Required” provisions, a License Exception or under a license. [272]

3.1312 Violations
3.1312a Violations under the EAA -- 50 U.S.C. App. § 2410
3.1312b Violations under EARs

3.1312a Violations under the EAA -- 50 U.S.C. App. § 2410

Elements of violation of § 2410(a) -- A person:

- Knowingly
- Violates, or conspires to or attempts to violate
- the EAA, regulations, order or license.

A criminal violation of § 2410(a) of the EAA requires that the conduct be knowingly done. “Knowingly” does *not* mean that the defendant must know of or

267 50 U.S.C. App. § 2415(3).
268 50 U.S.C. App. § 2415(4).
269 50 U.S.C. App. § 2403(a).
270 50 U.S.C. App. § 2414. The CCL can be found at 15 C.F.R. Part 174, Supplement No. 1.
271 15 C.F.R. §§ 748.6 and 748.9.
272 15 C.F.R. § 758.1.

be aware of the consequences for his conduct or that such conduct is prohibited or otherwise illegal. "Knowingly" simply means that he intended the particular conduct and it was not engaged in by accident or mistake.[273] In the context of this particular statute, however, the conduct that must be knowingly done is "[violate] ... any provision of this Act or any regulation, order or license. . ." Thus, it is necessary for the government to prove that the defendant *knew* that his actions violated some provision of the EAA or regulation, order or license thereunder.[274]

Elements of § 2410(b)(1) -- A person:

- Willfully
- Violates or conspires to or attempts to violate
- EAA, regulation, order or license
- With knowledge that the exports involved will be used for the benefit of, or that the destination or intended destination of the goods or technology involved is,
- Any controlled country or any country to which exports are controlled for foreign policy purposes.

In order to establish a criminal violation of § 2410(b) of the EAA, or of the *Arms Export Control Act* (AECA), the *International Emergency Economic Powers Act* (IEEPA), or the *Trading with the Enemy Act* (TWEA), all of which require that the conduct be *willfully* done, the government must prove specific intent meaning that it is necessary for the government to prove beyond a reasonable doubt that a defendant specifically intended to do what the law forbids.

By requiring that the conduct be *willful*, Congress set the threshold for a violation on the voluntary, intentional violation of a known legal duty. It is not enough for one to merely intend his conduct, but he must know that his conduct violates a specific legal duty.[275] The burden is on the government to affirmatively prove knowledge of the legal duty, e.g., the license requirement.[276] Knowledge that there may be criminal consequences for such a violation, however, is not required.[277]

273 Black's Law Dictionary (6th Edition), 872.
274 *Liparota v. United States*, 471 U.S. 419 (1985).
275 *United States v. Bishop*, 412 U.S. 346 (1973); *United States v. Lizarraga-Lizarraga*, 541 F.2d 826 (9th Cir. 1976).
276 *United States v. Macko*, 994 F.2d 1526 (11th Cir. 1993); *United States v. Fierros*, 692 F.2d 1291 (9th Cir. 1982).
277 See *United States v. Murphy*, 852 F.2d 1 (1st Cir. 1988); *United States v. Tooker*, 957 F. 2d 1209, 1214 (5th Cir. 1992); *United States v. Beck*, 615 F.2d 441 (7th Cir. 1980); *United States v. Muthana*, 60 F.3d 1217 (7th Cir. 1995); *United States v. Gregg*, 829 F.2d 1430 (8th Cir. 1987); *United States v. Lizarraga-Lizarraga*, 541 F.2d 826 (9th Cir. 1976); *United States v. Adames*, 878 F.2d 1374 (11th Cir. 1989); *United States v. Frade*, 709 F.2d 1387 (11th Cir. 1983); *United States v. Macko*, 994 F.2d 1526 (11th Cir. 1993).

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The EAA § 2410(b) offense also requires that the defendant *know* that the goods were destined for or were intended to be used for the benefit of a controlled country, or a country to which exports are controlled for foreign policy purposes.[278] Such knowledge can be established by circumstantial evidence.[279]

If the knowledge element cannot be established but all other elements are present then civil sanctions will apply.[280] Knowledge for administrative violations is lower than the criminal reasonable doubt standard and is defined as:

> Knowledge of a circumstance (the term may be a variant, such as "know," "reason to know," or "reason to believe") includes not only positive knowledge that the circumstance exists or is substantially certain to occur, but also an awareness of a high probability of its existence or future occurrence. Such awareness is inferred from evidence of the conscious disregard of facts known to a person and is also inferred from a person's willful avoidance of facts.[281]

There may be two or more violations, each with its own penalty, for the same shipment—e.g., exporting without the required license, acting with knowledge of a violation, and making false statements on export control documents.[282]

Elements of § 2410(b)(3):

This section criminalizes the mere possession of items with the intent to export such items illegally. The offense has three elements:

1. Possession of any item;

2. The item requires a license for reasons of national security or foreign policy (*not* because of short supply); and either

3. Intent to export the item without the required export license or in violation of the EAR, or any order, license or authorization issued thereunder,

** or **

278 50 U.S.C. App. § 2410(b).
279 See *Gregg*, 829 F.2d at 1439. In *Gregg*, the court found that this knowledge element was established by the defendant's possession of part of the export as he was about to board a flight to the country at issue, as well as several acts of subterfuge by the defendant.
280 15 C.F.R. Part 766.
281 15 C.F.R. § 772.1.
282 15 C.F.R. § 764.3(c).

3. Know or have reason to believe the item would be exported without the required report license or in violation of the EAR, or any order, license or authorization issued thereunder.[283]

There are no published opinions interpreting § 2410(b)(3). Nevertheless, from the analogous context of drug cases one may assume that the possession required may be actual or constructive. See Chapter Ten, Controlled Substances, for a complete discussion of actual and constructive possession.

3.1312b Violations under EAR

Violations are set forth at 15 C.F.R. § 764.2. The first enumerated violation, "engaging in prohibited conduct," is linked to the ten "General Prohibitions" set forth at 15 C.F.R. § 736.2(b). The ten General Prohibitions provide that no person may:

1. Export or reexport a controlled item without the required license;

2. Export or reexport from abroad a foreign-made item incorporating more than a de minimis amount of controlled U.S. content;

3. Export, reexport or export from abroad the foreign-produced direct product of U.S. technology if the technology is controlled or if the item is controlled for national security reasons;

4. Engage in actions prohibited by a denial order (an order denying a person's export privileges);

5. Export or reexport to a prohibited end-use or end-user;

6. Export or reexport to embargoed destinations;

7. Support proliferation activities;

8. Export an item through designated countries;

9. Violate any terms or conditions of a license or license exception;

10. Proceed with a transaction with knowledge that a violation has occurred or is about to occur.

Other violations set forth in 15 C.F.R. § 764.2 are: 1) causing, aiding, or abetting a violation; 2) soliciting or attempting a violation; 3) conspiracy; 4) acting with knowledge of a violation; 5) possession with intent to export illegally; 6) misrepresentation and concealment of facts; 7) evasion; 8) failure to comply with

283 See 50 U.S.C. App. § 2410(b)(3); 15 C.F.R. § 764.3(b)(2)(iii).

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reporting and recordkeeping requirements; 9) license alteration; and 10) acting contrary to the terms of a denial order.

3.1312b(1) Export or Reexport (or attempt or conspiracy)

The EAA defines "export" in a broader sense than the term's common usage would suggest. The term "export" is defined as any of three specified activities. The first is "an actual shipment, transfer, or transmission of goods or technology out of the United States."[284] The second is "a transfer of goods or technology in the United States to an embassy or affiliate of a controlled country."[285] The third is "a transfer to any person of goods or technology either within the United States or outside of the United States with the knowledge or intent that the goods or technology will be shipped, transferred, or transmitted to an unauthorized recipient."[286] The EAR has a broader definition which means "an actual shipment or transmission of items subject to the EAR out of the United States or release of technology or software subject to the EAR to a foreign national in the United States."[287]

As the last two of these definitions suggest, actual transport out of the United States is not required. Courts have recognized this principle in other contexts besides prosecutions under the EAA.[288]

Reexports may also need a license. A reexport means an actual shipment or transmission of items subject to the EAR from one foreign country to another foreign country or release of technology or software subject to the EAR to a foreign national outside the United States.[289]

284 50 U.S.C. App. § 2415(5)(A).
285 See 50 U.S.C. App. § 2415(5)(B).
286 See 50 U.S.C. App. § 2415(5)(C). For a definition of "export" as it relates specifically to technology or software, see 15 C.F.R. § 734.2(b)(2): "Any release of technology or software subject to the EAR in a foreign country or any release of technology or source code subject to the EAR to a foreign national."
287 15 C.F.R. § 734.2(b)(1).
288 In *United States v. One 1980 Mercedes Benz 500 SE*, 772 F. 2d 602 (9th Cir. 1985) (a civil forfeiture case under 22 U.S.C. § 401), the court held that luggage was exported when it was delivered to the curbside baggage check-in at the airport. This act would have been encompassed by the third definition of "export" in the EAA. See 50 U.S.C. App. § 2415(5)(C). In *United States v. Ajlouny*, 629 F.2d 830 (2d Cir. 1980) (prosecution for transporting stolen property in foreign commerce under 18 U.S.C. § 2314), the court ruled that a shipment is placed "foreign commerce" once it arrives in the Customs area, bound for a foreign destination.
289 15 C.F.R. § 734.2(b)(4).

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3.1312b(2) Controlled Item

The term "item" means "commodities, software and technology."[290] The Commerce Control list is found in 15 C.F.R. Part 774, Supplement No. 1, which lists items by Export Control Classification Number (ECCN). The license requirement for each ECCN will indicate the controls for each item, the reason for control, any license exceptions and reference the Country Chart found in 15 C.F.R. Part 738, Supplement No. 1, which in turn indicates to which destinations a license is required.

3.1312b(3) Prohibited End Use or End User

The prohibited end uses and end users, set forth in 15 C.F.R. Part 744, are defined as nuclear, missile, chemical or biological weapons, and nuclear maritime end uses and end users. Part 744 provides that, in addition to the license requirements for items specified on the CCL, a person may not export or reexport any item subject to the EAR without a license if at the time of the export or reexport the person knows the item will be used directly or indirectly in any one or more of the specified prohibited end use activities.[291]

3.1312b(4) Embargoed Destinations

Export of all items subject to the EAR may be controlled or prohibited to certain countries, such as, currently, Cuba, Iran, North Korea, Sudan and Syria, or may be prohibited to certain areas within a country or to certain organizations within a country.[292] Embargoes and other special controls are set forth at 15 C.F.R. Part 746. Certain restrictions also currently apply to assets of the former Yugoslavia (Bosnia-Herzegovina, Croatia, Macedonia, Serbia and Montenegro, Slovenia) that are still blocked by IEEPA.[293]

3.1312b(5) License Exception

Certain exports otherwise requiring licenses may meet the conditions of one or more license exceptions set forth in 15 C.F.R. Part 740. Such exceptions include shipments falling below a threshold value specified on the CCL, civilian end user for items controlled for national security reasons, certain temporary exports, and spare and replacement parts for previously licensed items.[294]

290 15 C.F.R. § 772.1.
291 See 15 C.F.R. Part 744.
292 See the website for the Commerce Department, Bureau of Industry and Security for a current list.
293 31 C.F.R. Part 585. For information on current or future *IEEPA* embargoes contact Treasury Department, Office of Foreign Assets Control (OFAC).
294 15 C.F.R. Part 740.

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3.1312b(6) Attempt

To be guilty of an attempt, a defendant must have culpable intent and must have engaged in conduct constituting a "substantial step" toward commission of the offense; mere preparation is not enough.[295] See Chapter One, Introduction.

Although there are no published opinions discussing attempts under the EAA, there is an *Arms Export Control Act* case that is instructive on this point.[296] In this case the defendant was convicted of attempting to transport firearms and ammunition across the border into Mexico. The court held that "[i]t is not necessary to reach a point of irrevocable commitment in order to be convicted of attempted exportation in violation of 22 U.S.C. § 2778." A number of factors were listed that it found sufficiently supportive of the jury's finding of an attempted unlawful export: the defendant placed the firearms and ammunition in his trunk and attempted to conceal them; he was stopped in the center lane; he tried to put his car in reverse when approached by an officer; one officer believed the defendant had committed himself to enter Mexico; the defendant told an officer that he did not need permission to export the firearms; and he said if he would have met the Customs requirements, he would have taken the firearms to Mexico that day.

Another *Arms Export Control Act* case involved a defendant who was convicted of attempting to export firearms to Lebanon without a license.[297] The court held that the defendant's criminal intent had been established by taped conversations between the defendant and the firearms dealer. It found that the defendant's conduct was sufficiently corroborative of his intent and noted that the purchase of the firearms was consummated in an abandoned warehouse under armed guard, that in discussing the pickup time the defendant stated it would "leave us more than six, seven hours," and that the defendant inquired as to the best route to New York City after the weapons had been crated.

As with other offenses for which an attempt is a crime, defendants charged with an illegal export under the EAA can be found guilty of an attempt even though an attempt charge was not included in the indictment.[298]

295 See, e.g., *United States v. Buffington*, 815 F.2d 1292 (9th Cir. 1987); *United States v. Mims*, 812 F.2d 1068 (8th Cir. 1987); *United States v. Remigio*, 767 F.2d 730 (10th Cir. 1985). See generally W. LaFave and Israel *Substantive Criminal Law* § 6.2 (1986); 4 *Wharton's Criminal Law* ch. 43 (14th ed. 1981).
296 *United States v. Ortiz-Loya*, 777 F.2d 973 (5th Cir. 1985).
297 *United States v. Mowad*, 641 F.2d 1067 (2d Cir. 1981).
298 FED. R. CRIM. P. 31(c); see, e.g., *United States v. Pino*, 608 F. 2d 1001, 1003 (4th Cir. 1979); *United States v. Marin*, 513 F.2d 974, 976 (2d Cir. 1975); *Simpson v. United States*, 195 F.2d 721 (9th Cir. 1952).

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3.1312b(7) Conspiracy

The conspiracy provision follows the common law rule that the government need not prove an overt act to establish the crime of conspiracy.[299]

The EAA conspiracy provision also provides for more severe penalties (up to ten years in prison) than does the general conspiracy statute found in 18 U.S.C. § 371 (up to five years in prison).

3.1312b(8) Causing, Aiding, Abetting, or Soliciting

The acts of causing, aiding, abetting or solicitation are also proscribed by the EAA regulations.[300]

The crime of solicitation traditionally has two elements:

1. The defendant must have the intent for another person to commit a crime, and

2. The defendant must entice, advise or otherwise encourage that person to commit an offense.[301]

The general solicitation statute includes the additional requirement that the defendant's acts occur "under circumstances strongly corroborative" of the required intent.[302] This element is not included in the EAA solicitation regulation.

3.1313 Penalties for Violations

The EAA contains five criminal penalty provisions, including forfeiture found in 50 U.S.C. App. § 2410. Knowing and willful violations of the Act (most typically unlicensed exports), as well as attempts, conspiracies, possessing items with the intent to illegally export them, and any actions taken with the intent to evade the provisions of the EAA are punishable under the statute.

A sixth penalty provision in the EAA makes it a crime for a person with an export license and knowledge that a licensed item is being used by a controlled country[303] for military purposes to not report that use to the Secretary of

299 50 U.S.C. App. §§ 2410(a) and 2410(b).
300 15 C.F.R. §§ 764.2(b), (c).
301 See W. LaFave and Israel, *Substantive Criminal Law* § 6.1 (1986); 4 *Wharton's Criminal Law* ch. 41 (14th ed. 1981).
302 See 18 U.S.C. § 373. For a discussion of this element of the solicitation statute, see *United States v. Gabriel*, 810 F.2d 627, 634-36 (7th Cir. 1987). It should be noted that 18 U.S.C. § 373 only criminalizes the solicitation to commit a crime of violence.
303 See 15 C.F.R. Part 738, Supplement No. 1.

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Defense.[304] In addition, the regulations promulgated pursuant to the EAA penalize misleading and false statements made with respect to any export from the United States as a criminal offense.[305]

The EAA also provides for civil penalties and administrative sanctions for violations of the Act, or any regulation, order or license issued thereunder, in addition to or in lieu of any other penalty that may be imposed.[306] Administrative sanctions, which are the responsibility of the Commerce Department, include fines and denial of export privileges.[307]

As discussed above, Congress mandated that the EAA expire after a fixed period of time.[308] Although Congress renewed the Act in 1993, there have been periods—including the present time—during which the Act has lapsed. As a result, for cases arising under an IEEPA order, IEEPA penalties apply to violations of the EAR rather than the EAA provisions.[309] IEEPA does not provide for criminal forfeiture, nor does it allow for the higher fines available under the EAA.[310]

Subject to the important caveat mentioned above concerning the expiration of the EAA, 50 U.S.C. App. § 2410(g) allows for the criminal forfeiture of certain property of defendants convicted under certain provisions of the EAA. Forfeiture under this section is mandatory for those convicted and where the government established the forfeitability of the property.

Three types of property are subject to forfeiture under this section:

- ✓ The defendant's interest in the item that is the subject of the violation[311];
- ✓ The defendant's interest in tangible property used to export (or attempt to export) the item[312]; and
- ✓ Any proceeds obtained by the defendant as a result of the violation.[313]

304 See 50 U.S.C. App. § 2410(b)(2); 15 C.F.R. § 764.3(b)(2)(ii).
305 15 C.F.R. § 764.2(g).
306 50 U.S.C. App. § 2410(c).
307 *Id.*
308 50 U.S.C. App. § 2419.
309 15 C.F.R. § 764.3.
310 See 50 U.S.C. § 1705 for IEEPA penalties.
311 50 U.S.C. App. § 2410(g)(1)(A).
312 50 U.S.C. App. § 2410(g)(1)(B).
313 50 U.S.C. App. § 2410(g)(1)(C).

Forfeiture under this section is limited to EAA violations involving goods controlled for national security purposes; criminal forfeiture is *not* available if the goods were controlled for reasons of foreign policy or short supply.[314]

In addition to criminal forfeiture, civil forfeiture is an available tool in EAA cases. Under 22 U.S.C. § 401, certain property involved in an EAA violation is subject to civil forfeiture. This section makes arms, munitions, "or other articles" subject to forfeiture if exported, or intended or attempted to be exported, in violation of law. Moreover, any vessel, vehicle, or aircraft used in such a violation is subject to forfeiture. Although the statute does not refer explicitly to the EAA, the courts have interpreted the "other articles" language to include any illegally exported items.[315]

The civil forfeiture statute is narrower than § 2410(g) in that it does not make proceeds from the violation subject to forfeiture. In addition, a civil forfeiture case gives potential defendants access to the broad federal civil discovery rules. On the other hand, the civil forfeiture statute renders the entire item and conveyance used in the violation subject to forfeiture, not just the criminal defendant's interest therein, as under § 2410(g).

3.1320 The *International Emergency Economic Powers Act* - 50 U.S.C. §§ 1701-1707

3.1321 In General
3.1322 Types of IEEPA Restrictions
3.1323 Penalties

3.1321 In General

The *International Emergency Economic Powers Act* (IEEPA) (pronounced "eye-ee-puh") with certain exceptions gives the President broad authority to regulate imports, exports and other international transactions (including blocking of assets and transactions in foreign financial exchanges) in times of national emergency.[316] Specifically, upon a declaration of a national emergency, the IEEPA authorizes the President, as to any person or with respect to any property "subject to the jurisdiction of the United States": (1) to investigate, regulate or prohibit transactions in foreign exchange, banking transactions involving foreign countries or nationals, and the importing and exporting of currency or securities; and (2) to investigate, regulate, direct or compel, nullify, void, prevent or prohibit transactions (including exportation's) "involving ... property in which

314 50 U.S.C. App. § 2410(g)(1).
315 See *United States v. Ajlouny*, 629 F.2d at 835 (prosecution for transporting stolen property in foreign commerce under title 18 U.S.C. § 2314); 15 C.F.R. § 758.7 (authorizing customs office to seize commodities under 22 U.S.C. § 401 for violations of the EAA).
316 See 50 U.S.C. §§ 1701-1702.

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a foreign country or a national thereof has an interest."[317] The President's power under IEEPA is far-reaching.[318]

There are four statutory exceptions to the President's IEEPA authority. He cannot regulate or prohibit: (1) "personal communication[s] ... not involv[ing] a transfer of anything of value"; (2) donations of "articles, such as food, clothing, and medicine, intended to relieve human suffering" (unless the President makes certain additional determinations); (3) the import or export of "informational materials" not otherwise controlled for export under the EAA (see § 3.1310) or the espionage laws; and (4) "transactions ordinarily incident to travel to and from any country."[319]

IEEPA controls originate in an executive order declaring a national emergency based on "unusual and extraordinary threat, which has as its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."[320] Typically, the order targets a particular country by barring U.S. persons from engaging in certain transactions involving the offending foreign government or its nationals, unless specific government authorization is obtained in advance. Thereafter, the Treasury Department, through OFAC will publish implementing regulations in the Federal Register that may require exporters, importers and others to obtain OFAC licenses prior to dealing with the targeted country or its nationals. Ultimately, the regulations are codified in title 31, subtitle B, chapter 5 of the C.F.R. Each embargo is different with respect to prohibited transactions.[321]

Normally, OFAC will only grant licenses consistent with the spirit of the executive order.[322] For example, suppose a new executive order creates an economic embargo which bars U.S. individuals and corporations from working in a certain country, and a U.S. corporation with assets in that country desires to ship equipment there in order to dismantle its factories and ship the assets back to the United States. The U.S. corporation must apply for and receive an OFAC license to do so, but because the company merely wants to salvage its fixed assets, rather than abandon them to the targeted country, OFAC would likely grant the license.

317 50 U.S.C. § 1702.

318 See *Dames & Moore v. Regan*, 453 U.S. 654, 669-74 (1981) (upholding the President's authority to nullify a judicial attachment obtained in federal court of assets in the United States held by the government of Iran and to compel the transfer of the attached assets to a Federal Reserve Bank for ultimate transfer to Iran).

319 50 U.S.C. § 1702(b).

320 50 U.S.C. § 1701.

321 See 31 C.F.R. Parts 500 to 598.

322 31 C.F.R. § 501.801.

Under the *National Emergencies Act* (NEA),[323] IEEPA restrictions expire one year from the date of the underlying executive order, unless the President issues a proclamation terminating them sooner or Congress enacts a joint resolution terminating the emergency, whichever occurs earlier.[324] The President may extend them by publishing a notice in the Federal Register and notifying Congress of the extension.[325] A notice of extension will extend the particular restrictions for another year. There is no limit to the number of extensions. In addition, the President may terminate a declared national emergency, yet continue IEEPA restrictions if he determines continuation is necessary due to claims involving the subject country or its nationals.[326]

As discussed in § 3.1300, due to the lapse of the EAA, all export controls falling within the purview of that statute have been continued by executive order, under the authority of the IEEPA. Contact OFAC for information concerning current and future economic sanctions.

For a list of countries currently under restriction, see 31 C.F.R. Parts 500 to 598.

3.1322 Types of IEEPA Restrictions

The country-specific IEEPA restrictions generally are of two types. The first type only governs activities between U.S. persons and the government of the offending country. The second type governs activities between U.S. persons and specific groups of people connected to the foreign country.

The elements of a violation of the IEEPA regulations are[327]:

- ✓ A knowing and willful
- ✓ Covered transfer, export, import, travel transaction, or contract performance;
- ✓ Without U.S. authorization

Despite the lack of any prohibition on attempts in the IEEPA statute, a criminal attempt charge based on the regulation is valid.[328]

323 50 U.S.C. §§ 1601-1651.
324 50 U.S.C. §§ 1622(a) and (d).
325 50 U.S.C. § 1622(d).
326 50 U.S.C. § 1706(a).
327 See 31 C.F.R. §§ 575.201-.212.
328 See *United States v. Mechanic*, 809 F.2d 1111, 1112-14 (5th Cir. 1987) (involving pre-1985 EAA, which did not expressly prohibit attempts, and regulation prohibiting attempts); *United States v. Gurrola-Garcia*, 547 F.2d 1075, 1078-79 (9th Cir. 1976) (involving EACA predecessor statute, which did not expressly prohibit attempts, and regulation prohibiting attempts).

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Additionally, the United States has adopted economic sanctions against countries supporting terrorism, and significant individual terrorists, terrorist groups, or narcotics traffickers.[329] These sanctions are also administered by OFAC. For information concerning current and future economic sanctions, contact OFAC.

It should be noted, however, that as long as a donor intends an item to be used to relieve human suffering and the item can reasonably be expected to serve that purpose, it cannot be restricted.[330]

3.1323 Penalties

The civil penalty for violating any license, order or regulation can be up to $50,000.[331]

The criminal penalty for an individual may include a fine up to $50,000 and imprisonment for up to twenty years. Any officer, director, or agent of a corporation in violation may face the same criminal penalties.[332]

The above penalties govern violations of any regulation or executive order promulgated pursuant to the IEEPA. In addition, until the EAA is reenacted, these penalties apply to violations of the EAA as well (if the violation occurred during the lapse).

With respect to IEEPA regulations concerning Iraq, Congress has authorized greater penalties. Willful violations of the executive orders and IEEPA regulations concerning Iraq are punishable by a fine of not more than $1,000,000 and imprisonment for not more than twelve years. [333]

3.1330 The *Trading with the Enemy Act* - 50 U.S.C. App. §§ 1-44

In 1917, TWEA was enacted into law to freeze ("block") assets in the United States belonging to World War I enemies of the United States. This economic sanction was intended to protect United States creditors of enemy aliens during World War I.[334] The Office of Foreign Asset Control (OFAC) administers TWEA sanctions and CBP assists OFAC in enforcement of these sanctions.

329 See 31 C.F.R. Parts 536, 594, 595, 596, 597, and 598.
330 *Veteran's Peace Convoy, Inc. v. Schultz*, 722 F. Supp. 1425 (S.D. Tex. 1988), an organization and several individuals seeking to send four motor vehicles to Nicaragua sought a declaratory judgment against U.S. officials as to the scope of the IEEPA's humanitarian aid exception.
331 50 U.S.C. § 1705(a).
332 50 U.S.C. § 1705.
333 See *Iraq Sanctions Act*, Pub. L. No. 101-513, § 586E, 104 Stat. 2049 codified at 50 U.S.C. § 1701 note.
334 The *Trading With the Enemy Act*, 50 U.S.C. App. §§ 1-44.

The Cuban Assets Control Regulations were issued by the United States in 1963 under the authority of TWEA in response to certain hostile actions by the Cuban government.[335] They are still in force today and prohibit most economic transactions with Cuba by U.S. citizens (including travel restrictions), all organizations physically in the United States, and all branches and subsidiaries of U.S. organizations throughout the world.[336] The basic goal of sanctions is to isolate Cuba economically. Penalties for violating the sanctions range up to 10 years in prison, $1,000,000 in corporate and $100,000 in individual fines.[337] Additionally, CBP assist OFAC in the enforcing of provisions of *The Cuban Democracy Act* (CDA),[338] which has the same fines as TWEA, and *The Cuban Liberty and Democratic Solidarity ("Libertad") Act of 1996*,[339] which also has the same fines as TWEA and codifies the Cuban Assets Control Regulations.

OFAC administers TWEA sanctions and implementing regulations, as well as a series of laws discussed under § 3.1330 that impose economic sanctions against hostile targets to further U.S. foreign policy and national security objectives. Current economic sanctions are issued under the authority of IEEPA, discussed under § 3.1320.

3.1340 The *Arms Export Control Act* - 22 U.S.C. § 2778

3.1341 In General
3.1342 Violations
3.1343 Penalties

3.1341 In General

The *Arms Export Control Act* (AECA) regulates the movement of defense articles and services from or into the United States. A "defense article" is any item on the United States Munitions List,[340] as well as any "models, mockups, and other such items which reveal technical data directly relating to items designated [on the Munitions List]."[341]

"Defense services" mean:

1. The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair,

335 31 C.F.R. Part 515.
336 For amendments to the regulations, see 76 Fed. Reg. 5072 (January 28, 2011).
337 31 C.F.R. § 501.701.
338 22 U.S.C. §§ 6001-10.
339 Pub. L. 104-114 (1996), 22 U.S.C. §§ 1465, 2295a, 2295b, 2370, 6021 note, 1643l, 1643m; 50 U.S.C. App. § 16.
340 22 C.F.R. § 120.2.
341 22 C.F.R. § 120.6.

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maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles; or

2. The furnishing to foreign persons any technical data . . . whether in the United States or abroad; or

3. Military training for foreign units, regular or irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, education or information publications and media of all kinds, training aid, orientation, training exercise and military advice.[342]

In pertinent part, the section authorizes the President to perform three functions:

1. To designate the items that are to be considered defense articles and defense services (the Munitions List);

2. To require licenses for the export and import of such articles and services; and

3. To promulgate regulations for the import and export of such articles and services.[343]

In addition, persons engaged in the business of exporting defense articles and services are required to register with the State Department.[344]

The Department of State regulations promulgated under the AECA are known as the *International Traffic in Arms Regulations* (ITAR).[345] These regulations contain the Munitions List[346], which sets forth twenty-one categories of defense articles and services that are subject to export licensing controls by the State Department, Directorate of Defense Trade Control (DDTC). Unless an exemption applies, the ITARs require a validated export license for the export of Munitions List articles and related technical data[347] to all destinations.[348] In addition to

342 22 C.F.R. § 120.9.
343 22 U.S.C. § 2778(a).
344 22 U.S.C. § 2778(b).
345 22 C.F.R. §§ 120-130.
346 22 C.F.R. Part 121.
347 "Technical data" is defined as follows:
(1) Information, other than software . . . which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions, or documentation.
(2) Classified information relating to defense articles and defense services;
(3) Information covered by an invention secrecy order;

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registering with the DDTC, such persons must obtain individual licenses for each shipment, and submit a Shippers Export Declaration (SED) to CBP.[349] A license application must particularly describe the munitions sought to be exported, as well as the ultimate consignee and use.[350] Any reexport or diversion from the country of ultimate destination is prohibited unless the DDTC issues prior written approval.[351]

3.1342 Violations

3.1342a Illegal Exports
3.1342b Failure to Register

3.1342a Illegal Exports

The elements of an illegal export offense are satisfied when a person:[352]

1. Willfully[353],

2. Exports (attempts[354] or causes to export),

3. An article listed on the Munitions List or a technology relating in a significant fashion to an article on the List,

4. Without a license.

The ITARs contain a specific definition of what constitutes the export of an item. The regulations list five activities, any one of which is an exportation: [355]

1. Sending or taking defense articles out of the United States in any manner;

2. Transferring registration, control or ownership to a foreign person of any aircraft, vessel, or satellite covered by the United States Munitions List, whether in the United States or abroad;

(4) Software . . . directly related to defense articles . . .
Information concerning general scientific, mathematical or engineering principles commonly taught in schools is not included within this definition. 22 C.F.R. § 120.10.

348 22 C.F.R. § 125.1.

349 See 22 C.F.R. §§ 123.1 and 123.5.

350 22 C.F.R. § 125.3.

351 22 C.F.R. § 123.9(a).

352 See 22 U.S.C. § 2778(c) and 22 C.F.R. § 127.1.

353 See 3.1312a for a discussion of "willfully."

354 See 3.1313b(6) for a discussion on "attempt." Note, attempted violations are prohibited in the regulations, but not in the ACEA itself.

355 22 C.F.R. § 120.17.

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3. Disclosing or transferring in the United States any defense article to an embassy, any agency or subdivision of a foreign government;

4. Disclosing or transferring technical data to a foreign person, whether in the United States or abroad;

** or **

5. Performing a defense service on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad.

As the regulations suggest, there is no requirement that the defendant be engaged in the business of exporting munitions.[356] In addition, criminal penalties are applicable to both the original export and subsequent attempts to reexport United States defense articles.[357]

As mentioned previously, individual licenses generally are required for all commercial shipments of Munition List items.[358] Arms sales by the United States government to foreign governments are covered by 22 U.S.C. §§ 2751-2769, and do not require licenses from the DDTC. However, individuals not agents of the foreign government receiving arms from the United States government may be subject to prosecution under the AECA if they resell the arms.[359] Also, 22 U.S.C. § 2780 prohibits sales, transfers, etc. to countries sponsoring terrorism by persons as well as U.S. government persons.

Technical data that is in the public domain[360] may be exported without a license.[361] A license is required for the export of defense services, and there is no public domain exception for the provision of such services.[362]

356 *Samora v. United States*, 406 F.2d 1095, 1097 (5th Cir. 1969); *United States v. Byrne*, 422 F. Supp. 147, 163 (E.D. Pa. 1976), *aff'd in part and remanded in part*, 560 F.2d 601 (3rd Cir. 1976).
357 *United States v. Evans*, 667 F. Supp. 974 (S.D.N.Y. 1987), *aff'd,* 844 F.2d 36 (2d Cir. 1988).
358 22 C.F.R. § 123.1. Exceptions to this provision allow the unlicensed export of firearms and ammunition for personal use, (22 C.F.R. § 123.17), as well as obsolete (manufactured before 1898) firearms, (22 C.F.R. § 123.17). In addition, nuclear materials under the export control of the Department of Energy or the Nuclear Regulatory Commission do not require licenses pursuant to the ITAR (22 C.F.R. § 123.20).
359 See *United States v. Evans*, 667 F. Supp. 974 (S.D.N.Y. 1984), *aff'd,* 844 F.2d 36 (2d Cir. 1988).
360 "Public domain" is defined at 22 C.F.R. § 120.11.
361 See 22 C.F.R. § 125.1.
362 See 22 C.F.R. § 124.1.

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3.1342b Failure to Register

The offense of failing to register occurs when one:[363]

1. Engaged in the business of exporting, importing or manufacturing defense articles or services on the Munitions List,

2. Willfully[364],

3. Fails to register.

"Business" has been defined as "that which habitually busies or occupies, or engages time, attention, labor and effort for . . . livelihood or profit."[365] The words "to engage in the business of" have been interpreted by one court to mean "more than one isolated sale or transaction."[366] However, 22 C.F.R. § 127.1(a)(5) says that "engaging in business of manufacturing or exporting defense articles or furnishing defense services requires only one occasion of manufacturing or exporting a defense article or furnishing a defense service."

Title 22 U.S.C. § 2778(b) sets forth the requirement that all manufacturers, exporters and importers of defense articles and services register with the government. As with the licensing function, the implementing regulations specify the DDTC as the entity charged with administering the registration requirement.[367]

The regulations exempt several categories of persons otherwise covered by the requirement.[368] One of these encompasses persons who engage in the fabrication of articles for experimental or scientific purposes, including research and development.[369] Another exemption applies to persons who produce unclassified technical data only.[370]

3.1343 Penalty Provisions

The penalty upon conviction for a willful violation of the AECA or any regulation is a fine up to $1,000,000 and/or up to ten years imprisonment.[371]

363 See 22 U.S.C. § 2778(c) and 22 C.F.R. § 127.1.
364 See 3.312a for a discussion on "willfully."
365 *Black's Law Dictionary* (6th Ed.), 198.
366 *United States v. Durrani*, 659 F. Supp. 1177 (D. Conn.), *aff'd*, 835 F.2d 410 (2d Cir. 1987), the defendant raised a "void-for-vagueness" challenge to the phrase.
367 See 22 C.F.R. § 122.1(a).
368 22 C.F.R. § 122.1(b).
369 22 C.F.R. § 122.1(b)(4).
370 22 C.F.R. § 122.1(b)(2).
371 22 U.S.C. § 2778(c).

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3.1350 Other Commonly Charged Offenses in Export Cases

3.1351 False Statement - 18 U.S.C. § 1001
3.1352 Federal Firearms Statutes
3.1353 Mail and Wire Fraud - 18 U.S.C. §§ 1341, 1343, 1346
3.1354 Money Laundering - 18 U.S.C. §§ 1956 and 1957
3.1355 Conspiracy to Injure Property of Foreign Government - 18 U.S.C. § 956; and Possession of Property in Aid of Foreign Government - 18 U. S.C. § 957
3.1356 Currency and Foreign Transactions Reporting Act - 31 U.S.C. §§ 5201-5326
3.1357 Weapons of Mass Destruction - E.O. 12938, 3 C.F.R. 950

3.1351 False Statement - 18 U.S.C. § 1001

One of the most common charges in export cases is a false statement charge. This offense may be charged as a violation of 18 U.S.C. § 1001, or as a violation of the pertinent export provisions.[372] Typically, false statements in export cases appear on the Shippers Export Declaration (SED), or on an export license application.

A false statement under 18 U.S.C. § 1001 must be *material* and fall within jurisdiction of a particular United States agency or agencies.[373]

A statement is deemed *material* if it is capable of affecting or influencing the exercise of a government function.[374] It is not necessary that the government be deceived,[375] or suffer monetary loss,[376] to satisfy § 1001. In addition, the materiality of a false statement is a question of fact for the jury to decide.[377]

The Second, Fifth, Seventh, Eighth and Eleventh Circuits have held that a false statement on an SED is material.[378]

[372] See, *e.g.,* 22 U.S.C. § 2778(c); 15 C.F.R. § 764.2(g).
[373] See, e.g., *United States v. Herring*, 916 F.2d 1543, 1546 (11th Cir. 1990); *United States v. Whitaker*, 848 F.2d 914, 916-17 (8th Cir. 1988); *United States v. Lange*, 528 F.2d 1280, 1287 (5th Cir. 1976); *United States v. Adler*, 380 F.2d 917, 920 (2d Cir. 1967).
[374] See, e.g., *United States v. Myers*, 878 F.2d 1142, 1143 (9th Cir. 1989); *United States v. Van Horn*, 789 F.2d 1492, 1510 (11th Cir. 1986); *United States v. Brack*, 747 F.2d 1142, 1147 (7th Cir. 1984); *United States v. Lichenstein*, 610 F.2d. 1272, 1278 (5th Cir. 1980).
[375] See, e.g., *United States v. Goldfine*, 538 F.2d 815, 820-21 (9th Cir. 1976).
[376] See *United States v. Gilliland*, 312 U.S. 86, 93 (1941); see also *United States v. White*, 765 F.2d 1469, 1473 (11th Cir. 1985).
[377] *United States v. Gaudin*, 515 U.S. 506 (1995).
[378] *United States v. Elashyi*, 554 F.3d 480 (5th Cir. 2008), *cert. denied,* 2009 U.S. LEXIS 5437 (October 5, 2009); *United States v. Gafyczk*, 847 F.2d 685 (11th Cir. 1988); *Untied States v. Gregg,* 829 F.2d 1430 (8th Cir. 1987);*United States v.*

As for the agency jurisdiction requirement, the Supreme Court has stated that "the term 'jurisdiction' should not be given a narrow or technical meaning for purposes of § 1001."[379] It is enough that the statement relate to a matter in which a federal agency has the power to act.[380] The defendant's actual or constructive knowledge of the federal relationship also satisfies the jurisdiction requirement.[381] The Eleventh Circuit held that a false statement on an SED was within the jurisdiction of the CBP, notwithstanding that SEDs are generated by the Department of Commerce.[382]

3.1352 Federal Firearms Statutes

Federal firearms statutes proscribe a number of transactions that are sometimes involved in export cases. For example, 18 U.S.C. § 922(e) prohibits the delivery of firearms or ammunition to any contract carrier for transportation in interstate or foreign commerce without written notice to the carrier. In addition, § 922(i) prohibits the shipment of stolen firearms or ammunition, and § 922(k) prohibits the shipment in interstate or foreign commerce of any firearm that has had the serial number removed or obliterated.

3.1353 Mail and Wire Fraud - 18 U.S.C. §§ 1341, 1343, 1346

Export offenses almost always involve the use of the mails or wires in communications; as a result, the jurisdictional predicate for mail or wire fraud is present in virtually every case.

3.1354 Money Laundering - 18 U.S.C. §§ 1956 and 1957

The AECA, TWEA and the EAA are listed as specified unlawful activities (SUAs), for money laundering violations.[383] As a result, financial transactions arising from export violations may constitute an offense under §§ 1956 or 1957.

The money-laundering provision most commonly invoked in export cases is § 1956(a)(2). That section prohibits the transportation of funds to a place in the United States from or through a place outside the United States, with the intent to promote the carrying on of specific unlawful activity. Funds transferred into the United States as payment for the illegal export of controlled U.S. goods therefore would be encompassed by § 1956. In addition, offenses against foreign nations which involve smuggling or an export control violation related to an item controlled by the United States Munitions List (22 U.S.C. § 2278), or the Export

Malsom, 779 F.2d 1228 (7th Cir. 1985); *United States v. Sorkin*, 275 F.2d 330 (2d Cir. 1960).

[379] *Bryson v. United States*, 396 U.S. 64, 70 (1969).

[380] See, e.g., *United States v. Popow*, 821 F.2d 483, 486 (8th Cir. 1987); *United States v. Green*, 745 F.2d 1205, 1208 (9th Cir. 1984).

[381] See *United States v. Lange*, 528 F.2d 1280 (5th Cir. 1976).

[382] See *United States v. Gafyczk*, 847 F.2d 685 (11th Cir. 1988).

[383] 18 U.S.C. § 1956(c)(7).

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Administration Regulations (15 C.F.R. §§ 730-744), and a financial transaction which occurs in whole or in part in the United States are also SUA's.[384]

See Chapter Nine, Money Laundering.

3.1355 Currency and Foreign Transactions Reporting Act - 31 U.S.C. §§ 5311-5326

See Chapter Seven, Bank Secrecy Act.

3.1356 Weapons of Mass Destruction - 22 U.S.C. §§ 2797, 2797a-b, 2799aa, 3201; 42 U.S.C. §§ 2077-2157; 50 U.S.C. App. §§ 2401-2420.

Executive Order 12938 authorizes the Secretary of Commerce to control any exports that would assist a country in acquiring the capability to develop or use weapons of mass destruction. There are several statutes concerning weapons of mass destruction under three major classifications: nuclear; chemical/biological; and missiles/delivery systems.[385] CBP assists the Department of Commerce in the enforcement of these statutes. For further information concerning these sanctions contact your Associate/Assistant Chief Counsel.

3.1360 Investigative Tools in Export Cases (Subpoenas)

CBP and the Commerce and State Departments can subpoena books and records of parties to export transactions for use in criminal, civil and administrative proceedings.[386]

Evidence obtained pursuant to any administrative subpoena is admissible in a criminal prosecution. It could also be disclosed to a foreign law enforcement agency pursuant to a national interest determination by the Commerce Department.[387] Once a case is referred to the Department of Justice, alternative evidence gathering techniques, including grand jury subpoenas, may be required depending upon the scope of the statutory authority for the particular administrative process. The Customs Export subpoena[388], however, is not

384 18 U.S.C. § 1956(c)(7)(B).
385 See, *e.g.,* Nuclear: 22 U.S.C. §§ 2799aa, 2799aa-1, 2799aa-2, 3201; 42 U.S.C. §§ 2077, 2099, 2122, 2131, 2133, 2138, 2155, 2156, 2157. Chemical/Biological: 22 U.S.C. §§ 5601-5605, 2798; 50 U.S.C. App. § 2410c. Missiles/Delivery Systems: 22 U.S.C. §§ 2797, 2797a, 2797b; 50 U.S.C. App. §§ 2405, 2410, 2410a, 2410b.
386 See 22 U.S.C. § 2778(e) (State Department); 50 U.S.C. App. § 2411 (Commerce Department and CBP).
387 Chief Counsel Opinion, En-97-0247, dated 1997.
388 See Customs Directive, 4210-009A, "Use of Customs Export Enforcement Subpoena," (September 2001).

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limited to civil enforcement only and can be used in support of a grand jury investigation.

3.1370 Special Sanctions in Export Cases

19 U.S.C. § 1436 has civil and criminal sanctions for any forged, altered or false manifest. 13 U.S.C. §§ 304 and 305 contain civil sanctions for failing to file any required report in connection with the exportation of cargo.

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Chapter Four

Diplomatic Immunity

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4.000 Introduction

Diplomatic immunity is a status created by international law under which certain foreign officials are removed from the jurisdiction of local courts and other authorities for both their official and personal activities. It has frequently been the subject of public criticism and misunderstanding. This has been the case especially when such officials or their family members have used their immunity to protect themselves from the consequences of acts, which, if committed by ordinary citizens, would result in the application of criminal sanctions.

The reason for diplomatic immunity is simple and basic. Its purpose is to protect the channels of diplomatic business by exempting foreign government representatives from local jurisdiction so that they can perform their official functions with complete freedom, independence, and security. Although the current law of diplomatic immunity is formalized in treaty the basic concept is reciprocity. We treat the diplomats of other nations in the way that we expect them to treat our diplomats in their country.

Diplomatic immunity has its roots in the customs and usages of ancient times. Because of mutual advantages, tribes, later nations, provided special protection to each other's emissaries and representatives. History records armed conflicts between nations over the arrest or imprisonment of the diplomatic envoys of one of the parties. Thus, in preserving peace and friendly relations nations recognized that ambassadors and other diplomats should be treated with special consideration.

In 1961, the *Vienna Convention on Diplomatic Relations* was drafted as a codification of international law in the area of diplomatic privileges and immunities by the United Nations. The United States signed the treaty in 1972, and it became law. In 1978, further progress was made through enactment of the *Diplomatic Relations Act*, 22 U.S.C. § 254[1] which established the *Vienna Convention* as the definitive United States law on the subject as of 1978.[2]

As a result of the legal reforms, members of foreign diplomatic missions are now accorded only those immunities which by general agreement are required in today's world to protect the interests of their governments. Currently, there are approximately 100,000 foreign officials and their dependents in the United States. Many of these individuals are entitled to some form of immunity, but the number of individuals afforded full diplomatic immunity is limited. The *Vienna Convention* makes the degree of immunity commensurate with the rank of the

1 Public Law 95-393; 92 Stat. 808, *An Act to Complement the Vienna Convention on Diplomatic Relations,* approved September 30, 1978. Originally codified as 22 U.S.C. § 254, and subsequently repealed and replaced with 22 U.S.C. §§ 254a-e.
2 *Vienna Convention on Diplomatic Relations*, 23 U.S.T. 3227 T.I.A.S. No. 7502, 500 U.N.T.S. 95 (April 18, 1961) (entered into force with respect to the United States on December 13, 1972).

member of the diplomatic mission. In modern times members of the family forming part of the diplomat's household have been accorded the same privileges and immunities as the diplomat himself so as to protect the interests of the sending State. The diplomat's household consists of his or her spouse, children under 18, or to age 23 if attending college, and other persons expressly agreed to by the Department of State. The United States extends the same immunities to the diplomats of both nations that are signatory to the *Vienna Convention*, and those that are not.[3]

Diplomatic immunity does not exempt a diplomatic officer from the obligation of observing local laws and regulations. An envoy is not clothed with diplomatic immunity to enable him to indulge with impunity in personal controversies, or to escape from liabilities to which he otherwise might be subjected. The purpose of immunity is not to benefit individuals but to ensure the efficient performance of the functions of the diplomatic missions.

When abuses of immunity occur, the United States is obliged under treaty and statutory law to recognize the immunity of the offender, without in any way condoning the offense.[4] When a diplomat or consular official is believed to have violated a law the agent or officer should notify the Office of Protocol in the Department of State. The Office of Protocol is available to both citizens and diplomats for the resolution of problems that may involve diplomatic immunity. That office has quite often been successful in settling disputes brought to its attention where the immunity of an individual has prevented a satisfactory settlement through the judicial process. In those few cases where the action of the diplomat is particularly egregious, the Department can request that the sending country waive diplomatic immunity, or the United States may declare the offender *persona non grata* after withdrawing the offender's accreditation. Stated differently, the Department of State may revoke the individual's official recognition (by the United States) and order him or her to leave. If the official fails to depart the United States within a reasonable time period after being declared *persona non grata* the United States may prosecute, if appropriate. Fortunately, such cases are rare since the vast majority of diplomatic personnel do obey the laws of this country.

The immunities and safeguards provided in the Vienna Conventions are precious to the United States in terms of shielding its own diplomats serving abroad from prosecution by local authorities operating under judicial systems with minimal due process safeguards. Family members could also be subject to false charges and other nefarious activities. Without such protection staffing our posts abroad would be difficult, if not impossible. We extend privileges and immunities to foreign diplomatic personnel here to ensure that our personnel are accorded the same treatment abroad. The Office of Foreign Missions was created October 1, 1982, pursuant to the *Foreign Missions Act*. The Act was passed in the summer of 1982 as an expression of Congressional concern for the

[3] 22 U.S.C. § 254b.
[4] 22 U.S.C. § 254d.

conditions under which some American diplomats were serving abroad and involves the Office of Foreign Missions along with the Department of State Office of Protocol in the examination of privileges and immunities.

Field Operations personnel should become familiar with the *Directive 3340-032, Processing Foreign Diplomatic and Consular Officials, January 5, 2002,* which includes detailed instructions on the handling of diplomatic pouches, consular pouches, diplomatic and consular couriers, baggage and effects of officials of foreign governments and their employees and other important subjects in this area.

4.100 Diplomatic Immunity at the Border - Persons

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Persons granted diplomatic immunity at the border are immune from any form of arrest, search, or detention. "A-1," "A-2," "G-1," "G-3" or "C-3" visas may indicate that a person has diplomatic immunity at the border. However, having a diplomatic visa does not mean that the individual is entitled to diplomatic immunity. The Department of State sometimes issues diplomatic visas to foreign officials travelling to the United States as a matter of official courtesy. For an individual to have diplomatic immunity at any level, requires that the Department of State to have specifically recognized that individual as having immunity.[5] The only conclusive evidence of diplomatic immunity is a diplomatic

5 See, *In re Baiz,* 135 U.S. 403, 432 (1890) (*a* certification by the Department of State that an individual is, or is not, a diplomatic agent, communicated to a court in the United States, is binding on the court); *Haley v. State,* 200 Md. 72, 88 A.2d 312 (1952*)* (In the United States, a person's diplomatic status is established when it is recognized by the Department of State); *United States v. Kostadinov,* 734 F.2d 905 (2nd Cir.1984), *cert. denied*, 469 U.S. 881 (1985) (trade representative travelling on a diplomatic passport and working in the Bulgarian mission premises in New York did not have diplomatic immunity because he was not recognized by the State Department); *United States v. Coplon*, 88 F. Supp. 915 (S.D.N.Y. 1950) (non-accredited Soviet Official denied immunity); *but* see, *Paredes v. Vila*, 479 F. Supp. 2d (D. D.C. 2007) (The United

identification card issued by the Department of State. However, a diplomat is entitled to the privileges and immunities of his position irrespective of whether he is in possession of the diplomatic ID card. New diplomats coming to the United States may have yet to be issued a card, and returning diplomats are not required to take the card out of the country with them so treat all individuals claiming diplomatic immunity courteously. If the individual claims diplomatic status but is not in possession of a valid Department of State issued identification card contact International Affairs at (202) 927-1480 during regular business hours (8 a.m. to 5 p.m. eastern standard time) for further guidance. After normal business hours, all requests for guidance should be made to the Diplomatic Security Watch Officer, Department of State, at (202) 647-1727.

As a matter of policy the United States does not normally recognize its own citizens, nationals or lawful permanent residents as diplomatic agents. They will generally not be entitled to full diplomatic immunity in the United States, and neither will their family members.[6] Members of the administrative and technical staff, and service staff, will have no immunity if they are United States citizens, national or permanent residents. Neither will their family have any immunity.

4.110 Diplomatic Agent

The category of diplomatic mission personnel is defined primarily with reference to the functions performed. There are three levels of diplomatic mission personnel; diplomatic agents, members of the mission administrative or technical staff, and members of the service staff.[7] A d*iplomatic agent* is the term assigned to ambassadors and the other diplomatic officers who generally have the function of dealing directly with host country officials. This category enjoys the highest degree of immunity. All officers having diplomatic functions, whatever their title or designation, including ambassadors, envoys extra ordinary, ministers plenipotentiary, ministers resident, commissioners, charge's d'affaires, counselors, agents and secretaries of embassies and legations, and their immediate families are issued an "A" visa.

Diplomatic agents and their family members have the following immunities;

States District Court for the District of Columbia held that Department of State's recognition of an individual as a diplomat is presumed accurate, but subject to judicial review.)

[6] Immediate family members are issued the same visa as the principal alien, and are generally entitled to the same immunities. The immigration regulations define immediate family member for diplomatic and consular personnel as; spouse, unmarried children under age 21; unmarried children under age 23 if still in full time attendance at a post secondary educational institution.; unmarried children under 25 in full-time attendance at a post-secondary institution in some instances; and unmarried physically or mentally disabled children of any age. See, 8 C.F.R. § 214.2 (a)(2)

[7] 22 U.S.C. § 254a

- Personal inviolability which includes complete freedom from seizures of any type and searches of any type as to their person, luggage, vehicle or residence,[8]

- Complete immunity from state and federal criminal jurisdiction,[9]

- Immunity from civil suit,[10]

- Immunity from compulsory process, i.e. diplomats may not be summoned as witnesses in civil or criminal cases,[11] even if they are the victim of the crime.[12]

8 See, U.S. Customs and Border Protection, *Directive 3340-032* for procedures in the event that an officer or agent has probable cause to believe that an arriving individual is carrying contraband.

9 Upon certification by the Department of State all actions against a diplomat are to be dismissed. See, *Abdulaziz v. Metropolitan Dade County*, 741 F.2d 1328 (11th Cir. 1984); *Shaffer v. Singh*, 343 F.2d 324 (D.C. Cir. 1965); *Ali Aidi v. Yaron*, 672 F. Supp. 516 (D. D.C. 1987) (dismissal of civil action for war crimes due to diplomatic immunity); *Skeen v. Fed. Rep. of Brazil*, 566 F. Supp. 1414 (D.D.C. 1983) (case dismissed due to diplomatic immunity where the grandson of the Brazilian Ambassador shot a man in an altercation outside of a nightclub).

10 There are four exceptions to a diplomats immunity from civil suit; 1) a diplomat may be sued in connection to real property transactions that are not conducted on behalf of the mission; 2) if acting as the executor of a state that is being distributed in the host country, i.e. the United States; 3) in connection with professional or commercial activities outside the scope of their official duties; 4) counterclaims where the diplomat initiated the civil suit.
For examples see, *Sabithi v. Al Saleh*, 605 F. Supp. 2d (D.D.C. 2009) (hiring domestic employees is not commercial activity); *Crum v. Saudi Arabia*, 2005 U.S. Dist. Lexis 38483 (E.D. Vir. 2005) (hiring a driver is not commercial activity that would subject a diplomat to civil jurisdiction for employment discrimination); Logan v. Dupuis, 990 F. Supp. 26 (D.D.C. 1997) (leasing a residence is not commercial activity); *but* see, *Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996) (hiring domestic help is a commercial function).

11 See, *Vulcan Iron Works, Inc. v. Polish American Machinery Corp.*, 472 F. Supp. 77 (S.D.N.Y.1979) (an attaché in Polish Commercial Counselor's Office with diplomatic immunity cannot be held in contempt for failure to respond to subpoena.)

12 Diplomat's are immune from service of process in actions against the diplomat's government. *Hellenic Lines Ltd. v. Moore,* 345 F.2d 978 (D.C. Cir.1965). For service of process on a foreign government see the *Foreign Sovereign Immunities Act,* 28 U.S.C. §§ 1604, 1605-1607

- Immunity of jurisdiction to prescribe including most taxes, customs duties, employment regulations,[13] social security taxes, military or national service, and jury duty.

- The premises of a foreign mission is inviolable, as are its archives and papers.

- All diplomatic immunity belongs to the sending state and not to the diplomat him or herself, and thus the diplomat cannot waive his or her own immunity. Any waiver must be authorized by the sending state, and will be construed narrowly by the courts**.**

4.111 Members of Administrative and Technical Staffs

Members of administrative and technical staffs of a diplomatic mission perform tasks critical to the inner workings of the embassy. They include secretaries, office managers, clerical and security personnel. Accordingly, they and their family members enjoy most of the same privileges and immunities identical to those of diplomatic agents. Administrative and technical personnel have significantly less immunity in civil cases as their civil immunity is only functional. Functional immunity, also known as official acts immunity, means that the individual only has immunity for actions taken as part of his or her official duties on behalf of the sending state. Members of the Administrative and Technical staff; as well as their family members will be issued "A" visas.

4.120 Administrative and Service Staff

Members of the service staff include positions such as drivers, janitorial, cleaning, and maintenance staffs. These individuals only have functional immunity, and their family members have no immunity. Service staff will have an A visa.

4.121 Temporary Official Visits

Individual foreign officials coming temporarily to the United States on official business are usually not given diplomatic immunity. If an issue arises with a visiting foreign official contact the State Department for further guidance.

4.130 Diplomatic Agents in Transit

Diplomatic agents in transit, as well as their family, to a third nation in order to take up or return to their posts must be accorded the all immunities necessary to ensure completion of their journey. A diplomat in transit is customarily issued a "C" visa, for a period of admission not to exceed 29 days.[14]

13 See, 8 C.F.R. § 214.2 (a) for specific details on the employment of a diplomats family members.
14 8 U.S.C. § 1101(a)(15)(C) and 8 C.F.R. § 214.2(c).

Prior to enactment of the *Vienna Convention on Diplomatic Immunity* the status of diplomats in transit was tentative and addressed case by case.[15] The Convention clarified the issue; diplomats in transit are immune unless the individual remained longer than was necessary in the United States.[16] If a diplomat abuses the transit privileges immunity may be subject to waiver by the United States. Thus we would be permitted to arrest and try him for criminal activity. As always waiver is a matter left exclusively to the Department of State and any action against a diplomat would require approval and coordination with the Department of State.

4.131 Consular Officers

Consulates and their foreign personnel are often erroneously considered to be identical to foreign embassies and their staffs in the popular view of privileges and immunities. Traditionally, the function of consular posts is fundamentally different from that of the diplomatic missions, and is governed by a different treaty, the *Vienna Convention on Consular Relations*.[17] Consulates do not have the principal role of providing communication between the two countries but rather perform a variety of functions of principal interest to their respective sending countries (e.g., issuance of travel documents, attending to the difficulties of their own countrymen who are present in the host country, advancing commercial interests of their countries, etc.) Career consular officials are prohibited from undertaking professional or commercial activities outside the scope of their official duties. Consular Officials are issued an "A-1" or "A-2" Visa.

Normally consular officers only have functional/ official acts immunity from both civil and criminal prosecution.[18] They are not obligated to testify on

15 *Bergman v. De Sieyes*, 170 F.2d 360 (2nd Cir. 1948)(a diplomat in transit is entitled to the same immunities as a diplomat in situ.) but see, *United States v. Arizti,* 229 F.Supp. 53 (S.D. N.Y.1964), (immunity denied to a career diplomat from Uruguay, with a diplomatic visa issued by the United States Embassy in Uruguay, when arrested on a narcotics charge while transiting the United States en route to a new posting).

16 *United States v. Pardo-Bolland,* 229 F. Supp. 473 (S.D.N.Y.1964), *affirmed*, 348 F.2d 316 (2d Cir.1965), *certiorari denied*, 382 U.S. 944, 86 S.Ct. 388, 15 L.Ed.2d 353 (1965); (Mexican Ambassador accredited to Bolivia arrested and tried in United States for violation of narcotics laws); *United States v. Rosal,* 191 F. Supp. 663 (S.D.N.Y.1960*)* (no immunity for diplomat accredited to a third state on personal business in United States).

17 *Vienna Convention on Consular Relations*, 21 U.S.T. 77, 596 UNTS 261 (Apr. 24, 1963).

18 The Ninth Circuit uses a two-part test when determining whether an act was "performed in the exercise of consular functions." First, are the asserted actions "legitimate 'consular functions, and if so were they performed in the exercise of the consular functions in question. *Park v. Shin*, 313 F.3d 1138, 1142 (9th Cir.

official matters, produce official documents for trial, or testify as experts. However, consular official do have limited personal inviolability. They may only be arrested pre-trial for felonies if the officer or agent has an arrest warrant.[19] Although they can be prosecuted for misdemeanors they may not be detained pending disposition of the matter. Family members of consular officials have no personal inviolability, and as they have no official responsibilities, no functional immunity. Since consular officers are not immune from legal process they must respond to a summons or similar order to appear. If appropriate they may plead immunity as an affirmative defense, but they must appear if summoned.[20] A certification by the Department of State is authoritative in proving a consular official's status as well as his immunity in a given circumstances. In actions against the officer's government, a consular officer is not an agent of his government authorized to accept service of process.[21] Consular officer may be sued for matters that fall outside of their official duties.[22]

4.140 Consular Employees and Service Staff

Members of a consulate's administrative and technical staff only have personal inviolability and official acts immunity. Consular service staff are only exempt from having to testify regarding official acts. The family members of both consular employees and service staff are entitled to no immunity.

4.141 Honorary Consuls

Honorary consuls are United States Citizens or permanent residents performing part-time consular functions for a foreign nation. They have no immunity.

4.150 Special Consular Conventions

In some cases the United States has negotiated specific bilateral treaties with individual nations that on a reciprocal basis grant additional immunities to lower ranking consular and diplomatic staff. The United States has concluded special consular conventions with Bulgaria, Peoples Republic of China, Hungary,

2002); citing, *Gerritsen v. Consulado Gen. de Mex.,* 989 F.2d 340, 346 & n.8 (9th Cir. 1993); see *also*, *Gerritsen v. de la Madrid Hurtado,* 819 F.2d 1511, 1517 (9th Cir. 1987).

19 Pursuant to 28 U.S.C. § 1351 the federal courts have exclusive jurisdiction over actions involving a consular officer.

20 See, *United States v. Wilburn,* 497 F.2d 946 (5th Cir.1974) (vice consul must respond to subpoena but can later decline to give evidence if he has immunity).

21 See, *Purdy Co. v. Argentina,* 333 F.2d 95 (7th Cir.1964), *cert. denied*, 379 U.S. 963 (1965); see also, *Oster v. Dominion of Canada,* 144 F. Supp. 746 (N.D.N.Y.1956), *affirmed*, 238 F.2d 400 (2d Cir.1956), *cert. denied*, 353 U.S. 936 (1957).

22 *Park v. Shin*, 313 F.3d 1138 (9th Cir. 2002) (Hiring and supervising a domestic servant is not an official act).

Poland, the Philippines, Romania, the Russian Federation and South Africa under which certain of their consular personnel in the United States and sometimes their families obtain significantly higher privileges and immunities than other consular officers. These arrangements are not uniform, so CBP officers will have to be governed by the official identity documents that have been issued by the Department of State. This does not extend to honorary consuls.

4.151 Couriers

An alien who is regularly and professionally employed as a courier by the government of the country to which he owes allegiance is classified "A-1" if he is proceeding to the United States on official business for his government.

An alien who is not regularly and professionally employed as a courier by the government of the country to which he owes allegiance is classified "A-2" if he holds an official position with that government and is proceeding to the United States as a courier on official business for his government.

An alien who is serving in the capacity of a courier but who is not regularly and professionally employed as such and who holds no official position with, or is not a national of, the country whose government he is serving, is classifiable as a visitor for business, "B-1."

4.160 Personnel of International Organization

The personnel of international organizations and their families are entitled to various privileges and immunities upon notification and approval of the Department of State.[23] These immunities come from treaties, and domestic legislation, and will vary according to the individual's rank.[24] Most personnel of international organizations are only given official acts immunity,[25] but at the border, "alien officers and employees of international organizations, or of aliens designated by foreign governments to serve as their representatives in or to such organizations, or of the families, suites, and servants of such officers, employees, or representatives shall be admitted (when imported in connection with the arrival of the owner) free of customs duties and free of internal-revenue taxes imposed upon or by reason of importation."[26] Furthermore, "the baggage and effects of alien officers and employees of international organizations, or of aliens designated by foreign governments to serve as their representatives in or to such organizations, or of the families, suites, and servants of such officers,

23 22 U.S.C. §§ 288d and 288e.
24 22 U.S.C. § 288, *The International Organizations Immunities Act*.
25 22 U.S.C. § 288d; see also, Art. 105 (2) of the United Nations Charter, and section 18 of the *Convention on Privileges and Immunities of the United Nations*, and Section 19 of the *Convention on Privileges and Immunities of the Specialized Agencies*.
26 22 U.S.C. § 288d.

employees, or representatives shall be admitted (when imported in connection with the arrival of the owner) free of customs duties and free of internal-revenue taxes imposed upon or by reason of importation." [27]

In many cases by agreement with the United States members of the executive staff for these organizations are accorded immunity commensurate with that of a diplomatic agent, as is the case with certain high officials of the United Nations, World Bank, International Monetary Fund, and Organization of American States.[28] These individuals and their dependents will usually be issued a "G" visa.[29] A complete list of recognized international organizations is located in 19 C.F.R. § 148.87.

4.161 Personnel Accredited to the United Nations

Members of foreign delegations to the United Nations are legally accredited to that body and not the United States.[30] However, in many cases the status of these individuals is usually the same as that of diplomatic personnel accredited to the United States. The most senior members of the mission are usually accredited the status of diplomatic agents, while most of the rest of the staff only have official acts immunity under the International Organizations Immunities Act and as required by various conventions.[31] Short-term official visitors to the United Nations may have full diplomatic immunity if they are head of state, however invitees to the United Nations headquarters including the press and staff of various non-governmental organization must be admitted to the United States, but they have no immunity. Always refer to the State Department issued credentials, or contact the State Department in individual cases. Personnel accredited to the United Nations will usually be issued a "C" or "G" visa.[32] In addition United Nations personnel are entitled to all of the privileges and

27 22 U.S.C. § 288b.

28 See, 19 C.F.R. § 148.88 (d).

29 The principal alien and his or her immediate family will be issued a "G-1" visa. Other accredited representatives and their families will be issued a "G-2" visa. A "G-3" is an official representative or family member of a government that is not recognized by the United States. A "G-4" is an officer or member of the organization's permanent staff. A "G-5" is an attendant, servant, or personal employee, or family member of a "G-1" through "G-4". See, 8 U.S.C. §1101 (a)(15)(G) and 8 C.F.R. § 214.2 (g).

30 *The Convention on Privileges and Immunities of the United Nations*, Feb. 13, 1946, *entered into force with respect to the United States* Apr. 29, 1970, 21 U.S.T. 1418, (the "CPIUN"), The CPIUN is a self-executing treaty that provides the U.N. absolute immunity from suit unless it expressly waives its immunity. The CPIUN in combination with the *Diplomatic Relations Act of 1978*, 22 U.S.C. § 254d governs the immunity of individual officials of the U.N. See, *Brzak v. United Nations,* 597 F.3d 107 (2nd Cir. 2010).

31 See, 22 U.S.C. § 288, and see also, 19 C.F.R. § 148.88.

32 8 U.S.C. § 1101 (a)(15)(C) and (G), see also, 19 C.F.R. §§ 214.2 (c) and (g).

immunities customarily given to personnel and family members of international organizations.

4.170 Misconduct by Diplomatic and Consular Officials

Immunity is not freedom to disregard the law. All diplomatic personnel are still obligated to comply with United States Law. Instead it is more appropriate to conceive of diplomatic immunity as a barrier to prosecution. The concept of inviolability generally precludes handcuffing, arrest or detention in any form. However, "…in extraordinary circumstances, to prevent a crime… where public safety is in imminent danger or it is apparent that a grave crime may otherwise be committed, police authorities may intervene to the extent necessary to halt such activity."[33] Of course, an agent or officer may also take the necessary steps to defend himself or others from violent action. Any misconduct by a diplomat or other individual with immunity should be thoroughly documented, and the agent or officer should see that the Department of State is notified.

If the matter is sufficiently serious, the State Department may request that the sending nation waive the official's immunity so that he or she may be prosecuted in the United States. The Department of State may also ask the sending country to withdraw the official, or in rare cases the Department of State will revoke the official's accreditation and expel him or her from the United States.

If diplomatic immunity is asserted on behalf of a foreign official, and he or she leaves the United States after having been recalled or expelled, that official will be thereafter inadmissible to the United States. Furthermore, the claim of immunity only protects the diplomat until he or she leaves the United States or their immunity is withdrawn or expires.[34] Good documentation and evidence gathering by an agent or officer could lay the basis for a future prosecution should that individual return to the United States at a later date.[35]

4.171 Waivers of Immunity

Diplomatic Immunity is "owned" by the sending state in order to protect its interests.[36] It does not belong to the official himself and may not be waived by

33 See, Department of State publication, *Diplomatic and Consular Immunity, Guidance for Law Enforcement and Judicial Authorities*, at 13 -14;

34 *United States v. Al-Hamdi*, 356 F.3d 564 (4th Cir. 2004) (Diplomat's son whose immunity expired successfully prosecuted for a firearms violation); *Baoanan v. Baja,* 627 F. Supp. 2d 155 (S.D.N.Y. 2009) (former diplomats are only entitled to residual immunity for official acts).

35 Note: Official Acts/Functional Immunity exists indefinitely.

36 Waivers of diplomatic immunity are narrowly construed. See, *Knab v. Republic of Georgia*, 1998 U.S. Dist. Lexis 8820 (D.D.C. 1998) (A waiver of immunity for criminal prosecution did not imply a waiver for civil suit unless stated expressly in the waiver.)

the official.[37] Only the sending state may waive the official's immunity.[38] It is the Department of State policy to seek waivers where the underlying incidents is a felony or violent crime, and the prosecutor has indicated that he would have prosecuted but for the immunity.[39] Therefore the strength of the agent or officer's report and accompanying documentation is critical to justifying a decision by the Department of State to seek a waiver. In the event of an incident the agent or officer should document and investigate the matter, to the same extent as would occur with any other individual to applicable policies. The Department of State should be notified, and the report of investigation forwarded accordingly.

4.200 Determining Diplomatic Immunity at the Border

4.211 Telephone numbers to Verify Diplomatic and Consular Personnel
4.212 Telephone numbers to Verify United Nations Personnel
4.213 Visas as an Indication of Diplomatic Immunity at the Border
4.214 Immediate Family Members
4.215 Certain Representatives to and Officers of the United Nations and the Organization of American States

Although a visa may indicate that an individual might be entitled to some form of immunity, the only authoritative identity document is the identity card issued by the Department of State, Protocol Office.

There are three types of identification cards - Diplomatic (blue border for diplomats), Official (green border for employees), and Consular (red border for consular personnel). The new identification cards are 3″ X 2″ and contain a photograph of the bearer. The bearer's name, title, mission, city and state, date of birth, identification number, expiration date, and a U.S. Department of State seal will appear on the front of the card.

A brief statement of the bearer's immunity is printed on the reverse side. Space will also be provided for the bearer's signature.

While this form of identification is generally to be relied upon, CBP officers are nonetheless urged immediately to seek verification as indicated below in connection with any serious incident or in any case where they have reason to doubt the validity of the card.

37 See, *Friedberg v. Santa Cruz,* 274 App. Div. 1072, 86 N.Y.S.2d 369 (2d Dep't 1949) (general appearance and plea to merits of a case is not an effective waiver of diplomatic immunity).
38 But see, *Mazengo v. Mzengi*, 542 F. Supp. 2d 96 (D.D.C. 2008) (Default judgment against diplomat valid where diplomat failed to file an answer in a civil complaint or introduce evidence of his diplomatic status).
39 *Diplomatic Immunity and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities.* Department of State Publication 10524, (Revised August 2010).

CBP Officers should be alert to the fact that newly arrived members of diplomatic and consular staffs may not yet have these official identity documents and should be prepared to contact the U.S. Department of State, Office of Protocol, for verification if confronted with such situations. Moreover, diplomats are not required to take their card out of the country when leaving so returning diplomats may not have their cards with them.

Telephonic inquiry should be made to the Command Center of the Bureau of Diplomatic Security; Department of State (operates 24 hrs/day): (571) 345-3146 or 1-866-217-2089 or the Department of State Operations Center at (202) 647-1512 in any case where an individual claims immunity and cannot present satisfactory identification or in any case where the officer has reason to believe that invalid identification is being presented.

4.211 Diplomatic, Consular, and International Organization Personnel[40]

During Normal Business Hours (8 a.m.-5 p.m. EST):
To verify immunity status: 202-647-1985 or 202-647-1727.

Current status of federal diplomatic license tags, registration, or other motor vehicle information: (202) 895-3521 or fax: (202) 895-3646

For reporting traffic incidents or accidents, issuance of citations, etc., involving foreign missions personnel: 202-895-3521 or fax: (202) 895-3646Fax: (202) 895-364 After Normal Business Hours:

All inquiries should be made to the Command Center of the Bureau of Diplomatic Security; Department of State (operates 24 hrs/day): (571) 345-3146 or 1-866-217-2089

4.212 United Nations Personnel[41]

During Normal Business Hours:
Diplomatic agents and family members, U.N. Mission staff and family members, or U.N. Secretariat employees 212) 415-4168 or (212) 415-4131, or 212-415-4407.
Current Status of federal diplomatic license tags, registration, or other motor vehicle information: (646) 282-2825 or (646) 282 2812.

After Normal Business Hours:

Information is available from the Communications Section of the U.S. Mission to the United Nations (open 24 hrs./day): (212) 415-4444.

40 www.state.gov/m/ds/immunities/c9125.htm
41 Id.

In the event that you are unable to determine the status of a particular individual, release the individual and detain the accompanying baggage, but do not inspect it unless you meet the requirements set forth in § 4.300.

4.213 Visas as an Indication of Diplomatic Immunity at the Border

Visas are not a reliable indication of who has diplomatic immunity at the border.

An "A-1" or "A-2" visa might qualify for diplomatic immunity. Many consular officers, however, like the Mexican consulate in Nogales, Arizona will have an "A-1" visa and are not entitled to immunity at the border. Members of the royal family of Saudi Arabia are given "A-1" visas but only a few of them are entitled to diplomatic immunity. Lesser officials and employees accredited by a foreign government and their immediate families are issued an "A-2" visa. On the other hand, many foreign military officers come to this country for training and travel on "A-2" visas and are not entitled to the immunity.

Attendants, servants, personal employees, family members are issued "A-3" visa. They only have immunity from official acts and are generally subject to search at the border.

Persons traveling on a "G-1" visa will usually be the principal country representatives to the United Nations (U.N.) or the Organization of American States (O.A.S.) and are entitled to immunity at the border. A "G-3" visa is issued to certain diplomats assigned to the U.N. or O.A.S. who are from countries with whom we have no diplomatic relations.

Persons traveling on a "C-3" will be diplomats of other nations traveling through this country to the country of their assignment. If a diplomat from another country is in this country as a tourist, he will not be traveling on a "C-3." The visa will probably be a "B-1" or "B-4" and he will not be entitled to immunity.

4.214 Immediate Family Members

Members of the immediate family of a foreign government official or close relatives who are members of the immediate family by blood, marriage, or adoption, who are not members of some other household and who will reside regularly in the household of the foreign official from whom they derive their status may be entitled to immunity. They normally have the same visa, and are entitled to the same immunities as the principal alien. The family member need not arrive with the principal alien.

4.215 Certain Representatives to and Officers of the United Nations and the Organization of American States

The following persons are free from arrest, search and detention:

1. Every person designated by a United Nations member nation as the principal resident representative to the United Nations of such member or as a resident representative with rank of ambassador or minister plenipotentiary and members of their families;

2. Such resident members of their staffs as may be agreed upon between the Secretary-General of the United Nations, the Government of the United States, and the Government of the United Nations member concerned and members of their families;

3. Every person designated by a United Nations member of a specialized United Nations agency as its principal resident representative, with the rank of ambassador or minister plenipotentiary at the headquarters of such agency in the United States and members of their families;

4. Such other principal resident representatives of United Nations members to a specialized United Nations agency and such resident members of the staffs of representatives to a specialized United Nations agency as may be agreed upon between the principal executive officer of the specialized agency, the Government of the United States, and the Government of the United Nations member concerned and members of their families;

5. The Secretary-General, Under Secretaries-General, and Assistant Secretaries-General to the United Nations and members of their families;

6. Any person designated by a member of the Organization of American States as its representative or interim representative on the council of the Organization of American States and members of their families; and

7. All other permanent members of the delegation of a member of the Organization of American States and members of their families regarding whom there is agreement for that purpose between the government of the member state concerned, the Secretary-General of the Organization of American States, and the Government of the United States of America.[42]

42 19 C.F.R. § 144.88

Most of the listed representatives to the U.N. and O.A.S. will be issued a "G-1" visa.

4.300 Diplomatic Shipments and Inspection of Luggage

4.310 Personal Luggage
4.320 Diplomatic Shipments
4.330 Diplomatic Pouches
4.340 Consular Pouches
4.350 Shipments of International Organizations

4.310 Personal Luggage

The personal luggage of those persons who have diplomatic immunity is ordinarily exempt from inspection, and not subject to duty. The luggage accompanying alien consular officers and diplomatic couriers is also ordinarily exempt from inspection. Refer to Directive 3340-032, *Processing Foreign Diplomatic and Consular Officials*, and 19 C.F.R. §§ 148.82 and 148.88.

However, such luggage may be inspected with "serious reason to believe" it contains:

- Articles other than those for the personal use of such persons or for the use of their households;

- In the case of consular officers or members of their families, articles intended for consumption in excess of the quantities necessary for direct use by the person concerned (e.g., large quantities of jewelry or appliances).

- All other articles which are absolutely or conditionally prohibited from importation (or exportation) under the laws and regulations of the United States.

- Articles which are subject to quarantine laws or regulations of the United States.[43]

The "serious reason to believe" standard in the Customs Regulations is equivalent to the "serious grounds for presuming" in Article 36 of the *Vienna Convention on Diplomatic Relations* and is roughly equivalent to "probable cause."

If one of the conditions applies and inspection of luggage is necessary, advise the individual involved that examination of his luggage is necessary and inform him of the reason.

[43] 19 C.F.R. § 148.82 (e)(2)

If the individual has no objection, examine the merchandise either in his presence or in the presence of his authorized agent.

If the individual objects to such examination, detain the luggage and notify the Port Director for coordination with the Department of State Office of Protocol.

4.320 Diplomatic Shipments

Diplomatic shipments, including "diplomatic pouches" and "consular pouches" are entitled to privileges and immunities, whether in the company of a courier or shipped unaccompanied. The current policy for processing diplomatic shipments is Directive 3350-083, *Processing Diplomatic Shipments*. In addition, the regulations found in 19 C.F.R. Part 148 also apply.

4.330 Diplomatic Pouches

A diplomatic pouch is defined as any package, envelope, bag, pouch or other container which is certified by a responsible official of the government or international organization concerned, as containing official communication, documents, etc. They are not limited to canvas sacks and there are no size or weight restrictions.

The diplomatic pouch must be clearly marked as diplomatic. There must be visible external marks of its character. The pouch must bear the seal of the government or international organization concerned. In addition, the pouch should normally have attached to it a detachable certificate under such seal signed by a responsible official of the government or international organization concerned.

If the pouch does not have any designation, it is considered ordinary freight and must go through routine CBP clearance.

Diplomatic pouches shall not be opened or detained nor shall they be subject to duty or entry.[44]

4.340 Consular Pouches

Consular pouches must bear visible marks of their character. Initially, they should not be opened or detained. However, with serious reason to believe that a consular pouch contains other than permissible materials, CBP may request that the pouch be opened in their presence by an authorized representative of the foreign government. If this request is refused, the consular pouch is denied entry to the United States and returned to its place of origin.[45]

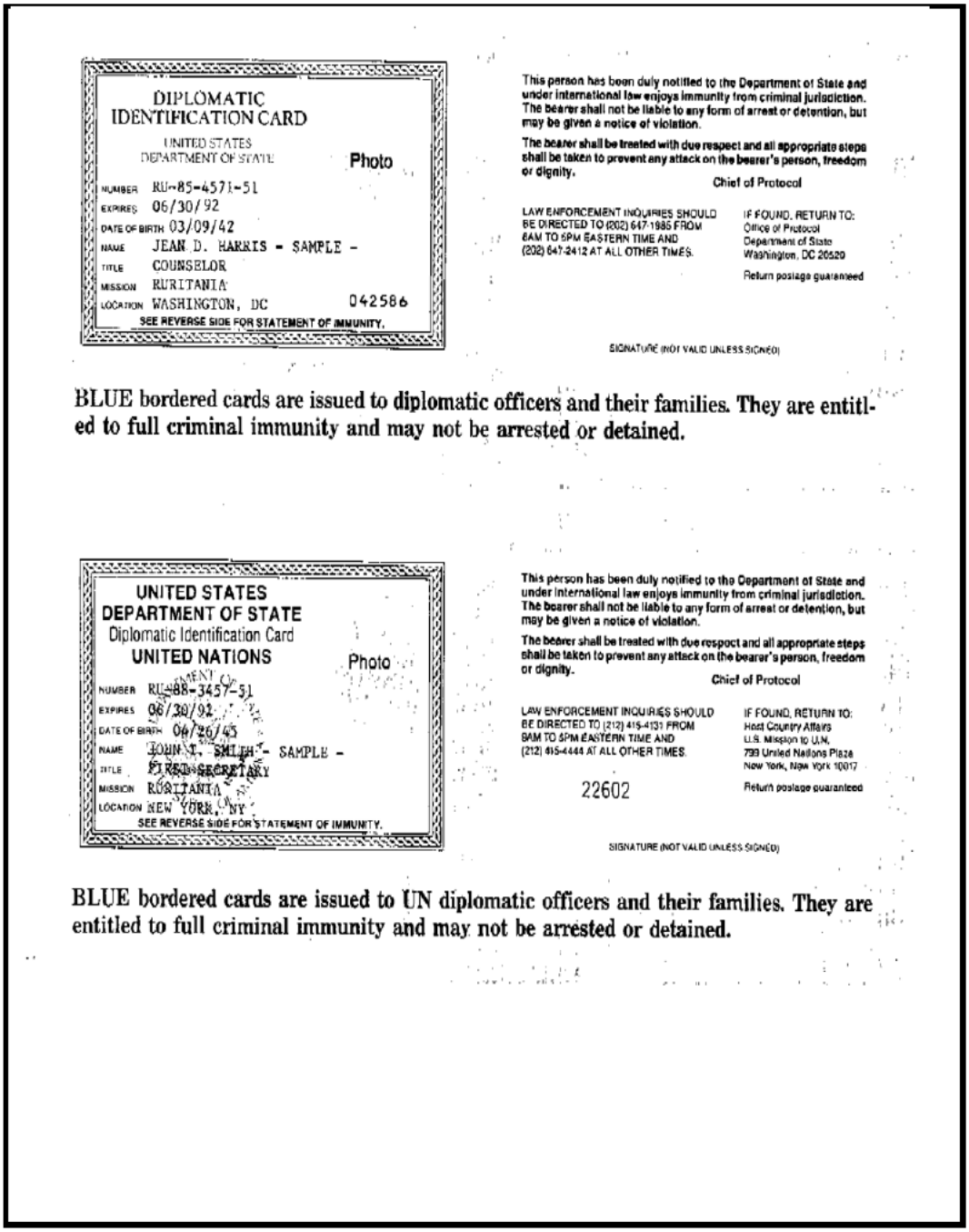
44 19 C.F.R. § 148.83 (a)
45 19 C.F.R. §148.83 (b)

4.350 Shipments of International Organizations

Upon request of the Department of State, shipments of designated International Organizations will be admitted duty free, without filing an entry.[46] Property and assets of international organizations are immune from search and seizure unless expressly waived.[47]

[46] 22 U.S.C. § 288a (d), see also, 19 C.F.R. §§ 148.86 and 148.87
[47] 22 U.S.C. § 288a (c)

4.400 Diplomatic Identity Cards



DIPLOMATIC
IDENTIFICATION CARD

UNITED STATES
DEPARTMENT OF STATE

Photo

NUMBER RU-85-4571-51
EXPIRES 06/30/92
DATE OF BIRTH 03/09/42
NAME JEAN D. HARRIS - SAMPLE -
TITLE COUNSELOR
MISSION RURITANIA
LOCATION WASHINGTON, DC 042586

SEE REVERSE SIDE FOR STATEMENT OF IMMUNITY.

This person has been duly notified to the Department of State and under international law enjoys immunity from criminal jurisdiction. The bearer shall not be liable to any form of arrest or detention, but may be given a notice of violation.

The bearer shall be treated with due respect and all appropriate steps shall be taken to prevent any attack on the bearer's person, freedom or dignity.

Chief of Protocol

LAW ENFORCEMENT INQUIRIES SHOULD BE DIRECTED TO (202) 647-1985 FROM 8AM TO 5PM EASTERN TIME AND (202) 647-2412 AT ALL OTHER TIMES.

IF FOUND, RETURN TO:
Office of Protocol
Department of State
Washington, DC 20520

Return postage guaranteed

SIGNATURE (NOT VALID UNLESS SIGNED)

BLUE bordered cards are issued to diplomatic officers and their families. They are entitled to full criminal immunity and may not be arrested or detained.

UNITED STATES
DEPARTMENT OF STATE
Diplomatic Identification Card
UNITED NATIONS

Photo

NUMBER RU-88-3457-51
EXPIRES 06/30/92
DATE OF BIRTH 06/26/45
NAME JOHN T. SMITH - SAMPLE -
TITLE FIRST SECRETARY
MISSION RURITANIA
LOCATION NEW YORK, NY

SEE REVERSE SIDE FOR STATEMENT OF IMMUNITY.

This person has been duly notified to the Department of State and under international law enjoys immunity from criminal jurisdiction. The bearer shall not be liable to any form of arrest or detention, but may be given a notice of violation.

The bearer shall be treated with due respect and all appropriate steps shall be taken to prevent any attack on the bearer's person, freedom or dignity.

Chief of Protocol

LAW ENFORCEMENT INQUIRIES SHOULD BE DIRECTED TO (212) 415-4131 FROM 8AM TO 5PM EASTERN TIME AND (212) 415-4444 AT ALL OTHER TIMES.

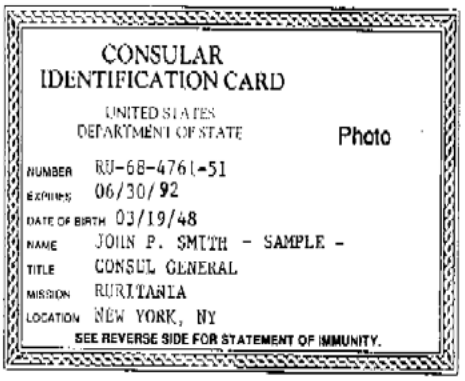
IF FOUND, RETURN TO:
Host Country Affairs
U.S. Mission to U.N.
799 United Nations Plaza
New York, New York 10017

22602

Return postage guaranteed

SIGNATURE (NOT VALID UNLESS SIGNED)

BLUE bordered cards are issued to UN diplomatic officers and their families. They are entitled to full criminal immunity and may not be arrested or detained.



CONSULAR
IDENTIFICATION CARD

UNITED STATES
DEPARTMENT OF STATE

Photo

NUMBER RU-68-4761-51
EXPIRES 06/30/92
DATE OF BIRTH 03/19/48
NAME JOHN P. SMITH - SAMPLE -
TITLE CONSUL GENERAL
MISSION RURITANIA
LOCATION NEW YORK, NY

SEE REVERSE SIDE FOR STATEMENT OF IMMUNITY.

This person has been duly recognized by the Department of State and under international law shall not be amenable to jurisdiction with respect to acts performed in the exercise of consular functions. This form of immunity must be asserted before, and proven to, the appropriate judicial authorities. The bearer shall not be liable to arrest or detention pending trial except on a warrant for a felony offense.

The bearer shall be treated with due respect and a notice of violation may be issued.

Chief of Protocol

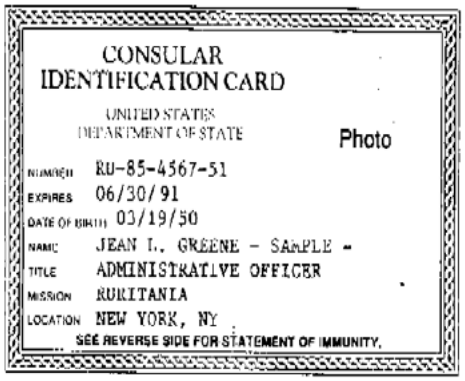
LAW ENFORCEMENT INQUIRIES SHOULD BE DIRECTED TO (202) 647-1985 FROM 8AM TO 5PM EASTERN TIME AND (202) 647-2412 AT ALL OTHER TIMES.

IF FOUND, RETURN TO:
Office of Protocol
Department of State
Washington, DC 20520

Return postage guaranteed

SIGNATURE (NOT VALID UNLESS SIGNED)

RED bordered cards are issued to Career Consular Officers. This card signifies that the bearer is entitled to criminal immunity for official acts only.



CONSULAR
IDENTIFICATION CARD

UNITED STATES
DEPARTMENT OF STATE

Photo

NUMBER RU-85-4567-51
EXPIRES 06/30/91
DATE OF BIRTH 03/19/50
NAME JEAN L. GREENE - SAMPLE -
TITLE ADMINISTRATIVE OFFICER
MISSION RURITANIA
LOCATION NEW YORK, NY

SEE REVERSE SIDE FOR STATEMENT OF IMMUNITY.

This person is registered with the Department of State and under international law shall not be amenable to jurisdiction with respect to acts performed in the exercise of consular functions. This form of immunity must be asserted before, and proven to, the appropriate judicial authorities. The bearer is not immune from arrest or the issuance of a citation.

Chief of Protocol

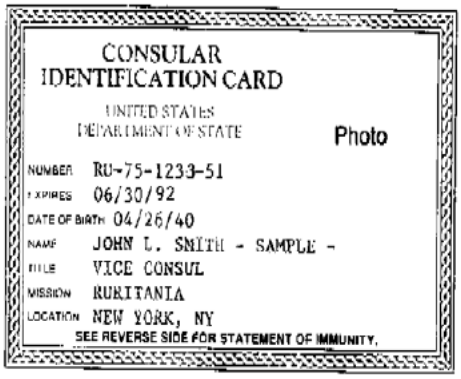
LAW ENFORCEMENT INQUIRIES SHOULD BE DIRECTED TO (202) 647-1985 FROM 8AM TO 5PM EASTERN TIME AND (202) 647-2412 AT ALL OTHER TIMES.

IF FOUND, RETURN TO:
Office of Protocol
Department of State
Washington, DC 20520

Return postage guaranteed

SIGNATURE (NOT VALID UNLESS SIGNED)

RED bordered cards are issued to Career Consular Employees. This card signifies that the bearer is entitled to criminal immunity for official acts only.



CONSULAR
IDENTIFICATION CARD

UNITED STATES
DEPARTMENT OF STATE

Photo

NUMBER RU-75-1233-51
EXPIRES 06/30/92
DATE OF BIRTH 04/26/40
NAME JOHN L. SMITH - SAMPLE -
TITLE VICE CONSUL
MISSION RURITANIA
LOCATION NEW YORK, NY
SEE REVERSE SIDE FOR STATEMENT OF IMMUNITY.

In accordance with a special agreement, this person enjoys immunity from criminal jurisdiction. The bearer shall not be liable to any form of arrest or detention, but may be given a notice of violation.

The bearer shall be treated with due respect and all appropriate steps shall be taken to prevent any attack on the bearer's person, freedom, or dignity.

Chief of Protocol

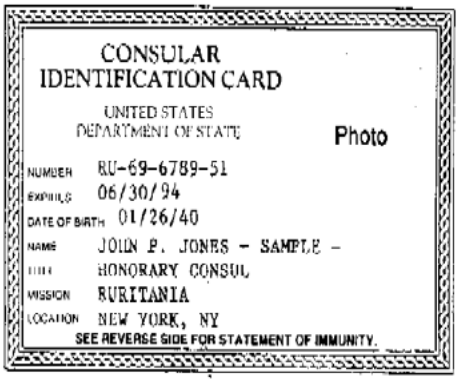
LAW ENFORCEMENT INQUIRIES SHOULD BE DIRECTED TO (202) 647-1985 FROM 8AM TO 5PM EASTERN TIME AND (202) 647-2412 AT ALL OTHER TIMES.

IF FOUND, RETURN TO:
Office of Protocol
Department of State
Washington, DC 20520

Return postage guaranteed

SIGNATURE (NOT VALID UNLESS SIGNED)

RED bordered cards are issued to Consular Officers/Employees and their families from countries with which the United States has special agreements. They are entitled to full criminal immunity and may not be arrested or detained.



CONSULAR
IDENTIFICATION CARD

UNITED STATES
DEPARTMENT OF STATE

Photo

NUMBER RU-69-6789-51
EXPIRES 06/30/94
DATE OF BIRTH 01/26/40
NAME JOHN P. JONES - SAMPLE -
TITLE HONORARY CONSUL
MISSION RURITANIA
LOCATION NEW YORK, NY
SEE REVERSE SIDE FOR STATEMENT OF IMMUNITY.

This person has been duly recognized by the Department of State and under international law shall not be amenable to jurisdiction with respect to official acts performed in the exercise of consular functions. This form of immunity must be asserted before, and proven to, the appropriate judicial authorities. The bearer is not immune from arrest or the issuance of a citation. The bearer shall be treated with due respect.

Chief of Protocol

LAW ENFORCEMENT INQUIRIES SHOULD BE DIRECTED TO (202) 647-1985 FROM 8AM TO 5PM EASTERN TIME AND (202) 647-2412 AT ALL OTHER TIMES.

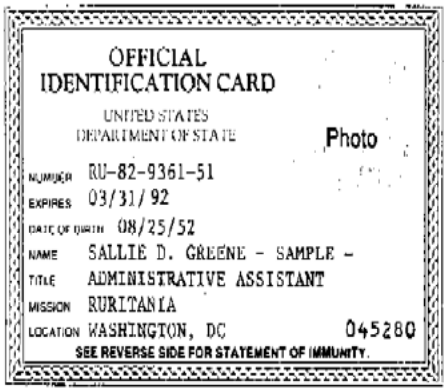
IF FOUND, RETURN TO:
Office of Protocol
Department of State
Washington, DC 20520

Return postage guaranteed

SIGNATURE (NOT VALID UNLESS SIGNED)

RED bordered cards are issued to Honorary Consular Officers. This card signifies that the bearer is entitled to limited immunity for official acts only.

REVISED 6-89



OFFICIAL
IDENTIFICATION CARD

UNITED STATES
DEPARTMENT OF STATE

Photo

NUMBER RU-82-9361-51
EXPIRES 03/31/92
DATE OF BIRTH 08/25/52
NAME SALLIE D. GREENE - SAMPLE -
TITLE ADMINISTRATIVE ASSISTANT
MISSION RURITANIA
LOCATION WASHINGTON, DC 045280

SEE REVERSE SIDE FOR STATEMENT OF IMMUNITY.

This person has been duly notified to the Department of State and under international law enjoys immunity from criminal jurisdiction. The bearer shall not be liable to any form of arrest or detention, but may be given a notice of violation.

The bearer shall be treated with due respect and all appropriate steps shall be taken to prevent any attack on the bearer's person, freedom or dignity.

Chief of Protocol

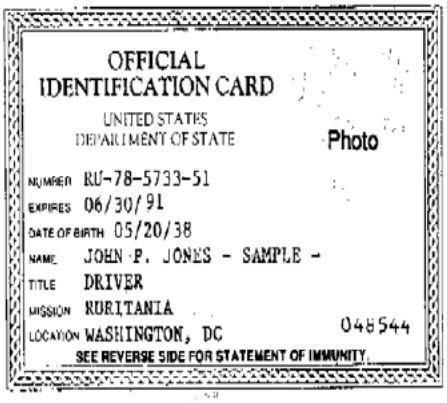
LAW ENFORCEMENT INQUIRIES SHOULD BE DIRECTED TO (202) 647-1985 FROM 8AM TO 5PM EASTERN TIME AND (202) 647-2412 AT ALL OTHER TIMES.

IF FOUND, RETURN TO:
Office of Protocol
Department of State
Washington, DC 20520

Return postage guaranteed

SIGNATURE (NOT VALID UNLESS SIGNED)

GREEN bordered cards are issued to embassy administrative and technical staff employees and their families. This card signifies that the bearer is entitled to full criminal immunity and may not be arrested or detained.



OFFICIAL
IDENTIFICATION CARD

UNITED STATES
DEPARTMENT OF STATE

Photo

NUMBER RU-78-5733-51
EXPIRES 06/30/91
DATE OF BIRTH 05/20/38
NAME JOHN P. JONES - SAMPLE -
TITLE DRIVER
MISSION RURITANIA
LOCATION WASHINGTON, DC 048544

SEE REVERSE SIDE FOR STATEMENT OF IMMUNITY.

This person has been duly notified to the Department of State and under international law enjoys immunity from jurisdiction with respect to acts performed in the course of official duties. This form of immunity must be asserted before, and proven to, the appropriate judicial authorities. The bearer is not immune from arrest or the issuance of a citation.

Chief of Protocol

LAW ENFORCEMENT INQUIRIES SHOULD BE DIRECTED TO (202) 647-1985 FROM 8AM TO 5PM EASTERN TIME AND (202) 647-2412 AT ALL OTHER TIMES.

IF FOUND, RETURN TO:
Office of Protocol
Department of State
Washington, DC 20520

Return postage guaranteed

SIGNATURE (NOT VALID UNLESS SIGNED)

GREEN bordered cards are issued to embassy service staff employees. This card signifies that the bearer is entitled to immunity for official acts only.

4.500 Diplomatic and Consular Offices and Facilities

United States law applies on the premises of the diplomatic and consular missions and in some cases we can prosecute for actions occurring on those premises. However this possibility is remote, since the premises, papers, and archives, of diplomatic and consular offices are inviolable under the *Vienna Convention*.[48] The United States government has an obligation not to intrude upon diplomatic and consular premises. International law also imposes an affirmative obligation to protect the premises from intrusion, damage, and disturbance of its dignity. The *Vienna Convention on Consular Relations* contains an explicit exception to that will allow entry by emergency officials in the event of a fire or other emergency. *The Vienna Convention on Diplomatic Relations* does not contain an emergency exception. *The Foreign Missions Act*, 22 U.S.C. 4301, et seq. spells addresses most areas of interest involving the facilities of foreign missions.

4.600 Assaulting a Diplomat

The United States has an obligation under international law to protect foreign officials working in the United States. Section 112 of Title 18 of the United States Code makes it a crime to assault, a foreign official, guest, or internationally protected persons.[49]

48 In addition to limitations on entry diplomatic and consular facilities are also immune from taxation, and attachment to satisfy a civil judgment. See, *City of New York v. Permanent Mission of India*, 618 F.3d 172 (2010); (Diplomatic properties are not taxable; and, *Bennett v. Islamic Republic of Iran*, 618 F.3d 19 (2010); diplomatic properties not subject to attachment.

49 18 U.S.C. §112

(a) Whoever assaults, strikes, wounds, imprisons, or offers violence to a foreign official, official guest, or internationally protected person or makes any other violent attack upon the person or liberty of such person, or, if likely to endanger his person or liberty, makes a violent attack upon his official premises, private accommodation, or means of transport or attempts to commit any of the foregoing shall be fined under this title or imprisoned not more than three years, or both. Whoever in the commission of any such act uses a deadly or dangerous weapon, or inflicts bodily injury, shall be fined under this title or imprisoned not more than ten years, or both.

(b) Whoever willfully—

(1) intimidates, coerces, threatens, or harasses a foreign official or an official guest or obstructs a foreign official in the performance of his duties;

(2) attempts to intimidate, coerce, threaten, or harass a foreign official or an official guest

(3) within the United States and within one hundred feet of any building or premises in whole or in part owned, used, or occupied for official business or for diplomatic, consular, or residential purposes by--

(A) a foreign government, including such use as a mission to an international organization;

(B) an international organization;
(C) a foreign official; or
(D) an official guest; congregates with two or more other persons with intent to violate any other provision of this section; Violation of 18 U.S.C. § 112 is punishable by a fine and/or six months imprisonment.

Chapter Five

Rights of the Suspect and the Accused

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Addendum 2 Suggested Fax Sheet

Addendum 3 Questions About Foreign Nationals

Addendum 4 State Law Listing

5.100 Introduction

The Declaration of Independence explained, in part, that people are:

> Endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness - - That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed….

These words describe how each of us possesses a series of rights that we should have a legitimate opportunity to enjoy free from outside intervention. Of course, it is unrealistic for us to expect an unfettered use of these rights since one person's effort to exercise one or many of their rights may, and oftentimes does, encroach upon another person's exercise thereof. The authors of the Declaration of Independence recognized this critical distinction between goals and reality and concluded that there must be an entity in place to help secure these rights, as equitably as possible, for all. Such an entity would have the authority to create institutions geared toward balancing the interests of all people in the exercise of their rights. However, once this important function had been served, the entity would have limited authority to intervene in the lives of the people.

The United States Constitution was an effort by the Founders to put into practice the principles outlined in the Declaration of Independence. Not only did the Constitution create a federal governmental system (the institution meant to help balance the interests of the people), but it also limited the power of that government in two significant ways: (1) by way of a system of checks and balances, and (2) by enumerating the ways in which the government shall be prevented from intervening in the lives of the people.

Nowhere is this last concept more effectively illustrated than in the first ten amendments to the United States Constitution, commonly referred to as the "Bill of Rights"; and more specifically the Fourth, Fifth, and Sixth Amendments to the Constitution. These latter Amendments discuss several rights we possess and the limits placed on the governmental response to the exercise of those rights. For instance, when one member of the community commits a crime against another, the criminal deprives the victim of that crime of some portion of their rights (e.g., life, liberty, the pursuit of happiness, privacy, etc…). Government is tasked with intervening and addressing the situation that deprived the aggrieved party of one or several of their rights. Law enforcement represents that part of government responsible for intervening in this fashion. However, the manner in which law enforcement intervenes is limited by the language found within the Constitution and its Amendments. Specifically, these amendments describe the extent to which government may act in response to the commission of criminal acts, with whom law enforcement may interact, and the manner law enforcement intervenes.

5.200 The Rights of People, the Suspect, and the Accused Found in the Fourth, Fifth, and Sixth Amendments

As a matter of a quick introduction to this topic, it might be useful to explain some terms that appear in this discussion:

> Person – This term includes the people, generally, and any individual who is not specifically identified by law enforcement as the subject of or suspect in the commission of a criminal act.
>
> Suspect – Any individual law enforcement believes may have committed a criminal act.
>
> Accused – Any individual against whom criminal charges have been lodged.

Some of the rights discussed in the Fourth, Fifth, and Sixth Amendments apply to each category of individuals described above, while some apply only to the suspect or the accused. We will explore this further, but for now the following represents the rights identified in each of these Amendments.

Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

> (1) *Right to be secure in our persons, houses, papers, and effects, against unreasonable searches and seizures*. [Note: The right to privacy and the right to freely move belong to the people and law enforcement may deprive people of these rights in limited circumstances only. These rights also apply to the suspect and the accused].
>
> (2) *No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.* [Obtaining a warrant from the Magistrate will require close attention to these "specificity" requirements. Failure to comply with these requirements can limit our ability to receive the warrant].

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(1) *Right to Presentment or Indictment of Grand Jury when accused of a crime*. [This concept applies to the individual at the moment in time he transitions from the suspect to the accused].

(2) *Right to be free from being placed in jeopardy twice for the same crime (Double Jeopardy)*. [Accused].

(3) *Right against being compelled in a criminal case to be a witness against oneself (Right against Self-Incrimination)*. [Person, Suspect, and Accused].

(4) *Right to Due Process when deprived of life, liberty, or property*. [Person, Suspect, and Accused].

(5) *Right to be free from the taking of private property for public use, without just compensation*. [Person, Suspect and Accused].

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

(1) *Right to Speedy and Public Trial (criminal case)*. [Accused].

(2) *Right to Jury Trial (criminal case)*. [Accused].

(3) *Right to Impartial Jury (criminal case).* [Accused].

(4) *Right to be informed of the Nature and Cause of the Accusation (criminal case).* [Accused].

(5) *Right to Confrontation of Witnesses (criminal case).* [Accused].

(6) *Right to Compulsory Process (criminal case).* [Accused].

(7) *Right to Assistance of Counsel (criminal case).* [Accused].

These rights and the government response thereto can be examined in two different ways: (1) Discuss each right as they appear in the Amendments; or, (2) Discuss them in a chronological manner. That is, we can look at the rights and law enforcement's response to people exercising those rights from the perspective of the field agent and/or officer. Given the fact that this book is meant to aid CBP law enforcement and CBP lawyers who provide legal advice to those officers and agents, we will take the latter approach and examine these topics from the law enforcement perspective.

Generally speaking, the following flowchart represents the events that law enforcement encounters in a typical criminal case and the legal issues that arise at each phase:

Evidence Collection

Law enforcement collects two primary types of evidence: (1) physical evidence and (2) statements. Typically, most evidence collection takes place prior to arrest and in chapters 2 and 3 of this book, we discussed multiple rules governing law enforcement's efforts to collect evidence by way of seizures and searches. We start this chapter by examining how the Fifth and Sixth Amendments impact the evidence collection process.

Due Process Considerations

Due Process is a fairness concept, mentioned in the Fifth Amendment and the Fourteenth Amendments, and is a right possessed by all individuals and applies to law enforcement in all phases of the criminal trial process. Regardless of the status of the individual and the stage of the process, law enforcement will be required, in a variety of ways to honor the individual's Right to Due Process. We will identify those events as they occur in the process.

Interrogation and Questioning

Interrogation and questioning are tools employed by law enforcement to collect evidence. More importantly, they also serve as triggering events to

several of the rights mentioned above. Here again, evidence collection by way of interrogation and questioning may occur at any phase of the criminal trial process and law enforcement's approach will change depending upon the status of the individual subject to interrogation or questioning (e.g., person, suspect, or accused). For instance, law enforcement will apply different standards when engaging in non-custodial questioning rather than custodial interrogation or questioning. To introduce statements/confessions as evidence in the criminal trial, the trial court must be satisfied that the statements were made voluntarily. Involuntary statements will not be permitted in court.

Non-Custodial Questioning

This concept was discussed in chapter 2 when we looked at the consensual encounter. Law enforcement needs no suspicion to question a person during a consensual encounter. Of course, law enforcement's approach changes once the interrogation becomes custodial.

Custodial Interrogation

Once the individual, typically a suspect, but not always, is subjected to Custodial Interrogation then the suspect has a Fifth Amendment right against being compelled to testify against himself and law enforcement must advise that person of such right as well as Fifth and Sixth Amendment rights to consult with and have counsel present prior to and during any interrogation.

Miranda Decision

To make sure that each person subjected to custodial interrogation is aware of these Fifth and Sixth Amendment rights, law enforcement must so advise that person prior to custodial interrogation. These advisements are referred to as Miranda Warnings based upon the Supreme Court's landmark decision in 1966.[1]

Miranda Warnings notify the person in custody that he has a

> Right to remain silent (Fifth Amendment);
> Right to know that anything said can be used against him in court (Fifth Amendment);
> Right to the presence of counsel (Sixth Amendment);[2] and, Right to government appointed counsel if indigent (Fifth and Sixth Amendments).

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] Note: As will be discussed later, the Court has also found there is a Fifth Amendment right to counsel.

Failure to so warn any person subject to custodial interrogation makes the person's statements inadmissible. The person may waive their Fifth and Sixth Amendment rights and provide law enforcement with a statement, but the waiver must be voluntary, knowing, and intelligent. Furthermore, the person may stop the process at any point and law enforcement must honor the request to do so.

Transition from Evidence Collection to Criminal Charges

Once law enforcement determines that the person committed a crime and institutes formal proceedings, then the status of the individual changes from that of the suspect to that of the accused. If law enforcement has not already seized the person, then a Fourth Amendment seizure (i.e., arrest) may be made as long as it is supported by Probable Cause.

Probable Cause Determination

The pre-arrest probable cause determination may be made by either the officer/agent or by the Magistrate. There are some slight distinctions in the law enforcement approach depending on who makes the pre-arrest probable cause determination:

Made by Magistrate Officer	Made by Officer
↓	↓
Arrest Warrant issued	No Arrest Warrant issued

Arrest Authority

Upon Arrest, Rule 5(a) of the Federal Rules of Criminal Procedure requires that law enforcement take the arrested individual, without unnecessary delay, before a Magistrate. As will be discussed later, multiple rules come into play at this stage. More importantly, the initial focus will be on whether the probable cause determination was made by law enforcement or the Magistrate. If made by law enforcement, then the Fourth Amendment also requires that a prompt judicial probable cause determination be made before an officer of the court. Each of these rules will be discussed in detail later.

Initial Appearance

(1) Brought without unnecessary delay [Rule 5(a)].
(2) Suspect informed of charges [Sixth Amendment].
(3) Restrictions placed on liberty [Fourth and Fifth Amendments].

Rights Available to the Accused

Rights Available Prior to Trial (And During Trial)

(1) Fifth Amendment Right Against Self-Incrimination
(2) Fifth Amendment Right to Due Process
(3) Fifth Amendment Right to Grand Jury and/or Preliminary Hearing
(4) Sixth Amendment Right to Assistance of Counsel
(5) Sixth Amendment Right to Compulsory Process

Rights Available at Trial

(1) Sixth Amendment Right to a Speedy and Public Trial
(2) Sixth Amendment Right to Jury Trial
(3) Sixth Amendment Right to Impartial Jury
(4) Sixth Amendment Right to Confrontation of Witnesses

5.300 Evidence Collection

As mentioned above, much of the focus of the Fifth and Sixth Amendments is on how the government interacts with those involved in the criminal justice system. Each Amendment heavily emphasizes fair and equitable treatment of the criminal defendant in order to preclude governmental overreaching and abuse of governmental power and authority. Naturally, then, these Amendments regulate evidence collection methods, not already addressed in the Fourth Amendment, and the manner in which government processes and prosecutes the criminal defendant.

The most notable evidence collection issue addressed surrounds the collection of the statement. This term, as used by the courts, includes any statements and confessions made, whether inculpatory (that is, incriminating) or exculpatory (offered to show innocence). The most fundamental rule associated with statements and their collection states that only voluntary statements are admissible in court (with a few extremely unique and specific exceptions that we will discuss later). Therefore, law enforcement must understand that the first obstacle to establishing the admissibility of any statement must be to show that the statement was voluntarily made by the criminal defendant. Involuntarily made statements will be excluded as a Due Process violation. Only after the court has determined the voluntariness of the statement will it examine the implications of *Miranda* and related issues.

5.400 Right to Due Process when deprived of life, liberty, or property

5.410 History of the Admission in Court of Confessions/Statements
5.420 Due Process and Involuntary Statements

The concept of Due Process (in either the Fifth or Fourteenth Amendments) is one of fair treatment within the criminal justice system. For purposes of clarification, the Fifth Amendment Due Process Clause applies to situations involving application of the federal law (United States Code). The Fourteenth Amendment Due Process Clause applies to situations involving application of state laws. Any Fifth Amendment Due Process protections not covered by the Fourteenth Amendment Due Process Clause would extend to those involved in

the state court process.[3] Therefore, any distinction between the two Due Process clauses has become moot for all practical purposes.[4]

Although the Due Process Clause generally permits each side an opportunity to present its respective positions in court, the Court has specifically discussed the scope of the Due Process Clause and held that, "[T]he Clause does place limits upon restriction of the right to introduce evidence, but only where the restriction 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'."[5]

5.410 History of the Admission in Court of Confessions/Statements

The right against being compelled in a criminal case to be a witness against oneself is a concept that pre-dates the Fifth Amendment by several hundred years. According to the Court in *Bram*, the maxim "had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons."[6] The Court further recognized that, "[W]hile the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him in a corner, and to entrap him into fatal contradictions, …, made the system so odious as to give rise to a demand for its abolition."[7] The English common law rule recognized that coerced confessions and/or statements are inherently untrustworthy and "to be admissible, a confession must be free and voluntary: that is it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."[8] If the person was involuntarily compelled to make a statement by a person in authority, then the statement would have been inadmissible.

It is from this perspective that early American court decisions examined the issue surrounding the admissibility of statements and those decisions created two tests to determine the voluntariness of any statement.

3 In *Malloy v. Hogan*, 378 U.S. 1 (1964), the Court held that the 5th Amendment Self-Incrimination Clause was incorporated in the 14th Amendment Due Process Clause (and thus applied to state court proceedings).

4 *See, McDonald v. City of Chicago*, 130 S. Ct. 3020 (June 28, 2010) at footnote 12.

5 *See*, *Patterson v. New York*, 432 U.S. 197, 201-202 (1977) and *Taylor v. Illinois*, 484 U.S. 400 (1988).

6 *Bram v. United States*, 168 U.S. 532 (1897).

7 *Id.*

8 *Id.* [Note: This became the basis of the Bram Voluntariness Test].

Up until 1936, American courts employed the *Bram Voluntariness Test*, wherein courts looked at whether the making of the statement was voluntary (i.e., did law enforcement extract the statement by any sort of threats or violence, direct or implied promises, or exertion of any improper influence). In *Wan* the Court held that a confession (statement) is voluntary in law if, and only if, it was, in fact, voluntarily made. According to the *Wan* Court, a confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them.[9] As will be noted later, it was this concept that the Supreme Court addressed in the *Escobedo* and *Miranda* decisions.

In 1936, American courts shifted away from the *Bram Test* and began to identify voluntariness issues in light of the Fifth and Fourteenth Amendments' Due Process Clauses. For the first time, in *Brown v. Mississippi*,[10] the Court started focusing on whether a defendant's will was overborne by the circumstances surrounding the giving of a confession based on a totality of the circumstances including (1) characteristics of the accused and (2) details of the interrogation. This was a highly subjective approach, but if under the *totality of the circumstances* the confession was coerced or compelled, then it was inadmissible as a Fifth and Fourteenth Amendment Due Process violation.[11]

Multiple examples of the Court's application of the *Due Process Voluntariness Test*[12] exist: *Brown v. Mississippi*, *supra*, (suspect tortured until confession obtained); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944), (suspect questioned for 36 hours without a chance to sleep); *Blackburn v. Alabama*, 361 U.S. 199 (1960), (suspect was mentally ill and police used this fact to suspect's disadvantage); *Payne v. Arkansas*, 356 U.S. 560 (1961), (suspect held incommunicado for 3 days with little food and police threatened to admit a mob into the jail to get the suspect); *Reck v. Pate*, 367 U.S. 433 (1961), (suspect held for 4 days without adequate food and medical attention until he confessed); *Culombe v. Connecticut*, 367 U.S. 568 (1961), (suspect held 5 days of questioning while police used coercive tactics); *Townsend v. Sain*, 372 U.S. 293 (1963), (suspect confessed after receiving a truth serum drug from a police doctor); *Davis v. North Carolina*, 384 U.S. 737 (1966), (suspect held incommunicado for 16 days while police interrogated him in a closed cell without windows); *Beecher v. Alabama*, 389 U.S. 35 (1967), (police held gun to wounded suspect's head to extract confession); *Greenwald v. Wisconsin*, 390 U.S. 519 (1968), (medicated suspect interrogated for over 18 hours without food or sleep).

By the 1960's, there seemed to be a fair amount of overlap in the Fifth Amendment's Due Process Clause and protection against self-incrimination. It appeared that the *Due Process Voluntariness Test* was being applied as an

9 *Wan v. United States*, 266 U.S. 1 (1924).
10 *Brown v. Mississippi*, 297 U.S. 278 (1936).
11 *Dickerson v. United States*, 530 U.S. 428 (2000).
12 Note: Not only did these cases fail to pass the Due Process Voluntariness Test, but they also represent Due Process violations. [See also, Part 6.300, above].

answer to issues arising under both Fifth Amendment protections. Since two rights were identified in the Fifth Amendment, they must have distinct functions.

The Court's response to this issue came in *Escobedo v. Illinois*,[13] where the Court essentially abandoned the *Due Process Voluntariness Test* for purposes of evaluating Fifth Amendment self-incrimination issues and returned to the *Bram Voluntariness Test*, which made statements admissible as long as they were voluntarily made. The *Due Process Voluntariness Test* has continued on, but only to assess whether the method employed by law enforcement to obtain the statement violated the Fifth Amendment's Due Process Clause.

5.420 Due Process and Involuntary Statements

The current state of the law regarding Due Process and involuntary statements states that the criminal defendant is deprived of Due Process of Law if his conviction is founded, in whole or part, upon an involuntary confession, regardless of the truth or falsity of the statement and regardless whether there is ample evidence aside from the confession to support the conviction.[14] The use of coerced confessions is forbidden because the method used to extract them offends constitutional principles.[15] Since the sole issue in Due Process determinations concerns whether the statement was coerced, whether the statement is true or not is irrelevant.[16] Furthermore, the Supreme Court has made it clear that coercive police activity is a necessary predicate to the finding that a confession is involuntary within the meaning of the Due Process Clause.[17] For instance, in *Mincey v. Arizona*, 437 U.S. 385 (1978), the statement obtained was found to be in violation of the Due Process Clause when the suspect was interrogated by police for 4 hours while incapacitated and sedated in an intensive-care unit.

Courts rely upon the totality of the circumstances test to determine voluntariness for Due Process purposes.[18] The key to making a Due Process Clause finding is whether there is a link between the government action and the resulting confession. Traditional indicia of coercion include: the duration and conditions of detention; the manifest attitude of the police toward him; his physical and mental state; and the diverse pressures which sap or sustain his powers of resistance and self-control.[19] Put another way, was the suspect's will

13 *Escobedo v. Illinois*, 378 U.S. 478 (1964).
14 *Lego v. Twomey*, 404 U.S. 477 (1972); *Malinski v. New York*, 324 U.S. 401 (1945); *Stroble v. California*, 343 U.S. 181 (1952).
15 *Rogers v. Richmond*, 365 U.S. 534 (1961).
16 *Jackson v. Denno*, 378 U.S. 368 (1964).
17 *Colorado v. Connelly*, 479 U.S. 157 (1986).
18 *Arizona v. Fulminante*, 499 U.S. 279 (1991) and *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).
19 *Culombe v. Connecticut*, 367 U.S. 568 (1961); *Colorado v. Spring*, 479 U.S. 564 (1987).

overborne and his capacity for self-determination critically impaired because of coercive police conduct?[20]

By way of example, the First Circuit, in *United States v. Boskic*,[21] reviewed a case in which investigators from the International Criminal Tribunal for the former Yugoslavia and the Joint Terrorism Task Force had focused their attention on a former member the Army of the Republika Srpska for war crimes in and around Srebenica, Bosnia and Herzegovina. Investigators obtained a federal criminal complaint against defendant prior to their meeting. In addition, they devised a plan that they would start with an immigration interview and then address the criminal charges. The First Circuit agreed that investigators tricked the defendant into believing he was not the subject of a criminal investigation during the immigration interview, they did not let him know that they had obtained a federal complaint for criminal charges, he did not have counsel present, and he was hesitant at the outset of the interview. Each of these items represented factors weighing in favor of involuntariness. On the other hand, the court noted that the defendant was Mirandized three times during the interviews, he learned about the charges during the interviews, the interviews were not long, breaks were taken, there was no physical discomfort, the room had adequate lighting, a translator was used, and the defendant was a well educated, mature, healthy individual. As such the First Circuit concluded that, under the totality of the circumstances, the statements were voluntary.[22]

Challenges to the voluntariness of a statement are questions of law to be made prior to trial and the government must prove the voluntariness by a preponderance of the evidence.[23] In addition, introduction of a coerced statement can be deemed harmless error, but it must be found to be harmless error beyond a reasonable doubt.[24]

5.500 Interrogation and Questioning
5.510 Custodial Interrogation and the Miranda Decision
5.520 Additional Voluntariness Issues
5.530 Application to Misdemeanors
5.540 Application to Currency Violations

As just discussed, the method used by law enforcement to obtain a statement must satisfy the Fifth Amendment's Due Process Clause (voluntarily made statement). If the court concludes that the statement was voluntarily made, then the court will determine whether the voluntary statement violates the Fifth Amendment right against compelled self-incrimination.

20 *Colorado v. Connelly*, 479 U.S. 157 (1986).
21 *United States v. Boskic*, 545 U.S. 69 (1st Cir. 2008).
22 *Id.*
23 *Lego v. Twomey*, (1972). See also, *Miller v. Fenton*, 474 U.S. 104 (1985), in the context of a Habeas Petition.
24 *Arizona v. Fulminante*, (1991). Note: This is one of the few times involuntary statements are allowed].

One significant issue remained after *Escobedo*. The *Bram Test*, as described in *Wan*, allowed voluntary statements even if they were made to police officers, while in custody, and in answer to an examination conducted by the police. Until *Escobedo*, the Court traditionally labeled excessive or coercive police interrogation as Due Process violations only. However, the *Escobedo* Court determined that if a suspect was unaware of his Fifth and Sixth Amendment Rights, then that fact alone, irrespective of inappropriate police behavior, called into question the true voluntariness of the statement in terms of a violation of the right against self-incrimination. As such, *Escobedo* also required, as a pre-requisite to proving that a statement was voluntarily made, that the suspect be advised of his Fifth and Sixth Amendment rights prior to police questioning. The Court revisited the topic of voluntary statements and their admissibility in *Miranda v. Arizona*, 384 U.S. 436 (1966).

5.510 Custodial Interrogation and the Miranda Decision

The *Miranda* Court focused on the Fifth Amendment right that, "No person…shall be compelled in any criminal case to be a witness against himself", and the Sixth Amendment provision that the accused shall have the assistance of counsel. The *Miranda* Court reiterated the historical rationale behind the Fifth Amendment right against self-incrimination as an interest in protecting people from the inquisitorial and manifestly unjust methods of interrogating accused persons and the reasoning behind the Sixth Amendment right to counsel as an effort to protect the people against the exercise of arbitrary power.

Miranda reviewed four separate cases because the Court determined that the cases followed a similar pattern in law enforcement. Specifically, each case involved incommunicado interrogations, in police dominated settings, which resulted in the suspects giving self-incriminating statements, without the benefit of being made aware of their Fifth and Sixth Amendment protections prior to giving the incriminating statements.

For reasons to be discussed later, *Miranda* arrived at the following set of rules and definitions:

(1) The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the suspect/accused unless the prosecution demonstrates that they used procedural safeguards to secure the privilege against self-incrimination.
(2) Custodial Interrogation meant questioning initiated by law enforcement officers after a person had been taken into custody or otherwise deprived of his freedom of action in any significant way.
(3) Procedural safeguards were to be explained before the interrogation was initiated and had to advise the suspect or accused that he had: (a) a right to remain silent, (b) anything he said could and would be used against the individual in court, (c) a right to consult with and

have present during questioning counsel, and, (d) a right to counsel free of charge if he was indigent.

(4) The suspect or accused could waive these rights as long as the waiver was voluntarily, knowingly, and intelligently made by the person giving the statement.

(5) If the suspect or accused refused to waive these rights, at any time before or during questioning, the interrogation would have to stop.

The *Miranda* Court arrived at this ruling and the establishment of this protocol after analyzing several factors. At the outset, the Court determined that the Fifth Amendment right against being compelled in any criminal case to be a witness against oneself (i.e., the right to remain silent) not only applied to courtroom statements, but also applied to statements made prior to trial. Relying upon the *Wan* decision[25], the *Miranda* Court agreed that a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise (emphasis added). Therefore, *Miranda* concluded that the Fifth Amendment protection applied to statements made in court and those made prior to trial.

Next, the *Miranda* Court discussed the ways in which statements could be obtained from the suspect or the accused. In short, the Court found that the following constituted the known methods of obtaining a statement from a person:

(1) Police violence, the "third degree", police brutality;

(2) Sustained and/or lengthy questioning;

(3) Employment of specific psychological stratagems where the coercion derives from some sort of mental vs. physical approach (i.e., offering the person some form of legal excuse to justify their behavior in order to convince them to admit to the crime, good cop vs. bad cop approach, trickery as in the use of a false line-up, confront the person with a confidence in their guilt, etc…);

The use of one or more of these methods certainly could compel a statement from a person. However, once one or more of these methods is employed out of public view (i.e., in private or incommunicado) then it is far more likely that the statement obtained was compelled (not voluntary) from a person who might otherwise have remained silent.[26]

More significantly, the Court identified a fourth method of questioning that qualified as inherently coercive. To the list of the three methods mentioned above, the *Miranda* Court added statements obtained as a result of custodial interrogation. According to the Court, each method, including custodial

25 *Wan v. United States*, 266 U.S. 1 (1924).

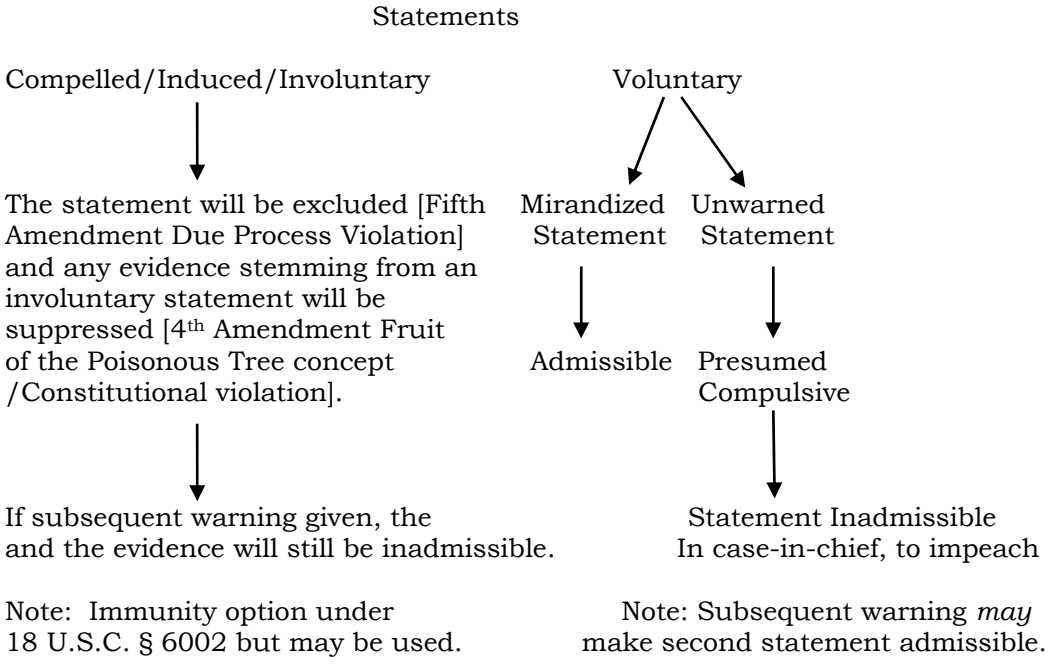
26 In addition, if employed, these methods could serve as the basis for a Due Process violation claim.

interrogation, is meant to subjugate the individual to the will of the examiner. Incommunicado/custodial interrogation is just as at odds with the Fifth Amendment's protection against self-incrimination as the other three methods. Furthermore, regardless of the method used, the officer could not ensure that the statements were the product of the person's free choice (voluntary). Therefore, procedural safeguards were needed to dispel the compulsion inherent in custodial surroundings; otherwise, no statement obtained in such a setting could truly be the product of one's free choice (voluntary) and would have been collected in violation of the Fifth Amendment.

The procedural safeguards, more commonly referred to as *Miranda* Warnings,[27] merely advise the individual of the rights available in the Fifth and Sixth Amendments. Once advised, the individual may decide to waive their Constitutional protections and opt to make a statement. In such a situation, the waiver must be made voluntarily, intelligently, and knowingly. Furthermore, questioning must end at the request of the suspect.[28]

In sum, involuntary statements are inadmissible as Due Process violations, and even if the statement is considered voluntary, it might be inadmissible as a Miranda/self-incrimination violation.

Therefore, the admissibility of statements should be analyzed in the following manner:



27 As noted previously the procedural safeguards were established by the Court in *Escobedo v. Illinois*, 378 U.S. 478 (1964).
28 *Miranda v. Arizona*, 384 U.S. 436 (1966).

5.520 Additional Voluntariness Issues

Statements made during a guilty plea proceeding have been held to be voluntary.[29] If the plea is withdrawn, then it is not admissible.[30] At this point, these concepts are governed by the Federal Rules of Evidence, Rule 410, and the Federal Rules of Criminal Procedure, Rule 11(f), which make the plea negotiation process inadmissible, except: (a) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought to in fairness be considered contemporaneously with it, or (b) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

5.530 Application to Misdemeanors

The compulsory self-incrimination prohibition applies whether the subject offense is a felony or a misdemeanor.[31]

5.540 (b) (7)(E)

(b) (7)(E)

5.600 Custody

5.610 Facts and Circumstances Surrounding Interrogation
5.620 Would a Reasonable Person Be Unable to Terminate the Encounter?
5.630 "Ultimate Inquiry" – Arrest or Tantamount to Arrest?
5.640 Interrogator's Suspicion and Suspect's State of Mind
5.650 Suspect's Age
5.660 Routine Traffic Stops
5.670 Administrative Seizures at the Border

[29] *Hutto v. Ross*, 429 U.S. 28 (1976).
[30] *Kercheval v. United States*, 274 U.S. 220 (1927).
[31] (b) (7)(E)
[32] 31 U.S.C. § 5316.

5.680 Questioning to Determine Alien's Admissibility
5.690 Non-routine Border Searches and Seizures

The *Miranda* decision requires that, "certain warnings be given to a suspect interrogated while in police custody in order to safeguard the uncounseled individual's privilege against self-incrimination under the *Federal Constitution's Fifth Amendment*."[33] The *Miranda* Court also defined custodial interrogation as, questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. [Emphasis added].[34]
The Supreme Court further refined the definition of custody in *Keohane* by stating:

> [T]wo discrete inquiries are essential to the [*custody*] determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene has been set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve 'the ultimate inquiry': '[was] there a formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.' *California v. Beheler*, 463 U.S. 1121, 1125, 77 L. Ed. 2d 1275, 103 S. Ct. 3517 (1983) (*per curiam*) (quoting *Mathiason*, 429 U.S. at 495).[35]

Therefore, the custody determination involves a three step process:

1) What facts and circumstances surround the interrogation? (i.e., what are the facts of the situation);
2) Given those facts and circumstances, would a reasonable person believe he or she was unable to terminate the encounter? (i.e., was the person seized at the time of the interrogation); and, if so,
3) "Ultimate Inquiry" – was the government's seizure a formal arrest or restraint on one's freedom of movement of the degree associated with a formal arrest?

For instance, when a person is stopped at primary at a port of entry or at an immigration checkpoint, it is clear from the facts and circumstances surrounding the stop that the person has been seized. Certainly, the person has been deprived of his freedom of action, but does the stop qualify as a significant deprivation of the freedom of action? *Keohane*, in essence, defined what the Court meant by a significant deprivation of one's freedom of action by requiring

33 *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) and *Thompson v. Keohane*, 516 U.S. 99, 116 S. Ct. 457, 133 L. ed. 2d 383 (1995).
34 *Miranda v. Arizona*, (1966).
35 *Thompson v. Keohane* (1995). See also, *Minnesota v. Murphy*, 465 U.S. 420, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984); and, *United States v. Moya*, 74 F. 3d 1117 (11th Cir. 1996).

an examination of what it referred to as the "Ultimate Inquiry". The mere fact that the person is not free to go, does not, in and of itself, constitute custody, merely a Fourth Amendment seizure. In order for this person to be in custody, his seizure has to amount to a formal arrest or restraint on his freedom of movement of the degree associated with a formal arrest.[36] Let's say, for example, during the stop at the POE the officer discovers drugs in the car and converts the temporary seizure at primary into a more permanent seizure (i.e., arrest). Prior to the discovery of the drugs, the person is not free to go (seized), but not in custody. However, once placed under arrest, the person will be considered seized and in custody for *Miranda* purposes.

Although an arrest is the clearest example of custody, courts can make a custody finding in circumstances that fall short of a formal arrest, if there was a restraint on freedom of movement of the degree associated with a formal arrest.[37]

5.610 Facts and Circumstances Surrounding Interrogation

Factors that a court might consider in determining "custody"[38] would be:

- ✓ the extent to which the person is confronted with evidence of guilt;
- ✓ the duration of the detention;
- ✓ the manner and scope in which pressure is being applied;
- ✓ the location of the interrogation
- ✓ the time of day
- ✓ the number of officers involved
- ✓ the degree and manner of force used
- ✓ the information provided to the suspect about the reason for the interrogation

36 *Orozxo v. Texas*, 394 U.S. 324 (1969).
37 *California v. Beheler*, 463 U.S. 1121, 1125 (1983); *United States v. Sullivan*, 138 F. 3d 126 (4th Cir. 1998).
38 Note: The "custody" discussion can differ depending upon the subject. For instance, the court will use a different standard when discussing "custody" in the context of a Federal *Habeas Corpus* Petition than it will use when discussing "custody" for *Miranda* purposes. *Minnesota v. Murphy*, 465 U.S. 420, 430, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984).

5.620 Would a Reasonable Person Be Unable to Terminate the Encounter?

CBP officers and agents work in a variety of unique operational environments. For instance, the CBPO works primary at ports of entry, while the Border Patrol Agent engages in operations at Immigration Checkpoints, Linewatch, Roving Patrol, and City Watch, and the Air and Marine Interdiction Agent operating environment is fairly self-explanatory. Depending on the location, determining whether the person is free to leave or end the encounter becomes a fairly easy inquiry to answer. For instance, individuals who enter Ports of Entry from foreign are not free to leave or end the encounter until the CBPO agrees to release the person. In other words, the person is seized, albeit temporarily, regardless whether the officer states this to the traveler. Although the person is seized that does not mean the officer is prohibited from asking questions prior to providing *Miranda* warnings to the traveler, because the person is not in custody.[39]

Similarly, the Border Patrol Agent encounters individuals who enter Immigration Checkpoints and who are stopped as part of Roving Patrol stop operations. In each of these situations, the traveler is not free to leave or end the encounter (i.e., the individual is seized, albeit temporarily).[40] And yet, the BPA is not prohibited from asking questions in these situations. Quite to the contrary, the CBPO and BPA will ask a wide variety of questions in these settings and still not violate *Miranda* or be required to offer *Miranda* warnings to the traveler. In these situations, the CBPO and BPA will only need to provide *Miranda* warnings to those individuals who are not only seized, but also under arrest or subject to a situation that is tantamount to arrest (i.e., part three of the Custody analysis).

Note: if the BPA or CBPO conducts a consensual encounter, there would be no *Miranda* implications unless the encounter is converted into a seizure.

5.630 "Ultimate Inquiry" – Arrest or Tantamount to Arrest?

The courts will answer the "Ultimate Inquiry" only after the facts and circumstances establish that the person is not free to leave or end the encounter. In other words, once the court determines that the person has been seized it will ask whether the government's seizure amounted to a formal arrest or one that constituted a restraint on one's freedom of movement of the degree associated with a formal arrest.[41] If the answer to this question is yes, then, the person will be considered in custody for *Miranda* purposes. If the answer to this question is no, then the person is not in custody.

Example: Ozuna attempted to enter the United States from Canada without using his actual name and valid documentary verification of his identity. INS

39 *United States v. Butler*, 249 F. 3d 1094 (9th Cir. 2001).
40 *United States v. Swanson*, 341 F. 3d 524 (6th Cir. 2003).
41 *Thompson v. Keohane*, 516 U.S. 99 (1995).

and Customs officers questioned him extensively to ascertain his identity and citizenship. During this questioning, Ozuna made several inconsistent and incriminating statements leading to a search of his car in which drugs were found. He moved to suppress his statement on grounds that he was not given his *Miranda* warnings. The court concluded that his border detention did not constitute "custody" since a reasonable person would have understood that under these facts he might be subjected to considerable questioning by officers responsible for determining his identity and citizenship, and was not under arrest.[42]

Example: Acevedo came into this country from Mexico at San Ysidro. Her luggage consisted of a shoulder bag and a duffel bag. When asked if she had anything to declare she responded in Spanish: "Nothing, my clothes, nothing more." When the Customs inspector searched her duffel bag, he first found some tablecloths. He asked her how many tablecloths she had and what she intended to do with them. She said there were ten, and that they were not for sale. The inspector continued searching the duffel bag and found three transparent plastic bags containing a large quantity of gold jewelry, later stipulated to have a value of $19,000. After finding the first bag, the inspector asked Acevedo what was in the bag, and she replied in English, "It's jewelry." As the inspector was in the process of taking out the other two bags of jewelry, Acevedo made an unsolicited statement that the jewelry belonged to someone else and she was merely delivering it for that person. After placing all the jewelry on the inspection counter, the inspector went to find his supervisor and told him, "I think we've got a biggie here." The inspector told his supervisor that he was sure that the jewelry he had found was undeclared.

The supervisory inspector then questioned Acevedo further. At first, Acevedo continued to deny that the jewelry was hers, but she eventually admitted that it belonged to her and that she had failed to declare it. Acevedo was arrested and charged with importing merchandise without declaring it, in violation of 18 U.S.C. § 545 (Smuggling).

Acevedo moved to have her admissions suppressed as the product of a *Miranda* violation. Acevedo was in "custody" for *Miranda* purposes when the supervising inspector questioned her. A large quantity of undeclared jewelry had been discovered during the course of a temporary border detention/seizure. The inspector's statement to his supervisor "I think we've got a biggie here" indicated to the court that there was a criminal focus. Therefore, Acevedo was not only seized, but the inspector's confrontation over the ownership of the undeclared jewelry would communicate to a reasonable person that although she had not yet been placed under arrest, she would be shortly. Under the circumstances, Acevedo was in custody for *Miranda* purposes and interrogated without receiving Miranda warnings. The *Miranda* violation made her statements inadmissible,

42 *United States v. Ozuna*, 170 F.3d 654 (6th Cir. 1999); *United States v. Galloway,* 316 F.3d 624 (6th Cir. 2003).

but the jewelry was admissible because it was found during a lawful border search.[43]

5.640 Interrogator's Suspicion and Suspect's State of Mind

Since the custody determination is an objective test, the state of mind of the interrogator and the suspect is immaterial.[44] The Court stated in *Berkemer* that an officer's subjective *undisclosed* suspicion of the interviewee is not an element in creating "custody."[45] For example, in *Stansbury v. California,*[46] an interviewee made certain statements that caused the police officer to suspect that the interviewee was a murderer, but the officer did not terminate the interview nor advise the suspect of his *Miranda* warnings until the officer later placed him under arrest. The Supreme Court held that an inquiry into whether interrogating officers have focused their suspicions upon the interviewee is not relevant for purposes of *Miranda* so long as the suspicions remain undisclosed to the interviewee, i.e., the suspect is not confronted with evidence of his guilt.[47]

The status of the interviewee (i.e., suspect, accused, etc…) is not what controls[48], but rather the coercive circumstances of the interrogation.[49] In *Beckwith v. United States*, agents of the Internal Revenue Service spoke with the defendant at a home where the defendant occasionally stayed about tax evasion charges. The defendant invited the agents into the home and agents allowed him to get dressed before they began their interview of defendant. The interview was friendly and relaxed and lasted about 2 to 3 hours. Agents then wanted to see some documents that defendant kept at his workplace. Agents and defendant drove separately to the workplace, and when they met again defendant was told that he did not need to produce the records. Defendant still produced the records. According to the Court, it was the compulsive aspect of custodial interrogation, not the strength or content of the government's suspicions at the time the questioning was conducted, which led the court to impose the Miranda requirements with regard to custodial questioning.[50] In this instance, the agents suspected Beckwith committed tax fraud, but the circumstances surrounding the interview were not coercive or custodial. Therefore, non-custodial interrogation is not inherently coercive and does not compel one to incriminate himself.[51]

43 *United States v. Estrada-Lucas*, 651 F.2d 1261 (9th Cir. 1980).
44 *California v. Beheler*, 463 U.S. 1121 (1983).
45 *Berkemer v. McCarty*, 468 U.S. 420 (1984).
46 *Stansbury v. California*, 511 U.S. 318 (1994); *United States v. Ali*, 68 F.3d 1468 (2d Cir. 1995).
47 See also, *Beckwith v. United States*, 425 U.S. 341 (1976).
48 *Oregon v. Mathiason*, 429 U.S. 97 (1977).
49 *United States v. Ventura*, 85 F. 3d 708 (1st Cir. 1996).
50 *Mathis v. United States*, 391 U.S. 1 (1968).
51 *Beckwith v. United States*, 425 U.S. 341 (1976).

5.650 Suspect's Age

Although the custody determination is an objective test, a suspect's age may be a relevant factor for officers or agents to consider. Age is not a determinative factor in every case, but should be considered as part of the *Miranda* custody analysis.[52] As the Supreme Court has explained, "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go."[53]

5.660 Routine Traffic Stops

Routine traffic stops are not custodial because the stop is usually brief and the motorist expects to be released. In addition, the encounter takes place in a public location that is less police dominated. Under the circumstances (e.g., roving patrol stop, immigration checkpoint, etc…), the person is seized temporarily, but is not in custody.[54] Nevertheless, the Court left open the definition of routine. We do not have many clear examples of an unusual or non-routine stop involving a prolonged detention that constitutes custody.[55] However, in *Perdue*, police officers assigned to perimeter security during a lawful search of a remote building in which weapons and illegal drugs had been found, stopped Perdue's car when it approached the site of the search, ordered Perdue out of his car and made him lie face down on the ground. One of the officers stood over Perdue with his gun drawn and asked him why he was there. Perdue's incriminating response that "I guess you found the dope" was suppressed since the *Terry* stop under these circumstances became "custodial" in character and therefore *Miranda* warnings should have been administered prior to the interrogation.[56]

Similarly, F.B.I. agents investigating a bank robbery were invited into Griffin's home by his parents. The agents met Griffin as he entered the house and informed him that they needed to speak with him concerning a bank robbery. The agents told the parents it was necessary for them to speak to Griffin in private, and the parents left Griffin alone with the agents. The agents, without giving *Miranda* warnings, questioned Griffin for two hours. During this time an agent escorted Griffin wherever he went in the house and told him to stay in view at all times. The agents did this to ensure their safety because a weapon had been used in the robbery, but they did not explain this to Griffin. Griffin appeared nervous during the interview and implicated himself in the robbery. Under a "totality of the circumstances" analysis, the presence of various coercive factors, such as the restriction on Griffin's freedom of movement, i.e., escorting him during questioning, together with never being informed that he was *not*

52 *J.D.B. v. North Carolina,* 564 U.S. ___ (2011). See also *Yarborough v. Alvarado*, 541 U.S. 652 (2004).
53 *Id.*
54 *Berkemer v. McCarty*, 468 U.S. 420 (1984).
55 *Pennsylvania v. Bruder*, 488 U.S. 9 (1988).
56 *United States v. Perdue*, 8 F.3d 1455 (10th Cir. 1993).

under arrest, reflected a pattern of conduct which the court held would lead any reasonable person to believe he was under arrest. Accordingly, the court held that Griffin was "in custody" for *Miranda* purposes and therefore unlawfully interrogated without the required *Miranda* warnings.[57]

5.670 Administrative Seizures at the Border

As mentioned previously, primary stops and even referrals to secondary inspection, by themselves, do not create custody for *Miranda* purposes.[58] If, on the other hand, the circumstances become coercive or otherwise such that the seizure of the traveler is deemed a restraint on one's freedom of movement of the degree associated with a formal arrest (i.e., "arrest-like"), then unwarned statements may be found inadmissible. For instance, in *United States v. Hernandez*, defendant and his co-defendant entered the port of entry at Otay Mesa, California. CBP officers referred their car to secondary, defendant was ordered out of the car and patted down. Officer found a small cellophane bag that appeared to hold drugs. At that point, defendant was asked, "what is this?" The defendant remained silent and then another asked if the bag contained methamphetamine. The defendant replied "yes." The defendant was then handcuffed and escorted to the secondary security office. It was held that the defendant was in custody at the time that he was confronted with evidence of his criminal behavior. The defendant was not going to be released so the circumstances changed from being a mere seizure to one that became a restraint on defendant's freedom of movement of the degree associated with a formal arrest.[59]

Example: Mrs. Luther was stopped at the primary inspection area at the port of entry in San Ysidro. She failed to make any declaration in response to the routine question by the Customs officer. An inspection of her car then revealed 3,600 laetrile capsules of German origin in the trunk. Her car keys were taken from her and she was directed to wait in the secondary inspection area.

She was questioned there by a Customs special agent who had been informed by telephone of the incident concerning Mrs. Luther. He knew that Mrs. Luther had failed to declare the medicine as required, and that the medicine was unauthorized for entry because of its foreign label. Upon viewing the laetrile capsules, however, he determined that they were of such little value that he would only make an administrative seizure. Holding the bag containing the capsules, he questioned Mrs. Luther over the public counter in the inspection area to verify her identification and her possession of the undeclared medicine.

57 *United States v. Griffin*, 922 F.2d 1343 (8th Cir. 1990). See also, *United States v. Torres-Monje*, 433 F. Supp. 2d 1028 (DND 2006).
58 *United States v. Fernandez-Ventura*, 132 F. 3d 844 (1st Cir. 1998); *United States v. Bengivenga*, 845 F. 2d 593 (5th Cir. 1988); *United States v. Galloway*, 316 F. 3d 624 (6th Cir. 2003); *United States v. Butler*, 249 F. 3d 1094 (9th Cir. 2001); and, *United States v. Moya*,74 F. 3d 1117 (11th Cir. 1996).
59 *United States v. Hernandez*, 476 F. 3d 791 (9th Cir. 2007).

He then offered Mrs. Luther a receipt and told her she could leave. Mrs. Luther chose to remain while a call was made to see if these laetrile capsules were authorized by the Food and Drug Administration. Upon learning that the capsules would be held, she obtained her car keys and left.

The next day the agent learned that the quantity of laetrile possessed by Mrs. Luther was worth $1,200. Surmising that a seizure of some importance had taken place, he obtained a warrant and arrested Mrs. Luther at her home. Only at that point were *Miranda* warnings given. Mrs. Luther argued that when questioned at the secondary inspection office at the port of entry in San Ysidro, she was deprived of her freedom of action in a significant way and was in custody. She contended that statements obtained at that time were inadmissible because no *Miranda* warnings had been given.

Mrs. Luther was summoned from among the other persons in the secondary inspection area when the Customs agent held up her capsules and asked to whom they belonged. The physical surroundings were a public counter. Rather than the compelling atmosphere of apprehension and arrest, it is plain that at most an administrative seizure was taking place and that the agent was merely filling out a form to that end. Her car keys were held pending the identification check, but any harmful effect of this is negated by the fact that she was not charged or arrested and was told that she could leave. Where a person is not charged, arrested, or otherwise confronted with guilt, the atmosphere is one of mere administrative routine. When the person is told she is free to go, the circumstances do not amount to a deprivation of freedom in a significant way and are not equivalent to the compelling atmosphere to which *Miranda* was directed. Mrs. Luther was not in "custody" for *Miranda* purposes. Her statements made during interrogation were admissible.[60]

5.680 Questioning to Determine Alien's Admissibility

There are several working environments in which officers/agents of CBP confront *Miranda* issues as a result of making immigration admissibility determinations. CBP encounters with aliens at the ports of entry, immigration checkpoints, and during roving patrol stops begin with a Fourth Amendment seizure of the person wherein the person is not free to leave. Arriving aliens do not have a right to remain silent; rather, they must prove to CBP that they are admissible.[61] CBP may question an arriving alien without the benefit of *Miranda* warnings in order to determine whether the alien should be admitted to, or excluded from, the United States, even if the questions involve grounds of inadmissibility that could also subject an alien to criminal prosecution.[62] As

60 *United States v. Luther*, 521 F.2d 408 (9th Cir. 1975).
61 *United States v. Gupta*, 183 F. 3d 615 (7th Cir. 1999); 8 U.S.C. Section 1361; and, 8 C.F.R. Part 235.1(f); and, *United States v. Munoz-Gutierrez*, 259 Fed. Appx. 197 (11th Cir 2007).
62 See, *United States v. Garcia-Hernandez*, 550 F. Supp. 1228 (SDCA 2008) and *United States v. Balsis*, 524 U.S. 666 (1998).

such, most immigration and/or admissibility questions asked during the course of these Fourth Amendment seizures do not constitute a "restraint on the freedom of movement of the degree associated with a formal arrest."[63] Therefore, the vast majority of scenarios at these locations that are meant to determine admissibility and/or the right to remain in the United States will not require *Miranda* warnings since the suspect, although seized for Fourth Amendment purposes, is not in custody for *Miranda* purposes.[64]

However, if the officer's questions "objectively cease to have a bearing on the grounds for admissibility and instead only further a potential criminal prosecution," the officer must provide *Miranda* warnings before proceeding.[65] The ultimate question, then, centers on when *Miranda* warnings become necessary in order to preserve a suspect's statements for criminal prosecution. "Routine" immigration questions, or ones that have a bearing on an alien's admissibility, do not require *Miranda* warnings. Furthermore, the questioning officer's subjective intent, suspicion, or views regarding the person's potential criminal liability are irrelevant factors in determining the need to provide *Miranda* warnings prior to questioning.[66] However, that does not mean that "non-routine" questions, or questions that tend to focus on the suspect's criminal liability, automatically require *Miranda* warnings.[67]

This distinction was addressed in *United States v. Kiam*, wherein the Third Circuit noted that although the "routine" versus "non-routine" questioning line is a "facially-appealing" approach, the unique situation at the border is "utterly unlike a normal law enforcement setting" and does not lend itself to *Miranda* application immediately after the start of "non-routine" questioning.[68] For instance, the court stated that, "[T]he alien may be taken out of a primary inspection line for secondary questioning, or as here, removed from a plane before reaching that initial line" and, "[I]n either event , the alien must meet his information production burden, and the border inspector is accordingly entitled to ask questions and require answers."[69] Certainly, the answers to some of those questions may produce incriminating statements that the prosecution may wish to use in the suspect's criminal prosecution. Nevertheless, the *Kiam*

63 *United States v. Massie*, 65 F. 3d 843 (10th Cir. 1995).
64 *United States v. Torres-Lona*, 491 F. 3d 750 (8th Cir 2007).
65 *United States v. Long Tong Kiam*, 432 F.3d 524, 530 (3d Cir. 2006), *cert. denied*, *Long Tong Kiam v. United States*, ___ U.S. ___, 126 S.Ct. 1453 (2006).
66 Stansbury v. California, 511 U.S. 318, 324, 114 S. Ct. 1526, 128 L. Ed.2d 293 (1994).
67 See the discussion in *United States v. Butler*, 249 F. 3d 1094 (9th Cir. 2001), wherein the court focused on the "objective circumstances of the interrogation"… For instance, the language used by the officers, the physical characteristics of the police where the question occurs, the degree of pressure applied to detain the individual, the duration of the detention, and the extent to which the person was confronted with evidence of guilt.
68 *United States v. Kiam*, 432 F. 3d 524 (3rd Cir. 2006).
69 *Id.*, at p. 529.

court ruled that an applicant for admission is entitled to *Miranda* warnings only when the CBP officer ceases questioning about administrative admissibility (i.e., when the officer establishes admissibility and/or inadmissibility) and begins the criminal investigation of that individual. Incriminating statements obtained during the admissibility determination phase will not be suppressed even if *Miranda* warnings are not provided prior to questioning conducted during the admissibility determination phase.[70]

It seems logical that this rule should apply to each of CBP's working environments noted previously. For instance, while at an immigration checkpoint, Border Patrol Agents subject travelers to temporary seizures for the purpose of determining the immigration status of those individuals found within the stopped vehicle. Those individuals are not free to leave, but they are not yet in custody for *Miranda* purposes, either. Questioning geared toward determining immigration status would not trigger the need for *Miranda* warnings. If, however, during the course of determining the status of the vehicle's occupants the agent uncovered evidence that warranted a criminal investigation, for which the agent had placed the suspect(s) in custody (i.e., drug detecting dog leads to discovery of marijuana in the trunk of the car), then *Miranda* warnings would be needed prior to questioning.[71]

Likewise, during a roving patrol stop in which a Border Patrol Agent had reasonable suspicion to believe that the occupants of a vehicle were unlawfully present in the United States, after stopping the vehicle the occupants would not be free to leave during the course of the stop (Fourth Amendment seizure), but would not be in custody for *Miranda* purposes until the seizure constituted a "restraint on the freedom of movement of the degree associated with a formal arrest." Questioning meant to determine status of the occupants would not require *Miranda* warnings unless those occupants were placed in custody during the course of the stop.

70 In contrast, see, *United States v. Chen*, 439 F. 3d 1037 (9th Cir 2006) –Chen had been arrested at a safe house in Guam and made admissions that he was unlawfully present in the United States. While being held awaiting his administrative removal hearing, investigators questioned (unwarned) Chen about his entry and Chen explained that he arrived by fishing boat. At Chen's subsequent bond hearing, investigators became concerned that Chen had lied about his entry and his involvement with the owner of the safe house. Based, in part, upon Chen's admissions while incarcerated, the government filed criminal charges (perjury and false statements). The Ninth Circuit found that the investigator's questioning of Chen while awaiting his administrative hearing was an interrogation for *Miranda* purposes because Chen was exposed "to an especially heightened risk of a § 1325 prosecution."

71 *United States v. Hudson*, 210 F. 3d 1184 (10th Cir. 2000).

5.690 Invasive Personal Searches/Detentions at the Border

By policy, anyone subject to a partial body, x-ray, body cavity search, and/or detention for monitored bowel movement is in custody for *Miranda* purposes.[72] Of course, just because someone is considered in custody, by law or policy, does not mean that *Miranda* warnings are required. Warnings are required only if you intend to interrogate a person while in custody.

5.700 Interrogation

5.710 Volunteered Statements
5.720 Testimonial Evidence
5.730 Non-Testimonial Evidence
5.740 Testimonial Evidence, Non-Criminal Settings, and Interrogation
5.750 Production of Testimony and Documents before a Grand Jury
5.760 Testimony before a Grand Jury
5.770 Documents before a Grand Jury
5.780 Biographical Questions Exception
5.790 Public Safety Exception

The *Miranda* Court defined interrogation as "questioning initiated by law enforcement officers." Much like the definition of custody, the definition of interrogation has undergone some refinement. Specifically, in *Rhode Island v. Innis*, the Court expanded the definition to include, not only express questioning, but also any words or actions on the part of the police (other than those words or actions normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response (that is, any response, whether inculpatory or exculpatory, that the prosecution may seek to introduce at trial) from the suspect. In other words, interrogation constitutes any words or actions police should know are reasonably likely to get an incriminating response from a suspect.[73] The Court further expanded the definition in *Illinois v. Perkins*, to include any words or actions that, given the officer's knowledge of any special susceptibilities of the suspect, the officer knows or reasonably should know are likely to have the force of a question on the accused, and therefore reasonably likely to elicit an incriminating response.[74]

In *McCain*, the defendant was suspected of smuggling narcotics into the United States inside her body. After a negative physical search of her body, officers showed the defendant a booklet full of newspaper clippings that described the health dangers associated with previous failed internal smuggling attempts.

72 Personal Search Handbook, CIS HB 3300-04B, Revised July, 2004.
73 *Rhode Island v. Innis*, 446 U.S. 291 (1979). Note: This is sometimes referred to as questioning and its functional equivalent. *Arizona v. Mauro*, 481 U.S. 520 (1987).
74 *Illinois v. Perkins*, 496 U.S. 292 (1990). Note: See, *United States v. McCain*, 556 F. 2d 253 (5th Cir. 1977) – actions found to be interrogation in the border setting.

One officer then spoke with her about the serious danger she might be in and that a ruptured container within the body could lead to death. At this point, McCain, "turned white, hung her head and blurted out that, 'Yes, I do have narcotics in my body.' " The Fifth Circuit concluded that although the officer posed no questions, the purpose of the interaction, given the situation, was to extract an incriminating response.

5.710 Volunteered Statements

Since the Fifth Amendment protects a suspect's right not to be "*compelled* in any criminal case *to be a witness against himself* ...," it applies only to compelled statements, not voluntary statements.[75] Thus, any statements a suspect makes without any prompting from a CBP officer will be admissible at trial. For example, if a CBP officer is transporting a person who has been arrested for drug smuggling and the individual spontaneously makes incriminating statements regarding his smuggling involvement, the failure to give *Miranda* warnings will not render the statements inadmissible.

5.720 Testimonial Evidence

The Constitutional protection in the Fifth Amendment is the prohibition of one being "compelled in any criminal case to be a witness against himself." This is referred to as the Self Incrimination Clause of the Fifth Amendment. Nevertheless, the Constitutional protection is not the "privilege against self-incrimination."[76] This seemingly trivial distinction becomes more significant if we apply the Supreme Court's explanation. According to the Court, the protection provided to the "witness" limits the category of compelled incriminating communications to those that are "testimonial" in character. For instance, there is a difference between the use of compulsion to extort communications from a person (i.e., instructing a suspect to "find and put on the clothes you wore last night" would involve the Fifth Amendment, since compliance, in effect, would be an admission by the suspect that the clothes he puts on "were those worn last night")[77] and compelling a person to engage in conduct that may be incriminating, but non-testimonial (i.e., like having a suspect try on clothing that was found at the crime scene to see if it fits the suspect).[78] Testimonial evidence requires an accused's communication to either explicitly or implicitly relate a factual assertion or disclose information.[79] This

75 *United States v. Monia*, 317 U.S. 424 (1943) and *United States v. Mandujano*, 425 U.S. 564 (1976)..

76 *United States v. Hubbell*, 530 U.S. 27 (2000).

77 *Curcio v. United States*, 354 U.S. 118 (1957).

78 *Holt v. United States*, 218 U.S. 245 (1910).

79 *Doe v. United States*, 487 U.S. 201 (1988). See also, *Estelle v. Smith*, 451 U.S. 454 (1981) – Use of a court ordered competency exam report violated Miranda because of the report's testimonial nature; whereas, such a report is admissible once an insanity defense is presented [*Buchanan v. Kentucky*, 483 U.S. 402 (1987)].

can include verbal and nonverbal conduct.[80] Therefore, much of the focus in these types of cases will center on the "testimonial" aspects of the evidence to be introduced.

5.730 Non-Testimonial Evidence

Conversely, a suspect's Fifth Amendment right not to be compelled in any criminal case to be a witness against himself is not violated by the introduction of non-testimonial evidence.[81] Non-testimonial evidence has been identified in the following cases: *United States v. Wade*, 388 U.S. 218 (1967), compelling a person into a lineup and having him repeat a phrase so the victim could see and listen to his voice was not testimonial; *Gilbert v. California*, 388 U.S. 263 (1967), compelling a person to provide handwriting exemplars was not testimonial; *United States v. Dionisio*, 410 U.S. 1 (1973), compelling a person to read a transcript in order to produce a voice exemplar was not testimonial; *California v. Schmerber*, 384 U.S. 757 (1966), compelling a person to give a blood sample was not testimonial (Note: The manner in which it is taken could raise Fourth Amendment search issues, though); *South Dakota v. Neville*, 459 U.S. 553 (1983), defendant's refusal to submit to testing is admissible and does not violate Fifth Amendment; *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), slurring of speech and other evidence of lack of muscular coordination revealed as a result of police questioning during a DUI stop was not testimonial.[82] None of these scenarios requires the suspect to disclose any knowledge he might have or to speak his guilt.

Likewise, the Fifth Amendment does not protect persons in situations in which incriminating evidence is obtained as a byproduct of obedience to a regulatory requirement: *United States v. Sullivan*, 274 U.S. 259 (1927), filing an income tax return; *Shapiro v. United States*, 335 U.S. 1 (1948), maintaining required records; *California v. Byers*, 402 U.S. 424 (1971), reporting an accident; or, *Baltimore v. Bouknight*, regulatory regime created to effect the states public purposes unrelated to enforcement of criminal laws.[83]

5.740 Testimonial Evidence, Non-Criminal Settings, and Interrogation

The Fifth Amendment privilege against self-incrimination applies to criminal cases, but the right has been held to apply in certain non-criminal settings:

80 *Braswell v. United States*, 487 U.S. 99 (1988).
81 *United States v. Patane*, 542 U.S. 630 (2004).
82 *Pennsylvania v. Muniz*, 496 U.S. 582 (1990); *Schmerber v. California*, 384 U.S. 757 (1966); *United States v. Del Edmo*, 140 F.3d 1289 (9th Cir. 1998). *United States v. Lara-Garcia*, 478 F. 3d 1231 (10th Cir. 2007) – Agent's failure to provide Miranda warnings prior to asking about immigration status does not require suppression of that status where fingerprint evidence is used to confirm illegal status.
83 *United States v. Hubbell*, 530 U.S. 27 (2000) and *United States v. Garcia-Cordero*, 2010 U.S. App. LEXIS 13245 (June 29, 2010).

Grand Jury Proceedings,[84] certain civil proceedings,[85] Congressional investigations,[86] and juvenile proceedings.[87] The natural concern which underlies many of these decisions is that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage.[88] Typically, these cases also emphasize the need on the part of the interviewee to claim the privilege and failure to do so does not constitute the basis for compulsion.[89]

5.750 Production of Testimony and Documents before a Grand Jury

The production of testimony, records, and documents, typically pursuant to a grand jury subpoena, can raise issues concerning an individual's Fifth Amendment right against compulsory self-incrimination. This is largely due to the function of the grand jury and its broad authority. The grand jury is meant to serve as a barrier to reckless and unfounded charges. It provides a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance.[90] The grand jury's investigative power must be broad if its responsibility is adequately to be discharged.[91] Grand jury powers include:

(1) The authority to compel the attendance and the testimony of witnesses;[92] and,
(2) The authority to require the production of evidence and documents.[93]

Therefore, even though these concepts are oftentimes linked in reality, we will discuss each separately, below.

5.760 Testimony before a Grand Jury

Everyone owes society their testimony, but the Constitution also recognizes certain privileges that limit the government's authority to act in this setting (e.g., the Fifth Amendment privilege against compelled testimony).[94] The Fifth Amendment privilege does not negate the duty to testify, it simply conditions

84 *Counselman v. Hitchcock*, 142 U.S. 547 (1892).
85 *McCarthy v. Arndstein*, 266 U.S. 34 (1924).
86 *Watkins v. United States*, 354 U.S. 178 (1957).
87 *In re Gault*, 387 U.S. 1 (1967).
88 *Michigan v. Tucker*, 417 U.S. 433 (1974).
89 *United States ex. Rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103 (1927).
90 *United States v. Mandujano*, 425 U.S. 564 (1976).
91 Id. See also, *United States v. Calandra*, 414 U.S. 338 (1974) and *Branzburg v. Hayes*, 408 U.S. 665 (1972).
92 *Kastigar v. United States*, 406 U.S. 441 (1972).
93 *United States v. White*, 322 U.S. 694 (1944).
94 *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

that duty. For instance, the privilege cannot be asserted by a witness to protect others from possible criminal prosecution[95] and it cannot be invoked simply to protect the witness' interest in privacy.[96] Therefore, the overriding rule governing one's testimony before the grand jury is that:

> The witness can be required to answer before a grand jury, so long as there is no compulsion to answer questions that are self-incriminating, but the privilege must be asserted. If the witness does not claim the privilege, then the testimony is not compelled. Hence, if the witness does not assert his Fifth Amendment privilege, then the grand jury obligation to give testimony remains absolute.[97]

Once the witness asserts the privilege, the grand jury has several options:

(1) Pursue another line of questioning;
(2) Question the legitimacy of the Fifth Amendment claim; if satisfied, then
(3) The prosecutor must decide if a grant of immunity would be appropriate;
(4) Failure to answer questions then subjects the witness to contempt because immunity displaces the danger posed by incriminating one self.[98]

Note: The immunity afforded by the Constitution relates to the past, and does not endow the person who testifies with a license to commit perjury.[99] Furthermore, the grand jury inquiry is different than custodial interrogation as contemplated by *Miranda*. It is not likely the grand jury will abuse its powers. Police custodial interrogation and grand jury inquiries contain elements of compulsion, but with custodial interrogation a person has a right to remain silent, while a grand jury witness has an absolute duty to answer all questions (subject only to a valid Fifth Amendment claim of privilege). As such, Miranda warnings are not required before grand jury testimony is taken because the grand jury oath places the witness on notice.[100]

5.770 Documents before a Grand Jury

Arriving at the proper answer in this area requires extreme precision since the Court's approach has evolved and changed over time. In addition, this topic involves three distinct issues:

95 *Rogers v. United States*, 340 U.S. 367 (1951).
96 *United States v. Calandra*, 414 U.S. 338 (1974).
97 *United States v. Mandujano*, (1976).
98 *Id.* See also, *Ullmann v. United States*, 350 U.S. 422 (1956) and *Lefkowitz v. Turley*, 414 U.S. 70 (1973).
99 *Glickstein v. United States*, 222 U.S. 139 (1911).
100 *United States v. Mandujano*, (1976).

(1) The *contents* of the document;
(2) The act of producing the documents; and,
(3) The *testimony* of the custodian related to the documents.

The Court has established several foundational concepts that have not changed:

(1) The *contents* of subpoenaed records are not privileged because the creation of the documents was not compelled.[101]
(2) Artificial entities, sometimes referred to as *collective entities* (e.g., corporations[102], partnerships[103], unions[104], etc...) are not protected by the Fifth Amendment, because the documents belong to the entity and the entity is not a person for Fifth Amendment purposes.[105]
(3) The custodian of the records cannot make a personal Fifth Amendment claim regarding the *contents* of the records on behalf of the entity because the custodian does not own the records.[106]
(4) Collective Entity Rule – *contents* of entity records are never privileged.[107]

Nevertheless, starting with the *Fisher* decision, the Court began to refine these concepts. In essence, the Court found that, although the *contents* of the documents are not privileged, certain aspects of the process are testimonial in nature. Accordingly, the Court created the Compelled-Testimony Standard. Specifically, the Court held that although the records are not protected, the *act of producing* the documents may be protected since the *act of producing* the records establishes the existence of the records, that they were in the entity's possession, that they were produced in response to the subpoena, and that they are authentic. What matters is the communicative or non-communicative nature of the disclosure of the records, not the nature of the entity, nor the contents of the documents.[108] Ultimately, the test to be applied is whether the act and answers communicate information about the existence, custody, and authenticity of the documents.[109]

Subsequent to *Fisher*, the Court further explained the Compelled-Testimony Standard in *Braswell*. Therein, the Court held that due to the testimonial nature of the act of producing records:

(1) The entity (corporation in this instance) must produce the records;

101 *United States v. Doe*, 465 U.S. 605 (1984); *Fisher v. United States*, 425 U.S. 391 (1976).
102 *Hale v. Henkel*, 201 U.S. 3 (1906).
103 *United States v. Bellis*, 417 U.S. 85 (1974).
104 *United States v. White*, (1944).
105 *United States v. Bellis*, (1974); *Wilson v. United States*, 221 U.S. 361 (1911).
106 *Drier v. United States*, 221 U.S. 394 (1911).
107 *Fisher v. United States*, (1976).
108 *Id.*
109 *United States v. Hubbell*, 530 U.S. 27 (2000).

(2) The custodian who produces the records is acting as a representative of the entity, so cannot make Fifth Amendment claim regarding the content of the records;
(3) The *act of producing* the records cannot be used as evidence against the custodian. The government cannot identify the individual who produced the documents because that would be communicative/ testimonial in nature.
(4) However, the government can reveal at trial that the documents were produced by the entity (without identifying who did so) in order to establish the existence of the records, that they were in the entity's possession, that they were produced in response to the subpoena, and that they are authentic.

Furthermore, *Braswell* concluded that any testimony, from the custodian, regarding the documents could not be compelled.[110] Likewise, if knowledge of the documents is a "foregone conclusion" (i.e., like tax returns in the possession of the taxpayer's accountant), then Fisher held that the compelled production does not have a testimonial aspect and is not protected by the Fifth Amendment.[111] However, if knowledge of the existence or location of documents is not known by government the compelled production has a testimonial aspect and the act of production is protected by the Fifth Amendment.[112] Note: Where a grand jury subpoena required a sole proprietor to produce his business records, the mere act of production is an admission that the records are his, authentic, in his possession, and produced in response to the subpoena. Such a compulsion violated the Fifth Amendment because the jury would have to conclude that the sole proprietor produced the documents.[113]

5.780 Biographical Questions Exception

As noted in *Rhode Island v. Innis*, the Court defined interrogation as "any words or actions on the part of the police…other than those words or actions normally attendant to arrest and custody." Routine "booking questions" or biographical questions have been found to fit into this exception. Questions concerning identity and physical characteristics such as name, age, address, height, weight, and so on, are not interrogation. In addition, general informational questions, routine inspectional questions, and requests for personal history are part of a legitimate administrative inquiry; meaning, they are not being asked in order to get an incriminating response, and not interrogation. In the same manner, statements made to an arrestee that are normally attendant to arrest are not interrogation, even if they produce an incriminating response.

For example, Moreno-Flores was arrested, given his *Miranda* warnings, and was told by a federal agent that he was in serious trouble and was facing a lengthy

110 *Braswell v. United States*, 487 U.S. 99 (1988).
111 *Id.* and *Fisher v. United States*, (1976).
112 *United States v. Hubbell*, (2000).
113 *John Doe v. United States*, 487 U.S. 201 (1988).

prison sentence because of the amount of cocaine found in connection with his arrest. The agent also told Moreno-Flores that after he had an opportunity to consult with his attorney that the agent wanted to obtain information from him about other individuals who might be involved in cocaine distribution. Moreno-Flores did not then respond, but when the agent picked him up to transport him to court the next day Moreno-Flores made several incriminating statements after being asked by the agent how his night was. The court concluded that the agent's statements at the time of arrest merely informed Moreno-Flores of circumstances which would contribute to an intelligent exercise of his judgment and therefore were "normally attendant to arrest and custody" and accordingly did not constitute interrogation within the meaning of *Miranda*. In reaching this determination, the court noted that the agent's statements did not call for, nor elicit, an incriminating response, and that the agent indicated that he did not intend to speak with Moreno-Flores until after Moreno-Flores had consulted with an attorney. The fact that the statements may have later struck a responsive chord, or may have been subtle compulsion, was held insufficient to be deemed the equivalent of interrogation.[114]

5.790 Public Safety Exception

The public safety exception states that *Miranda* warnings are not required when an officer asks a suspect, who is in custody, questions prompted by an objectively reasonable concern for the public safety regarding an immediate danger and the information sought is necessary to protect public safety. Public safety includes protecting the general public, officers, victims, and suspects. The test is whether a reasonable officer given the same facts and circumstances believe that the information sought is necessary to protect public safety.

The exception was established in *New York v. Quarles*, where an officer responded to a report from a woman that a man had just sexually assaulted her and that the assailant was currently in a nearby supermarket. During the assault, the victim claimed that the assailant had a gun. Based on the description provided by the victim, the officer arrested Quarles inside the store and during the patdown police discovered that Quarles was wearing an empty shoulder holster. The officer asked Quarles where the gun was. He nodded towards some cartons and said, "the gun is over there." Although no warnings had been given, the Supreme Court ruled that the statement and the gun were admissible, because the police questioning of the suspect was prompted by a reasonable concern for public safety.[115] The Court noted, however, that once the emergency ends, any further custodial interrogation should be preceded by the warnings and waiver.

114 *United States v. Moreno-Flores*, 33 F.3d 1164 (9th Cir. 1994).
115 See, *New York v. Quarles*, 467 U.S. 649 (1984).

DHS policy[116] states that CBP personnel are to use all lawful and appropriate means to gather terrorist threat information. Upon identifying any individual who is engaged in terrorist activities or acts in preparation for terrorist activities, CBP personnel must immediately notify the Joint Terrorism Task Force (JTTF) and have JTTF conduct the interrogation. However, in case of immediate concern for public safety and where it would be dangerous to wait for JTTF to respond, CBP personnel are to immediately ask questions without providing Miranda warnings.

The types of questions that would be appropriate under these circumstances would include:

> Possible impending or coordinated terrorist attacks;
>
> The location, nature, and threat posed by weapons that might pose an imminent danger to the public;
>
> The identities, locations, and activities or intentions of accomplices who may be plotting additional imminent attacks.

JTTF should be consulted as soon as possible and questioning should stop once public safety questions have been exhausted. In addition, immediately report the event to the Secretary of DHS through your chain of command or via the National Operations Center.

5.800 Miranda Warnings – Procedural Safeguards

If a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that:

(1) He has the right to remain silent;
(2) Anything said can and will be used against the individual in court;
(3) He has a right to consult with counsel prior to questioning and to have counsel present during any questioning; and,
(4) If he is indigent a lawyer will be appointed to represent him.

Furthermore, the Supreme Court has made it clear that, "[A]ll persons within the territory of the United States are entitled to the protection guaranteed by those amendments [Fifth and Sixth Amendments], and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, not be deprived of life, liberty, or property without due process of law."[117]

116 DHS Memorandum, Public Safety Custodial Interrogation of Certain Terrorism Suspects, October 22, 2010.
117 *Wong Wing v. United States*, 163 U.S. 228 (1896) and *United States v. Henry*, 604 F. 2d 908 (11th Cir. 1979).

Subsequent to *Miranda*, the Court made it clear that there is no precise formulation of the warnings that need to be given.[118] The burden to establish that warnings were given and understood is on the government officer or agent. The *Miranda* warnings may be given in oral or written form. Always read the *Miranda* warnings. If the interrogation will be conducted in a language other than English, then read the rights in English first and the second language next. If the suspect reads the form, then make sure he can read. If the suspect indicates that he understands his rights, complete the reading of the warnings. If the suspect is under the influence of alcohol or drugs or has a mental defect, it might be best to read the warnings to him. If the suspect is an unlawfully present alien who has previously been advised of his administrative warnings, the officer should ensure that the suspect understands that the *Miranda* warnings supersede the administrative warnings.[119]

CBP OFFICERS

MIRANDA WARNINGS

- Before we ask you any questions, it is my duty to advise you of your rights.
- You have the right to remain silent.
- Anything you say can be used against you in court, or other proceedings.
- You have the right to consult an attorney before making any statements or answering any questions, and you may have him present with you during questioning.
- You may have an attorney appointed by the U.S. magistrate or the court to represent you if you cannot afford or otherwise obtain one.

118 *California v. Prysock*, 453 U.S. 355 (1981). See also, *Bridgers v. Texas*, 532 U.S. 1034 (2001) and *Florida v. Powell*, 130 S. Ct. 1195 (2009).

119 In *United States v. San Juan-Cruz*, 314 F.3d 384 (9th Cir. 2002), Border Patrol Agents arrested an alien and provided administrative warnings pursuant to 8 C.F.R. § 287.3. Shortly thereafter, he was given *Miranda* warnings, interrogated, and made incriminating statements that were used to convict him of a crime. The appellate court threw out the conviction, noting that the contents of the administrative and *Miranda* warnings were different and could have confused San Juan-Cruz regarding whether he had the right to an attorney. It noted that while the agent "could have rectified the situation easily" by telling San Juan-Cruz to disregard the administrative warnings in favor of the *Miranda* warnings, the agent failed to do so and the subsequent waiver was invalid. "The Government should not presume after having read two sets of contradictory rights to an individual that he or she possesses sufficient legal or constitutional expertise to understand what are his rights under the Constitution."

- If you decide to answer questions now, with or without a lawyer, you still have the right to stop the questioning for the purpose of consulting a lawyer.

However

- You may waive the right to advice of counsel and your right to remain silent and answer questions or make a statement without consulting a lawyer if you so desire.

- Do you understand your rights?

- Do you waive your rights? [CD 3340-022 – Guidelines for Arrests made by Inspectors within the Ports of Entry (February 28, 2000)].

BORDER PATROL AGENTS

English	**Spanish**
Before we ask you any questions you must understand your rights.	Antes de que le hagamos cualquier pregunta, usted debe de comprender sus derechos.
You have the right to remain silent.	Usted tiene el derecho de guardar silencio.
Anything you say can be used against you in court or in any immigration or administrative proceeding.	Cualquier cosa que usted diga puede ser usada en su contra en un juzgado de la leyó en cualquier procedimiento administrativo o de inmigración.
You have the right to talk to a lawyer for advice before we ask you and questions and to have him present with you during questioning.	Usted tiene el derecho de hablar con un abogado para que el lo aconseje antes de que le hagamos alguna pregunta y de tenerlo presente con usted durante las preguntas.
If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.	Si usted no tiene el dinero para emplear a un abogado, se le puede proporcionar uno antes de que le hagamos alguna pregunta si usted lo desea.
If you decide to answer now, without a lawyer present, you still have the right to stop answering at any time.	Si usted decide contestar nuestras preguntas ahora, sin tener a un abogado presente, siempre tendrá usted el derecho

	de dejar de contestar cuando guste.
You also have the right to stop answering at any time until you talk to a lawyer.	Usted también tiene el derecho de dejar de contestar cuando guste hasta que pueda hable con un abogado.
Do you understand your rights?	¿Usted entiende las sus derechas?

[Office of Border Patrol Miranda Warnings].

5.900 Waiver of Fifth and Sixth Amendment Rights
5.910 Partial Waivers
5.920 Breaks in Interrogation
5.930 Waiver After Unwarned Interrogation

Miranda stated, "[I]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[120] This determination involves a two part inquiry:

(1) The relinquishment of the right must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception; [The uncoerced choice] and,
(2) The waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon that right [The level of comprehension of the right waived].[121]

If, based on a totality of the circumstances, the individual makes an uncoerced choice with an appropriate level of comprehension of the right waived, the court will find the waiver voluntary, knowing, and intelligent.[122]

An express statement ("express waiver") that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver.[123] Waivers can be established even absent formal or

120 *Miranda*, at p. 475. See *also*, *Johnson v. Zerbst*, 304 U.S. 458 (1938) and *Tague v. Louisiana*, 444 U.S. 469 (1980).
121 *Moran v. Burbine*, 475 U.S. 412 (1986). See also, *United States v. Garibay*, 143 F. 3d 534 (9th Cir. 1998).
122 *Moran v. Burbine*, 475 U.S. 412 (1986). See also, *North Carolina v. Butler*, 441 U.S. 369 (1979), *Fare v. Michael C.*, 442 U.S. 707 (1979), and *Colorado v. Spring*, 479 U.S. 564 (1987).
123 *Miranda,* at p. 475.

express statements of waiver ("implicit waiver").[124] An implied waiver will serve as a legitimate waiver as long as the defendant's silence is coupled with an understanding of his rights and then the defendant follows a course of conduct indicating waiver.[125] For instance, the suspect chooses not to expressly waive, but during the course of the interview, answers select questions, the suspect's waiver can be implied since by answering he has shown a course of conduct that indicates his intention to waive.[126] If there are additional indicators that show the suspect understood the warnings, then the implied waiver will be considered a valid waiver although the suspect did not expressly say so.

In addition, Miranda does not require that an interrogation cease merely because a suspect is uncertain about whether to waive his rights and answer questions without a lawyer present. Such uncertainty, however, does not establish a waiver of rights and the Court has suggested that it is good practice to focus the interview on clarifying the suspect's wishes.[127]

In those situations where an express waiver has not been provided by the suspect, the Supreme Court has ruled that police may continue to interrogate the suspect, as long as he understands the warnings, until the suspect invokes his right to remain silent or right to counsel in an unambiguous manner.[128]

When using rights waiver forms, another officer/agent should witness the suspect's signature. If the suspect agrees to waive their rights, but will not sign the waiver form, have another officer/agent witness the oral waiver and indicate what transpired on the form. The same holds true should the suspect opt to initial rather than sign the form or if the suspect is under the influence of alcohol or drugs or has a mental defect.

5.910 Partial Waivers

Note: Suspects can agree to waive their rights to discuss certain topics, while at the same time invoking their rights as to others. Such limitations are a prerogative of the suspect and the interrogation can continue so long as the limits established by the suspect are honored.

5.920 Breaks in Interrogation

If the suspect waives the rights outlined in the *Miranda* warnings and a break in interrogation occurs of such length that the suspect's appreciation of the warnings is reasonably likely to decrease, the warnings should be read again.

124 *Berghuis v. Thompkins*, 2010 U.S. LEXIS 4379, June 1, 2010.
125 *North Carolina v. Butler*, 441 U.S. 369 (1979) and *Berghuis v. Thompkins*, 2010 U.S. LEXIS 4379, June 1, 2010.
126 *Berghuis v. Thompkins*, 2010 U.S. LEXIS 4379, June 1, 2010.
127 *United States v. Davis*, 512 U.S. 452 (1994).
128 *Berghuis v. Thompkins*, 2010 U.S. LEXIS 4379, June 1, 2010.

5.930 Waiver After Unwarned Interrogation

As mentioned previously, statements were deemed by the Court to be admissible, prior to *Miranda*, as long as the statement was voluntarily given (within the meaning of the Due Process Clause).[129] Statements derived from police techniques or methods that offended due process or under circumstances in which the suspect clearly had no opportunity to exercise a free and unconstrained will were not admissible. *Miranda* created a measure (procedural safeguard) to insure that the right against compulsory self-incrimination was protected.[130] Understanding this concept is critical when applying the rules about to be discussed.

In *Oregon v. Elstad*,[131] police went to Elstad's home to serve him with an arrest warrant for burglarizing his neighbor's house. Elstad's mother invited the police into the house. Police gave Elstad an opportunity to get dressed prior to talking with him and also explained to his mother that they had an arrest warrant for her son. Police then spoke with Elstad in the home's dining room. They asked if Elstad knew why they were there and he said no. Police then asked if he knew about the burglary next door and Elstad said that he had heard about it. Police then said that they thought Elstad was involved at which point Elstad said that he was there. Police had not provided Elstad with *Miranda* warnings prior to taking this first statement. Nevertheless, police arrested Elstad and took him to the station. Once at the station, police Mirandized Elstad and he provided police with a second statement consistent with the first.

At the outset, the Court determined that Elstad was in custody during the taking of the first statement, but this unwarned statement was not compelled. That is, it was voluntarily given and did not violate the Due Process Clause. In addition, since the Fifth Amendment protection against compelled statements prohibits the use of compelled testimony, the taking of the first statement did not constitute a violation of this Constitutional provision. As such, the Court found that the taking of the first statement did not constitute a Constitutional violation. For that reason, the statement was not excludable as a violation of the Fruit of the Poisonous Tree Doctrine, because the Doctrine excludes from trial any evidence or witnesses discovered as a result of a Constitutional violation.[132] For instance, a custodial statement obtained after an illegal arrest (Fourth Amendment seizure violation) would be excluded at all stages of the trial.[133]

129 *Haynes v. Washington*, 373 US 503 (1963) and *Chambers v. Florida*, 309 US 227 (1940).

130 *Michigan v. Tucker*, 417 US 433 (1974) and *Edwards v. Arizona*, 451 US 477 (1981).

131 *Oregon v. Elstad*, 470 U.S. 298 (1985).

132 *Wong Sun v. United States*, 371 US 471 (1963).

133 Note: Exception – The subsequent confession is admissible if intervening events break the causal connection between the illegal arrest and the confession so that the confession is 'sufficiently an act of free will to purge the primary

The Court then addressed the failure to provide *Miranda* warnings prior to taking the first statement. Failure to provide warnings created a presumption of compulsion. The procedural safeguards were implemented in order to overcome this presumption and the sanction for taking unwarned statements, even voluntary, is to exclude them from trial. However, the taking of unwarned statements is not automatically a Constitutional violation, despite the possibility that the taking may be a violation of the *Miranda* procedural safeguards. Therefore, the Court in *Elstad* held that the unwarned statement, since deemed voluntarily taken in this case, was excluded from use in the case in chief as a procedural violation of *Miranda*, but it would be permitted for impeachment purposes.[134]

The Court next looked at the admissibility of the second, warned, statement and the Court concluded that a suspect who once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.[135] As can be seen from the discussion above, this exception only applies to a narrow category of cases in which the initial interrogation of the suspect was made in a totally uncoercive setting and in which the first confession obviously had no influence on the second. It does not apply in situations where warnings are inserted into the middle of coordinated and continued questioning, where suspects are likely to be misled or deprived of knowledge essential to making an informed choice.[136]

In *Seibert*, police had taken the defendant to the station and questioned her about her involvement in a murder/arson scheme. Police did not provide defendant with *Miranda* warnings before questioning her, although clearly in custody, and obtained an incriminating confession from her. Police then provided warnings and she gave a second statement consistent with her original confession. In this instance, the court determined that the police method used was intentional in that police were taught to get an unwarned statement from the suspect, and then get a similar warned statement from the suspect. Since the result of the police strategy employed eliminated a real choice between silence and not, the police strategy served to skirt the purpose of *Miranda*. Thus, when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and deprive the defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them. Consequently, the Court held that both statements were inadmissible as distinguished from *Elstad*. Further, the Court held this to be an intentional violation, thus the statements could not even be used for impeachment purposes.

taint.' *Taylor v. Alabama*, 457 US 687 (1982) and *Brown v. Illinois*, 422 US 590 (1975).

134 *Michigan v. Tucker*, 417 US 433 (1974) – Court refused to apply Wong Sun to evidence derived from an unwarned statement, although voluntary (no compulsion).

135 *Oregon v. Elstad*, 470 U.S. 298 (1985).

136 *Missouri v. Seibert*, 542 U.S. 600 (2004).

5.1000 Invocation of Fifth and/or Sixth Amendment Rights

5.1010 Invocation of Right to Remain Silent
5.1020 Invocation of Right to Counsel

According to *Miranda*, "[O]nce warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent the interrogation must cease….If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning."[137] Later, in *Michigan v. Harvey*, the Court held that post-assertion (i.e., invocation of rights) statements are presumed involuntary, even if the suspect later waives and gives a subsequent voluntary statement.[138] Therefore, it is extremely critical to proceed with caution once the suspect has invoked either right. It is equally important to advise any other law enforcement officer who takes custody of the suspect that the suspect received *Miranda* warnings and invoked either or both rights. If you are the officer/agent taking custody of a suspect, make sure that you inquire as to whether the suspect has been given *Miranda* warnings and whether he has invoked his rights.

Remember, though, in some cases, the suspect may make a spontaneous statement after having refused to waive his rights, demanded an attorney, or chosen to remain silent. In these situations, make careful note of the suspect's statement since it is fully admissible. There is no need to interrupt the suspect and administer *Miranda* warnings. However, if you then wish to interrogate the suspect following his spontaneous statements, *Miranda* warnings should be given and rights waived.

5.1010 Invocation of Right to Remain Silent

If the suspect chooses to exercise his right to remain silent he should not be interrogated. The right to remain silent must be asserted unambiguously before terminating interrogation.[139]

For example, a suspect's statement, "get the f___ out of my face. I don't got nothing to say" was *not*, when viewed in context, a clear invocation of the suspect's Fifth Amendment right to silence. In this case, the suspect was an intelligent person experienced in the criminal justice system, had testified that he had been read his *Miranda* warnings and understood them, and had answered some of the officers' questions, but not others. Under these circumstances, the court interpreted the suspect's statement as merely

137 *Miranda*, at p. 474.
138 *Michigan v. Harvey*, 494 U.S. 344 (1990); *McNeil v. Wisconsin*, 501 U.S. 171 (1991); and, *Texas v. Cobb*, 532 U.S. 162 (2001).
139 *Berghuis v. Thompkins*, 2010 U.S. LEXIS 4379, June 1, 2010. The counterpart to this rule related to invocation of the right to counsel is found at *Davis v. United States*, 512 U.S. 452 (1994).

responding angrily to being presented with a written waiver form, rather than asserting his right to remain silent. Therefore, his Fifth Amendment rights were not violated by continued interrogation.[140]

When clearly exercised, however, the choice to remain silent must be "scrupulously honored."[141] Implying harsher treatment if the right to silence is exercised is not proper and can render a subsequent confession involuntary. For example, Sonja Harrison was arrested on money laundering charges, given her *Miranda* warnings and acknowledged she understood those rights. After a brief silence, an agent told her that she could face up to twenty years in prison on the charges and asked her whether she thought it would be better if she talked to the agents and they tell the judge that she had cooperated or not. She responded that it would be better if she talked to the agents and the agents tell the judge that she had cooperated. She then made incriminating statements in a confession to the agents. The court noted that *Miranda* strictly curtailed any attempts by law enforcement officers to cajole a confession out of a suspect after advising the suspect of his rights. Here, the court found that the officer's suggestion that the exercise of the right to remain silent could result in harsher treatment by a court or prosecutor violated the suspect's Fifth Amendment right to remain silent and Harrison's confession was excluded from trial.[142]

Additionally, the prosecution is not permitted to comment on the suspect's choice to remain silent.[143] This concept applies also to guilty pleas[144] and sentencing,[145] as well.

In summary, if a suspect clearly chooses to remain silent after reading the warnings, a second interrogation at a later time should not violate *Miranda* if:

- ✓ The suspect's first request to remain silent was immediately honored, and the suspect later indicates a desire to speak with the officer/agent;

- ✓ The suspect has been readvised of the *Miranda* warnings and has voluntarily waived them; and,

If the suspect again invokes the right to remain silent, the second interrogation must be terminated.

140 *United States v. Banks*, 78 F.3d 1190 (7th Cir. 1996). See also, *United States v. Acosta*, 363 F.3d 1141 (11th Cir. 2004) (suspect who refused to sign a rights waiver form but indicated that he would cooperate without waiving his rights had not unambiguously asserted his right to remain silent).
141 *Michigan v. Mosley*, 423 U.S. 96 (1975).
142 *United States v. Harrison*, 34 F.3d 886 (9th Cir. 1994).
143 *Griffin v. California*, 380 U.S. 609 (1965); *Doyle v. Ohio*, 426 U.S. 610 (1976).
144 *Mitchell v. United States*, 526 U.S. 314 (1999).
145 *Roberts v. United States*, 445 U.S. 552 (1980).

Requests by suspects to speak with probation officers, clergy, friends, and relatives do not constitute an assertion of the right to remain silent or a request for an attorney.[146]

5.1020 Invocation of Right to Counsel

When a suspect invokes his right to counsel during custodial interrogation, the interrogation must cease until an attorney is present; except, if the accused initiates further communication, exchanges, or conversations with police.[147] The purpose of the *Edwards Rule* is to preserve the integrity of an accused's choice to communicate with police only through counsel.[148] Since *Edwards*, the rule has expanded to include that once the suspect states that he wants a lawyer, the interrogation must stop until an attorney is present.[149] Further, since the right involved is the right to have counsel present at *any* custodial interrogation, the mere fact that a suspect in fact consults with counsel does not dissolve his invocation of the right with respect to subsequent police attempts at custodial interrogation.[150] In short, once a suspect requests an attorney pursuant to *Miranda*, no further custodial interrogation can take place unless the *suspect* (a) initiates further communications, exchanges or communications, and (b) waives his right to the presence of counsel during interrogation.

In 2009, the Supreme Court added to the existing *Edwards/Minnick* rule. In *Maryland v. Shatzer*,[151] in 2003, police approached Shatzer, who was already serving a prison term for a previous criminal conviction, provided *Miranda* warnings, and asked Shatzer if he would discuss an unrelated crime. Shatzer invoked his right to an attorney and police honored Shatzer's request per the *Edwards* rule. Police re-approached Shatzer two and a half years later while Shatzer was serving the same sentence, but at a new correctional facility. This time Shatzer, after receiving new *Miranda* warnings, waived his right to counsel and agreed to talk. Under these circumstances, the Court held that when a suspect who initially requested counsel but is reinterrogated after a "break in custody" does not violate the *Edwards* rule or *Miranda*. The Court also held that fourteen (14) days was a sufficient "break in custody" for purposes of re-approaching the suspect. The *Shatzer* rule, then, permits law enforcement to re-approach a suspect fourteen (14) days after the initial request as long as the suspect has been released from custody in that time.[152]

146 *Fare v. Michael C.*, 442 U.S. 707 (1979).
147 *Edwards v. Arizona*, 451 U.S. 477 (1981). See also, *Solem v. Stumes*, 465 U.S. 638 (1984) and *Alvarez v. Gomez*, 185 F.3 995 (9th Cir. 1999).
148 *Patterson v. Illinois*, 487 U.S. 285 (1988).
149 *Minnick v. Mississippi*, 498 U.S. 146 (1990); *Oregon v. Bradshaw*, 462 U.S. 1039 (1983); *Arizona v. Roberson*, 486 U.S. 675 (1988); and, *Shea v. Louisiana*, 470 U.S. 51 (1985).
150 *Minnick v. Mississippi*, 498 U.S. 146 (1990).
151 *Maryland v. Shatzer*, 130 S. Ct. 1213 (2009).
152 The *Shatzer* Court also addressed a second issue that may be more unique. Of course, Shatzer was and remained incarcerated throughout the time in

Thus, to obtain a valid waiver after a suspect has clearly requested an attorney, an officer/agent must establish that:

- The suspect initiated a second interrogation, and the suspect knowingly and voluntarily waived his rights (*Edwards*) or

- There was a "break in custody" of fourteen (14) days or greater before the suspect was re-approached after an invocation of a right to counsel (*Shatzer*).

Note: When the suspect makes a seemingly ambiguous request for counsel, the court will first determine whether the individual expressed his desire for, or clearly asserted his right to counsel, and if so, the court will then assess whether he initiated further discussions with police and knowingly and intelligently waived that right.[153]

The *Davis*[154] Court applied the *Edwards Rule* in analyzing a seemingly ambiguous request. Davis was arrested for murder, received *Miranda* warnings, signed a written waiver, and agreed to speak with investigators. Approximately an hour into the interrogation, Davis said, "Maybe I should talk to a lawyer." The investigators ceased questioning and sought clarification from Davis as to whether he desired to speak with counsel. Davis said he did not wish to speak with a lawyer and the interrogation continued and produced statements that were used to convict him of murder. While indicating the desirability of investigators clarifying the suspect's desire to speak with counsel, the Supreme Court refused to *require* such clarification or the termination of interrogation when a suspect makes an ambiguous statement concerning counsel. Citing *Edwards v. Arizona*,[155] which requires interrogators to stop questioning when a suspect requests counsel, the Court explained that the *Edwards* rule was meant only to prevent police from badgering suspects into waiving previously asserted *Miranda* rights, and that adoption of a requirement to "stop-and-clarify" would needlessly prevent the police from questioning a suspect in the absence of counsel, even if the suspect did not wish to have a lawyer present.

question. Because of that fact, the Court had to determine whether the two and a half year break constituted a "break in custody". The Court concluded that lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*. In fact, the Court determined that there are vast differences between *Miranda* custody and incarceration pursuant to a conviction. As such, the Court concluded that Shatzer was not in custody for Miranda purposes during his two and a half years of incarceration, therefore, that timeframe served as a "break in custody" for purposes of the *Shatzer* rule described above.

153 *Smith v. Illinois*, 469 U.S. 91 (1984).

154 *Davis v. United States*, 512 U.S. 452 (1994).

155 *Edwards v. Arizona*, 451 U.S. 477 (1981).

In an 11th Circuit case, Coleman was arrested, three times advised of and waived his *Miranda* warnings, and on each occasion admitted killing his sister. Following the third confession the detectives received a call from a public defender who asked the detectives to cease the interrogation and the detectives asked Coleman whether he was talking to them of his own free will and asked whether he felt that he wanted to have a public defender present. Coleman replied, "I don't know. But if he said to stop it I don't want to do what he said not to do." The detectives asked Coleman whether he wanted to talk to them alone, or to have somebody with him and Coleman replied, "I want to talk." The interrogation then continued and Coleman made key incriminating statements.[156] The court in the *Coleman* case cited *Davis v. United States*[157] holding that a suspect must clearly request the assistance of counsel to determine that an unambiguous indication of a desire to remain silent is required in order to require interrogators to stop an interrogation. Therefore, since Coleman's statements were ambiguous, the interrogators were not required to stop the interrogation and Coleman's incriminating statements were properly admitted.[158]

A suspect will not be found to have initiated the dialogue, however, where the "initiation" is preceded by actions or comments by the officers that equate to interrogation, or are construed as attempts to induce the suspect into "waiving" his right to counsel. Further, not all statements or actions by a suspect can be interpreted as willingness to resume interrogation. For example, a request to use the telephone or for a glass of water will not be viewed as a desire on the part of the suspect to open up a more generalized discussion relating directly or indirectly to the investigation.[159]

In *Arizona v. Roberson*,[160] the Supreme Court made it clear that this right to counsel is not "offense specific." When a suspect has cut off custodial interrogation by invoking his *Miranda* right to counsel, officers may not thereafter seek to initiate interrogation with respect to *any* crime as long as the suspect remains in custody.

5.1100 Miranda Violation Sanction

Statements taken in violation of *Miranda* are inadmissible in the prosecution's case against the defendant.

156 *Coleman v. Singletary*, 30 F.3d 1420 (11th Cir. 1994).
157 *Davis v. United States*, 512 U.S. 452 (1994).
158 See also, *United States v. Rodriguez*, 518 F. 3d 1072 (9th Cir. 2008) and *United States v. Plugh*, 576 F. 3d 135 (2nd Cir. 2009).
159 *Oregon v. Bradshaw*, 462 U.S. 1039 (1983).
160 *Arizona v. Roberson*, 486 U.S. 675 (1988).

5.1110 Use of Miranda Violation Statement for Impeachment

However, this does not provide the defendant with a license to use perjury (i.e., lie under oath), when testifying in his defense. Therefore, the prosecution can use the defendant's prior inconsistent statements, even though obtained without proper *Miranda* warnings to impeach (cast doubt on the truth of) his testimony at trial.[161] Specifically, statements made by a defendant in circumstances violating the strictures of *Miranda* are admissible for impeachment if their trustworthiness satisfies legal standards.[162]

This "impeachment exception" was not, however, intended to provide law enforcement officers with the option of continuing onward when rights are invoked in the hopes of acquiring impeachment evidence. The Ninth Circuit has distinguished such cases, noting that they "are laden with police misconduct that is 'identical with the historical practices [of incommunicado interrogation] at which the right against self-incrimination was aimed'."[163] Thus, officers implementing such designs could be subject to personal lawsuits for violating the Constitution if a court concludes they had, in effect, indirectly compelled a suspect to be a witness against himself in violation of the Fifth Amendment right against compulsory self-incrimination.[164]

For example, in two separate interrogations, officers intentionally continued to interrogate the suspect after he had invoked his rights, i.e., the right to silence, and the presence of counsel, respectively. The officers intended thereby to obtain statements "outside *Miranda*" that, although inadmissible in the Government's "case in chief," could be used to "impeach," i.e., contradict any inconsistent statement(s) made by the suspect should he testify at trial. The resulting incriminating statements by the suspects were used in one case to impeach the suspect, and in the other case were used at sentencing as an aggravating factor. The suspects brought suit against the officers pursuant to 42 U.S.C. § 1983, alleging that the officers had violated their Fifth Amendment rights. The Ninth Circuit held that the officers were not entitled to qualified immunity from liability because such action constituted a violation of a clearly established constitutional right, and they could not have reasonably believed that their conduct was proper under the circumstances.[165] Since then, the Supreme Court

161 *Michigan v. Harvey*, 494 U.S. 344 (1990). See also, *Raffel v. United States*, 271 U.S. 494 (1926); *Harris v. New York*, 401 U.S. 222 (1971); *Oregon v. Hess*, 420 U.S. 714 (1975); and, *Walder v. United States*, 347 U.S. 62 (1954).
162 *Mincey v. Arizona*, 437 U.S. 385 (1978) and *Harris v. New York*, (1971). See also, *United States v. Hale*, 422 U.S. 171 (1975); *Frazier v. Cupp*, 394 U.S. 731 (1969); and, *Brecht v. Abrahamson*, 507 U.S. 619 (1993).
163 *California Attorneys Criminal Justice v. Butts*, 195 F.3d 1039, at 1046 (9th Cir. 1999); quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).
164 *Id.*; *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992)(*en banc*).
165 *California Attorneys Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999)

has reinforced the Ninth Circuit's determination that *Miranda* is a constitutional rule.[166]

Note: Testimony given in response to a grant of legislative immunity is the essence of compelled testimony[167] so the statement cannot be used for impeachment purposes.[168]

5.1200 Miranda and the Fruit of the Poisonous Tree Doctrine

We introduced this topic when we discussed *Oregon v. Elstad* and the use of unwarned statements. The Fruit of the Poisonous Tree Doctrine excludes from trial any evidence or witnesses discovered as a result of a Constitutional violation.[169] This Doctrine is more commonly applied to Fourth Amendment search and seizure scenarios, but violations of the Fifth Amendment also qualify under the *Wong Sun* rule. Since statements that are involuntarily given violate the Fifth Amendment's Due Process Clause[170] and protection against compelled statements, any statement taken in violation of either one of these provisions that produces additional evidence or witnesses would be excluded as Fruit of the Poisonous Tree.[171] If the statement was otherwise voluntarily given, and *Miranda* warnings were not given prior to taking the statement, then the statement would be inadmissible as a *Miranda* violation, but not as a Fifth Amendment violation. Therefore, the Fruit of the Poisonous Tree Doctrine would not apply to evidence or witnesses discovered as a result of the statement obtained in violation of *Miranda*.

For instance, in *United States v. Flores-Sandoval*,[172] 422 F. 3d 711 (8th Cir. 2005), state police placed defendant in custody, without cause. Police called Border Patrol to supply an interpreter during questioning. The defendant gave an unwarned admission during this interview that he was illegally present in the United States. ICE fingerprinted the defendant the day after the interview and it revealed that he had been previously deported. At this point, ICE Mirandized the defendant and he made the same admission. The Eighth Circuit first stated that statements resulting from an illegal detention are not admissible. Next the court found that there was no basis for the state police to take defendant into custody, and thus, they violated the Fourth Amendment. All evidence, both

166 *Dickerson v. United States*, 530 U.S. 428 (2000).
167 *Mincey v. Arizona*, 437 U.S. 385 (1978) – Any trial use against defendant of his involuntary statement is a denial of due process of the law.
168 *New Jersey v. Portash*, 440 U.S. 450 (1979).
169 *Wong Sun v. United States*, 371 US 471 (1963).
170 *Jackson v. Denno*, 378 U.S. 368 (1964).
171 Note: Exception – The subsequent confession is admissible if intervening events break the causal connection between the illegal arrest and the confession so that the confession is 'sufficiently an act of free will to purge the primary taint.' *Brown v. Illinois*, 422 US 590 (1975); *Dunaway v. New York*, 442 U.S. 200 (1979); and, *Taylor v. Alabama*, 457 US 687 (1982) and
172 *United States v. Flores-Sandoval*, 422 F. 3d 711 (8th Cir 2005).

statements and the fingerprints, stemming from the illegal detention were suppressed as Fruit of the Poisonous Tree.[173]

In sum, a violation of *Miranda* does not automatically constitute a Fifth Amendment violation.[174] Where there is no Fifth Amendment (i.e., constitutional) violation, there is no "poisoned tree" and thus no poisoned fruit to suppress. For example, the Court has recently held that the "introduction [into evidence] of the nontestimonial fruit of a voluntary statement … does not implicate the Self-Incrimination Clause [of the Fifth Amendment]."[175] A suspect's Fifth Amendment rights are not violated merely by a failure to provide *Miranda* warnings. In the *Patane* case, a convicted felon was arrested and made a voluntary statement leading to the discovery that he was illegally in possession of a firearm. Patane was not advised of his *Miranda* warnings at the time of his arrest. The Court held, however, that the Fifth Amendment's self-incrimination clause "cannot be violated by the introduction of non-testimonial evidence (firearm) obtained as a result of voluntary statements."[176]

There would be a different result, however, if a Fifth Amendment constitutional violation accompanied the *Miranda* violation. Although there was a failure to give *Miranda* warnings in the *Patane* case, the failure was not accompanied by any coercion or duress such as to render Patane's response to the weapons question involuntary. If, however, Patane's responses were made under coercive circumstances or under duress, or otherwise such that they were involuntary, i.e., not the product of a free and unrestrained choice, then the statements would be obtained in violation of the Fifth Amendment. In other words, regardless of whether *Miranda* warnings are given, if statements leading to the discovery of non-testimonial evidence were made involuntarily by a suspect (i.e., coerced), the non-testimonial evidence would still be subject to suppression.

5.1300 Fifth Amendment, Miranda, and Employee Rights

5.1310 Administrative Investigation

The Fifth Amendment prevents the government from engaging in conduct that violates Due Process protections, which means that the government cannot take away something of value unless the government satisfies certain procedural Due Process requirements. In the federal work environment, like virtually every other work environment, there are expectations. The employer employs the federal employee to perform specific functions and the employer has an interest

173 See also, *United States v. Hernandez-Hernandez*, 384 F. 3d 562 (8th Cir 2004).

174 While ruling that *Miranda* announced a constitutional rule, the Supreme Court has refused to apply the traditional "fruits of the poisonous tree" doctrine to all *Miranda* violations. The Court noted that, "the *Miranda* exclusionary rule … serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself," and that "unreasonable searches under the Fourth amendment are different from unwarned interrogation under the Fifth Amendment." *Dickerson v. United States*, 530 U.S. 428 (2000).

175 *United States v. Patane*, 542 U.S. 630 (2004).

176 *Id.*

in the successful performance of that function. Federal employees agree to perform those functions in an appropriate manner, but for some form of compensation. As a result, federal employment provides the federal employee with something of value, referred to as a property interest. Since federal employment bestows a property interest upon the federal employee (i.e., something of value), the federal government must extend procedural Due Process protections to the employee if there is an attempt by the employer to remove, alter, or diminish that property interest. The method used to alter the employment relationship typically comes in the form of an adverse action.

According to the law, there can be no adverse action against an employee except "for cause", which is the type of cause that impacts the efficient running of the service.[177] Therefore, the employer must provide the employee with procedural Due Process when it imposes discipline as part of an adverse action. Many of the procedural requirements are outlined in workforce negotiated agreements that both parties have agreed to abide by. In addition, the employee possesses many rights stemming from Constitutional, statutory, and regulatory provisions. These provisions require the agency to ensure that the employee receives procedural Due Process during the course of the adverse action.

5.1310 Administrative Investigation

Any agency investigation conducted for non-criminal prosecution purposes is refereed to as an administrative investigation. The investigation is meant to provide a factual basis for choosing a course of action. The goal is to impartially gather and compile all relevant evidence.

The legal authority to conduct an administrative investigation comes from a variety of sources. Title 5 U.S.C. § 2635 entitled Standards of Ethical Conduct for Employees of the Executive Branch identifies public service as a public trust. Public employees "subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights."[178] Shortly after entering on duty, the agency employee must sign an appointment affidavit as a condition of employment, which states that the employee, "will well and faithfully discharge the duties of the office on which I am about to enter." Title 5 C.F.R. Part 735.203 entitled Conduct Prejudicial to the Government states that, "[A]n employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government." Finally, CBP Directive 51735-013 entitled Standards of Conduct at 6.4.2 states that, "[W]hen directed by competent authority, employees must truthfully and fully testify, provide information, or respond to questions (under oath when required) concerning matters of official interest that are being pursued administratively."

Procedurally, the starting point, for any administrative investigation and adverse action, is with Title 31 C.F.R. Part 0.207, which states that, "employees shall

177 Title II of the Civil Service Reform Act.

178 *Uniformed Sanitation Men Association v. Commissioner of Sanitation*, 392 U.S. 284-285 (1968).

respond truthfully and under oath when required, whether orally or in writing, and must provide documents and other materials concerning matters of official interest when directed to do so by competent Treasury authority."[179] Title 31 C.F.R. Part 0.102[180] states that all employees are required to follow the rules of conduct and procedure. Failure to comply with those rules subjects the employee to corrective action or discipline up to and including removal.

Question: What if a manager suspects that an employee has been taking office supplies from the agency so that the employee can use the supplies to perform Parent Teacher Association work? What if the manager questions the employee about this conduct? What answer will the employee give and what are some of the employee's concerns? Even without any specific understanding of this area of the law, it should be fairly obvious that the employee faces a series of dilemmas. If the employee answers honestly, then the employee will be subject to discipline or, possibly, criminal prosecution. If the employee answers dishonestly, then the employee is subject to discipline and criminal prosecution. If the employee refuses to answer, then the employee violates the agency code of conduct and will be subject to discipline.

At what point do procedural Due Process protections apply? Put another way, what procedural Due Process safeguards, if any, protect the employee in situations similar to the one mentioned above? The Supreme Court has wrestled with these issues for many years and has produced a large body of significant case law that will help answer these questions. More importantly,

179 Note: By virtue of the authority delegated to the Commissioner through creation of the Department of Homeland Security (found at Title 6 of the United States Code) the reference to Treasury can be read to include DHS.

180 § 0.102 Policy.

(a) All employees and officials of the Department are required to follow the rules of conduct and procedure contained in the Rules, the Treasury Supplemental Standards, the Executive Branch-wide Standards of Ethical Conduct, the Employee Responsibilities and Conduct (5 CFR part 735), and any bureau issued rules.

(b) Employees found in violation of the Rules, the Treasury Supplemental Standards, the Executive Branch-wide Standards or any applicable bureau rule may be instructed to take remedial or corrective action to eliminate the conflict. Remedial action may include, but is not limited to:

(1) Reassignment of work duties;

(2) Disqualification from a particular assignment;

(3) Divestment of a conflicting interest; or

(4) Other appropriate action.

(c) Employees found in violation of the Rules, the Treasury Supplemental Standards, the Executive Branch-wide Standards or any applicable bureau rule may be disciplined in proportion to the gravity of the offense committed, including removal. Disciplinary action will be taken in accordance with applicable laws and regulations and after consideration of the employee's explanation and any mitigating factors. Further, disciplinary action may include any additional penalty prescribed by law.

the Supreme Court has provided us with guidance regarding how these issues are handled by the administrative investigator and the employee.

Throughout this chapter we have explained that the Fifth Amendment prevents government from compelling someone to offer testimony against themselves in a criminal prosecution. In the example above, the investigator's questioning can change in focus from purely administrative matters to criminal in nature. Under these circumstances, *Miranda* warnings might be required.

Shortly after the *Miranda* decision, the Court addressed just such a scenario. In *Garrity v. New Jersey*,[181] New Jersey police officers, who had fixed tickets, were asked by investigators about their involvement in the scheme. At the time, a New Jersey state statute required officers to answer investigative questions, and if they did not, they would lose their jobs. The officers gave statements to investigators and those statements were used to convict the officers in a criminal prosecution. The Court found that the statements were obtained from the officers by means of compulsion in violation of the Fifth Amendment's prohibition against compelled self-incrimination (i.e., make statements or lose job). More importantly, *Garrity* held that statements acquired in this manner cannot be used in a criminal prosecution.

The next year, the Court looked at a variation of *Garrity*. In *Gardner v. Broderick*, a New York City police officer was asked to waive his Fifth Amendment right against self-incrimination, in the form of a "waiver of immunity", or lose his job. He refused to sign the waiver and lost his job subsequent to an administrative hearing. The Court held that the agency cannot fire an employee for exercising his Constitutional rights. Then the Court noted that if he had been given immunity from use of his compelled testimony, then the agency would be permitted to compel testimony by threatening the employee with loss of his job.[182]

Next, the Court heard *Kastigar v. United States*,[183] in which Kastigar and others had been subpoenaed to testify before a grand jury concerning work related misconduct. The government anticipated that they would refuse to answer questions, so the government obtained a court order that provided immunity to each witness pursuant to 18 U.S.C. Sections 6002 and 6003.[184] Despite the

181 *Garrity, et. al. v. New Jersey*, 385 U.S. 493 (1967).

182 *Gardner v. Broderick*, 392 U.S. 273 (1968) and *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

183 *Kastigar, et. al. v. United States*, 406 U.S. 441 (1972).

184 § 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to--

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an

immunity order, Kastigar refused to testify and the court found Kastigar in contempt of court. He was ordered imprisoned until he answered the grand jury's questions or the term of the grand jury ended. According to the Court, testimony can be compelled by the government against a witness who invokes the Fifth Amendment right to remain silent by conferring immunity pursuant to 18 U.S.C. Section 6002 from the use of the compelled testimony in a later criminal proceeding. This is known as use immunity which prevents the use of compelled statements *and its derivatives* in future criminal proceedings. If the person receives use immunity, the person still may be prosecuted as long as the government proves that the evidence it proposes to use against the person is derived from a legitimate source wholly independent of the compelled testimony. [Note: Transactional immunity is a broader form of immunity that provides full immunity from prosecution for the offense to which the compelled testimony relates].

The next issue, once the government extends immunity to the employee, is whether the employee has made an express refusal to answer questions. In *Modrowski v. Department of Veteran Affairs*,[185] the Federal Circuit concluded that the employee's request for additional time to consult with a lawyer prior to answering questions did not constitute a refusal to cooperate.

order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.
§ 6003. Court and grand jury proceedings
(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title [18 USCS § 6002].
(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General or any designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under subsection (a) of this section when in his judgment--
(1) the testimony or other information from such individual may be necessary to the public interest; and
(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

185 *Modrowski v. Department of Veteran Affairs*, 252 F. 2d 1344 (Fed Cir 2001).

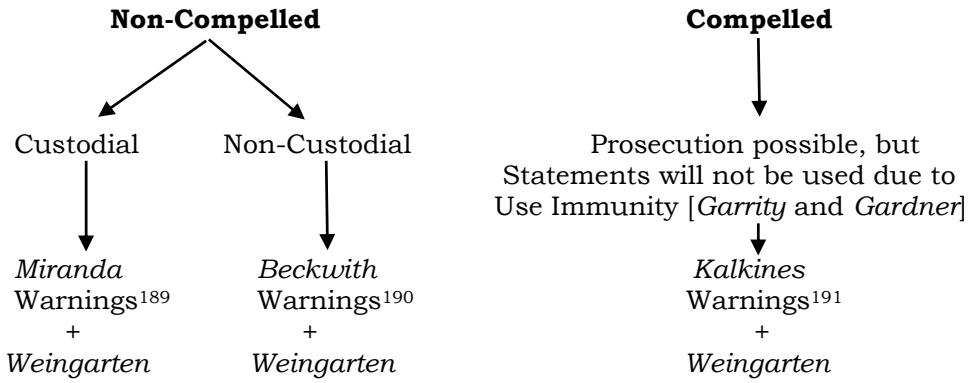
In *Kalkines v. United States*,[186] the United States Court of Claims reviewed a case in which Kalkines, a Customs employee, was suspected of taking bribes and he refused to answer agency investigative questions. Customs policy required answers to Customs related administrative investigations. Kalkines refused to answer questions and he was discharged for failure to comply with agency policy. Relying on *Gardner*, the Court of Claims found that the employee cannot be discharged because he invoked his right to remain silent. Likewise, the court cited *Garrity*, which held that the agency cannot use statements compelled by "talk or lose job" approach. However, the Kalkines court concluded that if the investigator adequately informed the employee that if he made a statement, the statement, and their fruits, could not be used against him in a criminal proceeding, then a failure to answer questions would subject the employee to discharge for violating agency policy.

In *National Labor Relations Board v. Weingarten, Inc.*,[187] the Court addressed an agency conducted investigative interview of an employee regarding theft at a store. The employee requested the presence of a union representative during the course of the interview and the investigators refused to honor the request. The employee believed that the answers given in the interview could lead to disciplinary action and believed that he was entitled to union representation at the interview. The Court held that the employee is entitled to union representation during the interview if: (1) the employee believes that the results of the interview may result in disciplinary action against the employee; and, (2) the employee requests union representation.

186 *Kalkines v. United States*, 473 F. 2d 1391 (USCC 1973).
187 *National Labor Relations Board v. Weingarten, Inc.*, 420 U.S. 251 (1975).

Bargaining Unit Employees
Criminal Investigation

General Notice[188]



188 General Notice: I am investigating the alleged_____ (misconduct). You, (employee's name), are the subject of the investigation concerning this matter.

One of the following must be checked.

____ The general nature of this matter is criminal.

____ The general nature of this matter is administrative.

One of the following must be checked.

____ This interview is related to possible criminal misconduct by you.

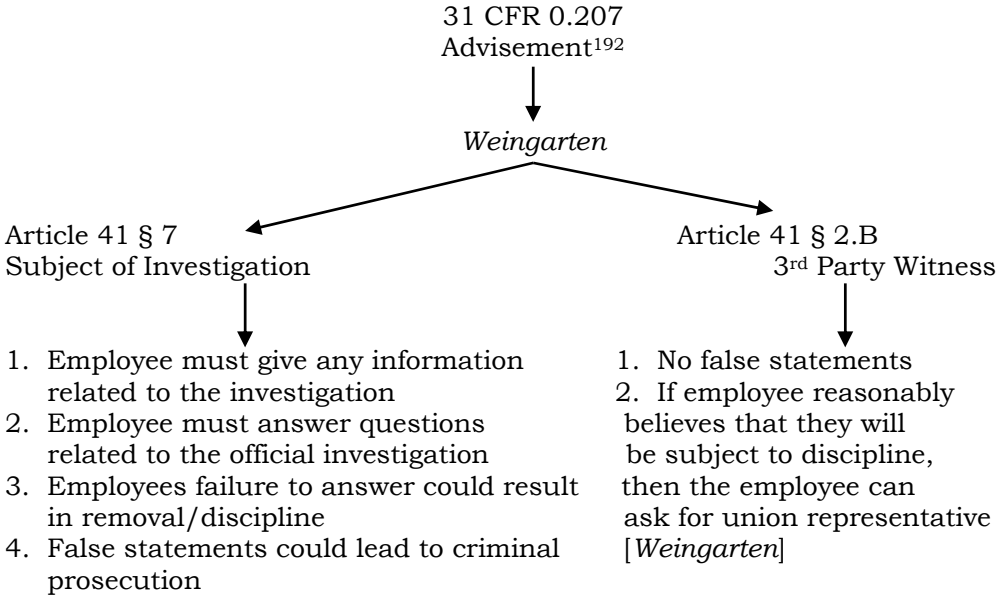
____ This interview is not related to possible criminal misconduct by you.

189 See above.

190 Beckwith Warnings: You have the right to remain silent if your answers may tend to incriminate you. Anything you say may be used as evidence later in an administrative proceeding or any future criminal proceeding involving you. If you refuse to answer the questions posed to you on the grounds that the answers may tend to incriminate you, you cannot be discharged solely for remaining silent. However, your silence can be considered in an administrative proceeding for its evidentiary value that is warranted by the facts surrounding your case.

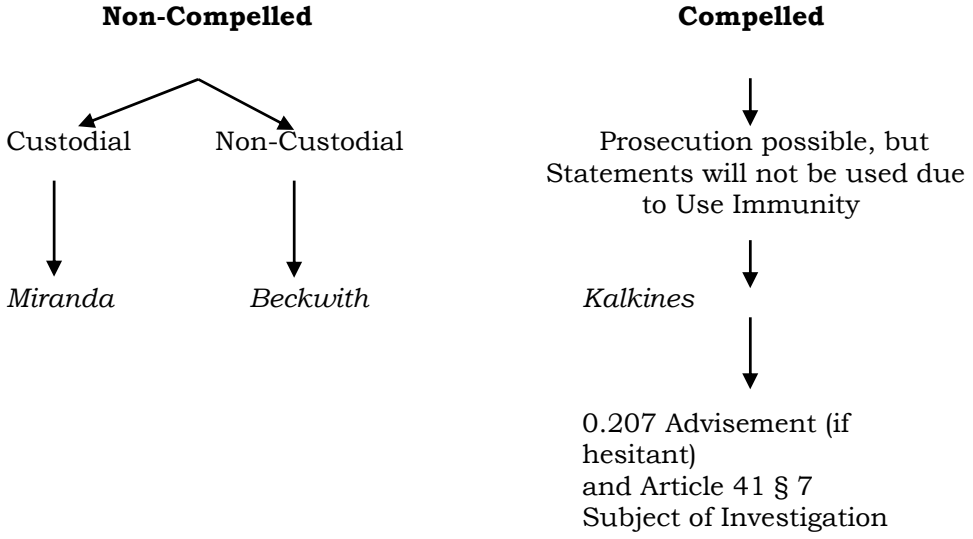
191 Kalkines Warnings: Before we ask you any question, it is my obligation to inform you of the following: You are here to be asked questions pertaining to your employment with the U.S.C.B.P. and the duties that you perform for the agency. You have the option to remain silent, although you may be subject to removal from your employment by the agency if you fail to answer material and relevant questions relating to the performance of your duties as an employee. You are further advised that the answers you may give to the questions propounded to you at this interview, or any information or evidence which is gained by reason of your answers, may not be used against you in a criminal proceeding except that you may be subject to a criminal prosecution for any false answer that you may give.

Bargaining Unit Employees
Non-Criminal Investigation



192 31 CFR Part 0.207 Advisement: I, the undersigned employee of the United States Customs and Border Protection, hereby acknowledge receipt of the Administrative Warning. I understand: That _____ , acting as the Designated Agency Fact Finder, has been charged with conducting an official inquiry. I have been informed this inquiry is solely administrative in nature. Pursuant to Department rules of conduct, 31 C.F.R. Part 0.207: "Employees shall respond to questions truthfully and under oath when required, whether orally or in writing, and must provide documents and other materials concerning matters of official interest when directed to do so by competent agency [Treasury] authority." I have been informed that I may be subject to disciplinary action, up to and including removal from the agency for my failure or refusal to answer proper questions relating to the performance of my duties as an employee of the U.S.C.B.P. I have been informed that I may also be subject to criminal prosecution and/or administrative disciplinary action for any false answer that I give to any questions.

Non-Bargaining Unit Employees
Criminal Investigation



Non-Criminal Investigation

Acknowledgement of Administrative Warnings
For Non-Bargaining Unit Employees

31 CFR 0.207 Advisement (if hesitant)

1. Employee must give any information related to the investigation
2. Employee must answer questions related to the official investigation
3. Employees failure to answer could result in removal/discipline
4. False statements could lead to criminal prosecution

5.1400 Arrest Authority and Transition to Sixth Amendment Issues

5.1410 Probable Cause Determination

Once law enforcement determines that the person committed a crime, the individual's status changes from that of the suspect to that of the accused. If law enforcement has not already seized the person, then a Fourth Amendment seizure (i.e., arrest) may be made as long as it is supported by Probable Cause

(facts and circumstances sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense).[193]

5.1410 Probable Cause Determination

The pre-arrest probable cause determination will be made by either the officer/agent or by the Magistrate. There are some slight distinctions in the law enforcement approach depending on who makes the pre-arrest probable cause determination:

> If made by the Magistrate an arrest warrant will be issued after reviewing the officer/agent's affidavit of probable cause.[194]
>
> If made by the officer/agent no arrest warrant will be issued and the officer/agent's assessment will not be subjected to court review until after the arrest has been made and the accused is brought before a Magistrate.[195]

5.1500 Federal Arrest Authority

5.1510 Outstanding Federal Warrant
5.1520 NCIC Missing Person's File
5.1530 Asylum
5.1540 Rendering Cross Border Assistance at the Request of Foreign Law Enforcement

An arrest may be made with or without a warrant under federal or state arrest authority. If the crime is a state crime, state arrest procedures must be followed. If it is a federal crime, the Federal Rules of Criminal Procedure must be followed. CBP Federal arrest authority can be found in Titles 8 and 19 of the United States Code:

> **8 U.S.C. § 1357(a)(2) [INA Section 287(a)(2)]** – permits arrest of any alien who in the agent/officer's presence or view is entering or attempting to enter in violation of immigration laws or any alien already in the United States in violation of immigration laws and is likely to escape before an arrest warrant can be obtained.
>
> **8 U.S.C. § 1357(a)(4) [INA Section 287(a)(4)]** – permits arrest of any person for an immigration-related felony and the person is likely to escape before a warrant can be obtained.

193 *Beck v. Ohio*, 379 U.S. 89 (1964) and *Maryland v. Pringle*, 540 U.S. 366 (2003).
194 Rule 4(a) of the Federal Rules of Criminal Procedure.
195 Rule 5(a) of the Federal Rules of Criminal Procedure.

8 U.S.C. § 1357(a)(5)(A) [INA Section 287(a)(5)(A)] – permits arrest for federal crime that occurs in the agent/officer's presence and the person is likely to escape before obtaining a warrant.

19 U.S.C. § 1589a – permits arrest, without a warrant, for any federal offense, felony or misdemeanor, that occurs in the officer/agent's presence and for federal felonies that occur outside the officer/agent's presence. Federal misdemeanor's that occur outside the officer/agent's presence require a warrant. The officer/agent must be performing lawful duties and probable cause is required.

Title 8 Arrest Authority

	Immigration Felony	**Immigration Misdemeanor/ Administrative**	**Non-Immigration Felony**	**Non-Immigration Misdemeanor**	
If act occurs in presence of agent	8 U.S.C. § 1357(a)(4)*	8 U.S.C. § 1357(a)(2)*	8 U.S.C. §1357(a)(5(A)*	8 U.S.C. § 1357(a)(5)(A)*	* = likely to escape
If act occurs outside presence of agent	8 U.S.C. § 1357(a)(4)*	8 U.S.C. § 1357(a)(2)*	Obtain arrest warrant or rely on 1589(a)	Must obtain arrest warrant	* = likely to escape

Title 19 Arrest Authority

	Immigration Felony	**Immigration Misdemeanor/ Administrative**	**Non-Immigration Felony**	**Non-Immigration Misdemeanor**	
If act occurs in presence of agent	19 U.S.C. § 1589a	19 U.S.C. § 1589a	19 U.S.C. § 1589a	19 U.S.C. § 1589a	
If act occurs outside presence of agent	19 U.S.C. § 1589a	Obtain arrest warrant or rely on1357(a)(2)	19 U.S.C. § 1589a	Must obtain arrest warrant	

Note: To be lawful, an arrest must be supported by probable cause.

5.1510 Outstanding Federal Warrant

Typically, outstanding federal warrants are brought to light as part of a Treasury Enforcement Communications System (TECS) or National Crime Information Center (NCIC) alert (i.e., "hit"). First, ensure that the warrant is still valid and that the person to be arrested is the person specified in the warrant. The warrant need not be in your possession at the time of the arrest, but upon request, you will be required to show the warrant to the suspect as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he should inform the suspect of the offense charged and of the fact that a warrant has been issued.[196]

5.1520 NCIC Missing Person's File

CBP officers/agents have no authority to detain a missing person for that reason alone. Although CBP officers/agents have the authority to detain all persons coming into the United States from foreign countries pursuant to 19 U.S.C. § 1582, that authority is for the purpose of enforcing the Customs and related laws, so detention of a missing person pursuant to the NCIC entry would not be incidental to a Customs purpose and, therefore, would exceed the authority of CBP officers. CBP has no legal responsibility to perform any specific action regarding missing persons, but CBP could appropriately notify the proper law enforcement authorities. Special consideration should be given to young children, mentally disturbed persons, etc. In these unique situations, seek the advice of local authorities and/or Associate/Assistant Chief Counsel before releasing the person.

5.1530 Asylum

Any alien who is physically present in the United States or applying for admission at any port of entry may request asylum from CBP.

CBP officers should assume that an alien is requesting asylum if the alien indicates in any way a desire to remain in the United States. Any words spoken or actions taken by the alien that would demonstrate to the Customs officer a desire to remain in the United States can be the basis for assuming a request for asylum. Neither special words nor the term "asylum" needs to be used to make such a request.

If the applicant is *on board a vessel or aircraft* and the master of the vessel or commander of the aircraft refuses to permit the applicant to leave, clearance will be withheld pending resolution of the matter. Information regarding such withholding of clearance may be obtained from the Entry and Carrier Rulings Branch in the Office of Regulations and Rulings (202) 482-6940.

196 FED. R. CRIM. P. 4(d)(3).

5.1540 Rendering Cross Border Assistance at the Request of Foreign Law Enforcement

No law or regulation specifically authorizes CBP officers to render assistance to foreign law enforcement officers outside the United States. On the other hand, 22 U.S.C. § 2291(c), known as the Mansfield Amendment, specifically bars a United States officer or employee from directly effecting "an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts." The legislative history of this act provides that arrest action means "any police action, which under normal circumstances would involve the arrest of individuals *whether or not* arrests, in fact, are actually made." Nevertheless, the statute outlines four exceptions to this prohibition pertinent to CBP officers.

With approval of the United States chief of mission, a United States officer or employee may be present during and/or assist foreign officers in effecting an arrest where there is an agreement to that effect with the foreign country involved. Any such agreement must be between the Secretary of State and the foreign government and must be reported to Congress.[197]

A United States officer or employee, faced with an exigent or threatening circumstance, is not barred from acting to protect life or safety as long as the event is unanticipated and poses an immediate threat to a United States officer or employee, a foreign government officer or employee, or members of the public.[198] The statute permits maritime law enforcement operations in the territorial sea or archipelagic waters of a foreign country provided the officer obtains permission from that country.[199] In all events, § 2291(c)(5) prohibits United States officers or employees from interrogating or being present during the interrogation of a United States person arrested in a foreign country, unless the arrested individual gives written consent authorizing such action.

Many uncertainties are involved in conducting activities on foreign soil. Absent statutory authority and /or supervisory direction, such acts might not be deemed as within the scope of employment and the officer may be denied Department of Justice representation in the event of a lawsuit resulting from these activities. In addition, if the officer might be deemed to not be in the performance of official duty, he would not be entitled to compensation in the event of disability or death resulting from the assistance. Also, the Federal Tort Claim Act does not apply in foreign countries. Finally, the foreign country's laws could make it illegal for the CBP officer to perform certain functions (e.g., investigation, arrests, etc.) without prior approval from the foreign government.

5.1600 State Arrest Authority

5.1610 Peace Officer Status
5.1620 Private Person (Citizen) Arrest Authority

197 22 U.S.C. § 2291(c)(2).
198 22 U.S.C. § 2291(c)(3).
199 22 U.S.C. § 2291(c)(4).

5.1630 Warrantless Arrests under the Uniform Criminal Extradition Act
5.1640 Warrantless Arrests Authorized by State Statute
5.1650 Outstanding State Warrants
5.1660 CBP Arrest Authority Under State Law

There are four mechanisms by which a given state may empower a federal officer/agent, to include Customs and Border Protection officers and agents, to make arrests for state violations.

5.1610 Peace Officer Status

Each state determines who may serve as a peace officer and what authority peace officers in that state possess. Generally, the term includes sheriffs, sheriff deputies, constables, marshals, municipal police officers, and other officers whose duty is to enforce and preserve the public peace. Peace officers can typically arrest for a state felony if he has probable cause to believe that a state felony has been committed and probable cause to believe the suspect committed the state felony. An arrest for state misdemeanors requires the crime be committed in the peace officer's presence. Most states do not confer peace officer status on CBP agents and officers.[200]

5.1620 Private Person (Citizen) Arrest Authority

In most states, a private citizen may make an arrest for a state felony committed in his presence.[201] Some states permit arrests for state felonies not committed in one's presence as long as there is probable cause to believe that the person to be arrested committed the state felony.[202]

5.1630 Warrantless Arrests under the Uniform Criminal Extradition Act

A considerable number of model laws have been approved by the National Conference of Commissioners on Uniform State Laws, and many of them have been adopted by the states. The Uniform Criminal Extradition Act is such a law. Extradition is the surrender of a fugitive from justice or a prisoner by one state to another. Section 14 of the Extradition Act reads:

> The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information

200 Addendum 4 at the end of this chapter sets forth the law in each state regarding peace officer status. Please contact your Associate/Assistant Chief Counsel for further guidance.

201 See, *United States v. Sealed Juvenile I*, 255 F. 3d 213 (5th Cir. 2001) –in a few states citizen arrest authority extends to misdemeanor level breaches of the peace.

202 Variations exist, so it is best to become fully familiar with each state's individual requirements.

> that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section; and thereafter his answer shall be heard as if he had been arrested on a warrant.

If the state in which the arrest is made has adopted this law, and this section as quoted, a CBP officer/agent, as either a peace officer or a private citizen, could arrest any person charged by another state with a state felony. Some states have not adopted this law and others, such as California, have limited the authority to peace officers.[203]

5.1640 Warrantless Arrests Authorized by State Statute

Some states have granted, by state statute, limited arrest authority to CBP officers and agents and this authority may differ from the authority the state may have granted to peace officers. Examples are California, Florida, New Jersey, and New York.[204]

5.1650 Outstanding State Warrants

No federal statute authorizes a CBP officer/agent to make an arrest based on outstanding state warrants. Generally, CBP officers/agents making such an arrest would be doing so as a peace officer or private citizen depending on the laws of the state in which the arrest is made. An exception would be 18 U.S.C. § 1073, Unauthorized Flight to Avoid Prosecution (UFAP) where the person to be arrested is in a state other than the one in which the warrant was issued. In such a case or in all cases where the fugitive is crossing the border, there is probable cause to believe that the fugitive left the issuing state to avoid prosecution and is therefore subject to arrest pursuant to the UFAP statute.

5.1660 CBP Arrest Authority Under State Law

CAUTION: Although current as of the date of publication, these laws can change. Consult your Associate/Assistant Chief Counsel to ensure the information has not changed. Further, the referenced state laws generally have not been amended to reflect the transfer of authorities that followed enactment of the Homeland Security Act of 2002 (I). Consequently, state laws generally reference the authority of "Customs officers" and/or "Immigration officers." Pursuant to sections 403(1), 411 and 441 of the I, which transferred the

203 Addendum 4 at the end of this chapter sets forth the law in each state regarding the Extradition Act. Please contact your Associate/Assistant Chief Counsel for further guidance.

204 Refer to such statutes in Addendum 4 at the end of this chapter. Please contact your Associate/Assistant Chief Counsel for further guidance.

Customs Service to DHS, and the President's Modified Reorganization Plan, which renamed the Customs Service and shifted some enforcement assets to CBP as well as out of CBP, the terms "customs officer," and "immigration officer" are read to include any officer of the U.S. Customs and Border Protection of the Department of Homeland Security.

See, complete* State Law Listing *at* Addendum 4 *at the end of this chapter.

5.1700 Post-Arrest Obligations

5.1710 Rule 5(a) of the Federal Rules of Criminal Procedure; *McNabb-Mallory Rule*; and 18 U.S.C. § 3501
5.1720 Release of an Arrested Person
5.1730 48 Hour Rule
5.1740 Initial Appearance
5.1750 Juveniles Charged with Federal Crimes - 18 U.S.C. §§ 5031-5042
5.1760 Arrest of Foreign Nationals
5.1770 Material Witnesses
5.1771 18 U.S.C. § 3144 Release or Detention of a Material Witness
5.1772 8 U.S.C. § 1185 Travel Control of Citizens and Aliens
5.1773 8 U.S.C. § 1324(d) Admissibility of Videotaped Witness Testimony

5.1710 Rule 5(a) of the Federal Rules of Criminal Procedure; *McNabb-Mallory Rule*; and 18 U.S.C. § 3501

Rule 5(a) requires that law enforcement take the arrested individual, without unnecessary delay, before a magistrate and each CBP officer/agent is responsible for knowing the location of the nearest U.S. magistrate judge or a state or local magistrate if the U.S. magistrate judge is unavailable. The obligation of an officer to present an arrestee before a magistrate judge without unreasonable delay was a common law right that was subsequently codified in a number of federal statutes.[205] In *McNabb v. United States*,[206] the Court held that the federal statute in place at the time[207] required police, with reasonable

205 *Corley v. United States,* 129 S. Ct. 1558, 173 L. Ed. 2d 443 (2009); see also, United States v. Alvarez-Sanchez, 511 U.S. 350 (1994) and *United States v. Garcia-Hernandez*, 569 F. 3d 1100 (9th Cir. June 25, 2009).

206 *McNabb v. United States*, 318 U.S. 332 (1943). *McNabb* Facts: Moonshiner case at the McNabb Settlement, Tennessee where a federal Alcohol Tax Unit officer was shot and killed by members of the McNabb clan. Five members of the McNabb family were taken into custody and held for 14 hours before their initial presentment to a "Commissioner" [i.e., Magistrate]. During this time, officers questioned each of the suspects, multiple times, and eventually obtained a confession. There was no obvious evidence of involuntariness related to the admissions.

207 18 U.S.C. Section 595; 5 U.S.C. Section 300a (Act of June 18, 1934) – Similar statute for FBI agents. 18 U.S.C. Section 593 (Act of March 1, 1879) – Similar statute for alcohol violations.

promptness, to present to the commissioner (i.e., Magistrate) or nearest officer with authority, a person charged with a crime. Failure to promptly present the defendant would justify suppression of the defendant's statements taken during the period of unnecessary delay. The policy meant to be served by this statute was to safeguard against:

(1) Law enforcement using the "Third Degree" to obtain evidence and
(2) Subjecting persons accused of crimes to secret interrogations.

Consequently, the rule governing suppression of statements taken in violation of a prompt presentment of a criminal suspect to a magistrate became known as the *McNabb Rule*.

In 1946, Rule 5(a) of the Federal Rules of Criminal Procedure was promulgated in order to create one, common presentment rule that was to apply to all federal officers. It stated:

> An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States.

The Court applied Rule 5(a) in *Mallory v. United States*[208] and suppressed a statement taken seven hours after arrest due to the failure to promptly present the defendant to a local Magistrate. The *McNabb Rule* became the *McNabb-Mallory Rule,* which generally renders inadmissible confessions made during periods of detention that violate the prompt presentment requirement of *Rule 5(a).*

In 1968, Congress passed 18 U.S.C. §3501. There are three critical parts to §3501:

> Sections 3501(a) and 3501(b) provide that a confession voluntarily given is admissible and it is fairly undisputed that Congress meant for these two provisions to overrule, by legislative action, the Supreme Court's *Miranda* decision.[209]
>
> Section 3501(c), the third part, essentially states that a confession made by a person while under arrest or other detention in the custody of any law enforcement agency shall not render the confession inadmissible solely due to delay in presentment if such

208 *Mallory v. United States*, 354 U.S. 449 (1957).

209 See, *Dickerson v. United States*, 530 U.S. 428 (2000) – the Court ruled that 3501(a) and (b) could not and did not overrule the warnings required by Miranda. More importantly, (a) and (b) were held unconstitutional.

> confession: (1) is found by the trial judge to have been given voluntarily; and, (2) if the weight to be given the confession is left to the jury; and, (3) if such confession was given within 6 hours [emphasis added] immediately following arrest or other detention (unless, the delay in presentment is found to be reasonable considering the means of transportation and the distance to be traveled to the nearest magistrate).

Most recently, in *Corley*, the Supreme Court re-examined each of these rules and statutes and concluded that §3501(c) did not replace the *McNabb-Mallory Rule*, but rather modified the rule to "provide immunization to voluntary confessions given within six hours of a suspect's arrest."[210] More importantly, *Corley* created a two-part test:

> Part I – The court must first find whether the defendant confessed within six hours of arrest (unless a longer delay was "reasonable considering the means of transportation and the distance to be traveled to the nearest available magistrate"). If the confession came within that period, it is admissible, subject to the other Rules of Evidence, so long as it was "made voluntarily and the weight to be given it is left to the jury.
>
> Part II - If the confession occurred before presentment and beyond six hours, however, the court must decide whether delaying that long was unreasonable or unnecessary under the *McNabb-Mallory* cases, and if it was, the confession is to be suppressed.

An example of the application of this two-part test is found in a recent Ninth Circuit case, *United States v. Garcia-Hernandez.*[211] Garcia-Hernandez was formally removed on June 28, 2007 and found in the United States four days later. The Patrol arrested him at 4:00 a.m. and transported him to El Centro Station. The station was unusually busy that day since agents had arrested five times the average number of aliens that day. At 9:00 a.m., agents ran a record check and determined that he had been previously deported. Garcia-Hernandez was administratively processed at 5:00 p.m. and at 6:00 p.m. received his administrative warnings. At 11:43 p.m. agents determined that he was subject to criminal prosecution. At that point he was given *Miranda* warnings and Garcia-Hernandez admitted being a citizen of Mexico. He was arraigned the next day.

Garcia-Hernandez argued at suppression that his citizenship admission should have been suppressed as a violation of the prompt presentment

210 *Corley v. United States*, 129 S. Ct. 1558, 1564 (2009). Collateral relief – *Duckworth v. Eagan*, 492 U.S. 195 (1989); *Withrow v. Williams*, 507 U.S. 680 (1993); and, *Stone v. Powell*, 428 U.S. 465 (1976).

211 *United States v. Garcia-Hernandez*, 569 F. 3d 1100 (9th Cir. June 25, 2009).

rule. The Ninth Circuit first concluded that Part I of the *Corley Test* was not met because the confession was obtained beyond six hours after his arrest. Also, the court held that the reason for the delay was not related to means of transportation or distance traveled.[212]

The court then applied Part II of the *Corley Test*, which requires an application of the *McNabb-Mallory Rule*. The Ninth Circuit made a distinction between delays that are meant to extract a confession (unreasonable and unnecessary delays) and delays resulting from administrative challenges like limited government personnel or judges (reasonable and necessary delays). Ultimately, the Ninth Circuit found that since El Centro Station was unusually busy the delay was related to administrative challenges, and, therefore, the delay in obtaining the statement within six hours of arrest was reasonable and necessary.

Note: The arresting officer is responsible for the well-being of the arrestee including food, shelter, and safety. If the arrestee is injured, or has special medical problems such as diabetes or drug addiction, medical assistance for the arrestee should be obtained.

5.1720 Release of an Arrested Person

Situations sometime arise where a person is arrested but both the U.S. attorney and the state have declined to prosecute. Although the federal rules require that any time a person is arrested, he must be brought to the nearest available U.S. magistrate without unnecessary delay, such is not necessary where the purpose of the arrest is no longer viable and no useful purpose would be served. If prosecution is declined, the person is simply released for that reason.

5.1730 48 Hour Rule

If the probable cause determination was made by law enforcement, the Fourth Amendment requires that a prompt judicial probable cause determination be made before a neutral and detached magistrate.[213] This principle was re-iterated in *Gerstein v. Pugh*,[214] as a Fourth Amendment shield against unreasonable seizures that requires a prompt judicial determination of probable cause following an arrest made without a warrant and ensuing detention. The Court has defined prompt, as contained in the *Gerstein Rule*, as within 48 hours of the warrantless arrest and absent extraordinary circumstances a longer delay violates the Fourth Amendment.[215]

212 See, 18 U.S.C. § 3501(c).
213 *Johnson v. United States*, 333 U.S. 10 (1948).
214 *Gerstein v. Pugh*, 420 U.S. 103 (1975).
215 *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Note: Non-judicial days are excluded from the calculation of those hours].

5.1740 Initial Appearance

As such, there are Fourth, Fifth, and Sixth Amendment concerns surrounding the initial appearance before the magistrate. Of course, once the accused has been *promptly* and *without unnecessary delay* brought before the judicial officer, the magistrate will advise the accused of the nature and cause of the accusation and learn about any restrictions placed on his liberty (e.g., bail or jail). If ordered to jail, federal prisoners must be detained in federally approved detention facilities.

5.1750 Juveniles Charged with Federal Crimes - 18 U.S.C. §§ 5031-5042

Special laws apply to juveniles who are charged with federal crimes.[216] A juvenile is a person who has not yet attained his eighteenth birthday.[217]

In order to proceed against a juvenile defendant in federal court, the Attorney General must certify that at least one of the following circumstances exists:

1. The state has no jurisdiction or refuses to assume jurisdiction;

2. The state has no adequate programs to meet the needs of juveniles;

3. The offense charged is a crime of violence that is a felony; or[218]

4. The offense charged is a felony drug or firearms violation enumerated in 18 U.S.C. § 5032, and there is a substantial federal interest in either the case or the offense that justifies federal involvement.[219]

When a juvenile, or anyone whom there is any chance is a juvenile,[220] is arrested for a federal crime, the arresting officer shall:

- ✓ Immediately provide the juvenile with *Miranda* warnings, in a language the juvenile can understand.[221] This is true even if we never intend to interrogate the juvenile.

216 18 U.S.C. §§ 5031-5042.
217 18 U.S.C. § 5031.
218 21 U.S.C. §§ 952(a), 955, 959.
219 18 U.S.C. § 5032.
220 *United States v. Juvenile Male*, 528 F. 3d 1146, 1158 (9th Cir. 2008), rehearing denied, 552 F. 3d 1061 (9th Cir. 2009) – "On its face [18 U.S.C. § 5033] does not allow any exceptions in situations in which an officer has no reason to know of an individual's juvenile status or in which the juvenile lies about his age." April 30, 2009, reargued and remanded *United States v. Juvenile Male*, 2010 U.S. App. LEXIS 1686 (January 26, 2010).
221 *United States v. Jose D.L.*, 453 F.3d 1115 (9th Cir. 2006); *United States v. C.M.,* 485 F. 3d 492 (9th Cir. 2007).

- ✓ Immediately notify the U.S. attorney and the juvenile's parents or guardian of such custody.[222]

- ✓ Advise the parents or guardian of the rights of the juvenile and of the nature of the alleged offense.[223]

- ✓ In addition, the Ninth Circuit has held that an effective notification of these rights includes the advisement that the parent may communicate with the juvenile prior to interrogation.[224]

Failure to meet each of these requirements can result in prejudicial error requiring reversal of the conviction. The courts have refused to suppress confessions by juveniles whose parents or guardians were not notified where officers have made a good faith effort to locate the parents or guardian.[225] On the other hand statements by a detained alien juvenile were suppressed when the government made no effort to contact either the detainee's parents or the Mexican consulate.[226]

The juvenile must be taken before a magistrate judge "forthwith," which means as soon as possible. In no event can the juvenile be detained for longer than is reasonably necessary to bring him before a magistrate judge.[227]

Example: After drugs were found in a car in which she had been a passenger, a 16-year old female juvenile (RRA-A) was handcuffed to a bench in a locked security office where she remained for the next four hours. When a Customs agent arrived approximately three hours after RRA-A had been handcuffed, he found out that RRA-A did not have a home telephone number. The agent then contacted an AUSA and told her that he had a minor in custody whose parents could not be reached. The AUSA told the agent that she would notify the Mexican consulate to see if they could assist in locating RRA-A's parents. Approximately an hour and a half later, the agent speaking in Spanish, told RRA-A that she was under arrest and gave her the *Miranda* warnings. RRA-A later testified that the agent also warned her to tell the truth, and that she could go to jail for a long time. After multiple denials, RRA-A cried and incriminated herself by confessing her involvement in the attempt to smuggle drugs.

222 18 U.S.C. § 5033. Note: Congress passed this law as part of the *Juvenile Justice and Delinquency Prevention Act of 1974*, which can be found in part at 18 U.S.C. §§ 5031-5042. See also, *United States v. Jose D.L.*, 453 F. 3d 1115 (9th Cir. 2006) and *United States v. C.M.,* 485 F. 3d 492 (9th Cir. 2007).
223 18 U.S.C. § 5033.
224 *United States v. Female Juvenile (Wendy G.),* 229 F.3d 737 (9th Cir. 2000).
225 *United States v. Burrous*, 147 F.3d 111 (2d Cir. 1998).
226 *United States v. Doe*, 862 F.2d 776 (9th Cir. 1988). See also *Jose D.L.*, 453 F.3d 1115 and *United States v. C.M.*, 485 F. 3d 492 (9th Cir. 2007).
227 18 U.S.C. § 5033; *United States v. Jose D.L.*, 453 F.3d 1115 (9th Cir. 2006); *United States v. C.M.*, 485 F. 3d 492 (9th Cir. 2007).

Meanwhile, having failed to reach the Mexican consulate, the AUSA delegated this task to her legal secretary.

Over an hour after RRA-A's interrogation had commenced, the AUSA's secretary contacted the Mexican consulate and advised them of RRA-A's arrest, location, and available parental information. A Consulate official called the AUSA early the next morning and informed her that he had visited RRA-A the night before and had convinced her to give him a neighbor's telephone number by which he had contacted her parents. RRA-A, in fact, knew how to contact her parents all along, but did not want them to get involved. At trial, RRA-A moved to suppress her incriminating statements.

The court found that RRA-A was arrested at the time she was handcuffed, and that the government had violated her rights under the Juvenile Justice and Delinquency Prevention Act of 1974 (18 U.S.C. § 5033) by not immediately advising her of her *Miranda* warnings, and failing to make reasonable efforts to notify RRA-A's parents. Because RRA-A was given *Miranda* warnings prior to interrogation, the court held that the two violations of the Act did not constitute a due process violation. The court did, however, reverse RRA-A's conviction holding that she was prejudiced by the violations, which contributed to her confession.[228]

Note: The magistrate judge will make a determination as to whether or not the juvenile is to be detained in an institution. If detained, the juvenile cannot be confined in any institution in which the juvenile has regular contact with adult prisoners or with adjudicated delinquents.

5.1760 Arrest of Foreign Nationals

The Vienna Convention on Consular Relations ("VCCR" or "Vienna Convention"),[229] ratified by the United States on October 22, 1969,[230] requires law enforcement officials who have arrested a foreign national to so inform the consular post of the arrestee's home country, and to allow consular officials to visit and consult with the arrestee.[231] The United States has repeatedly invoked the Vienna Convention on behalf of American citizens detained abroad who have not been granted the right of consular access.[232] Also, the VCCR, as a ratified treaty, creates an obligation as with any act of legislation.[233]

228 *United States v. Juvenile (RRA-A)*, 229 F.3d 737 (9th Cir. 2000).
229 April 24, 1963, 21 U.S.T. 77, 101 T.I.A.S. No. 6820, 596 U.N.T.S. 261, in force on April 24, 1964.
230 See Cong. Rec. 30997 (1969).
231 VCCR, Article 36 1(b)&(c).
232 *United States v. Superville*, 40 F. Supp. 2d 672, 676 & n.3 (D. V.I. 1999).
233 *Ackermann v. Levine*, 788 F2d 830, 838 (2d Cir. 1986)(quoting U.S. Const. Art. VI, cl. 2).

The following steps should be followed when a foreign national is arrested or detained:

1. Determine the foreign national's country. In the absence of other information, assume this is the country on whose passport or other travel document the foreign national travels. See, suggested questions and aids at Addendum 3 at the end of this chapter.

2. Offer, without delay, to notify the foreign national's consular officials of the arrest/detention. [Suggested statement to the foreign national].[234] Translations of the statement into selected foreign languages are available in Part Four of a publication by the State Department entitled Consular Notification and Access. This publication can be obtained on the Internet at http://www.state.gov. Choose index and select "consular."

3. If the foreign national asks that consular notification be given, notify the nearest consular officials of the foreign national's country without delay.[235] For phone and fax numbers for foreign embassies and consulates in the United States see Addendum 1 at the end of this chapter. A suggested fax sheet for making the notification is at Addendum 2 at the end of this chapter.

4. If the foreign national declines consular notification, determine if the foreign national's country is on the list of mandatory notification countries:

[234] **Statement 1:** When Consular Notification is at the Foreign National's Option (For Translations, See Part Four). As a non-U.S. citizen who is being arrested or detained, you are entitled to have us notify your country's consular representatives here in the United States. A consular official from your country may be able to help you obtain legal counsel, and may contact your family and visit you in detention, among other things. If you want us to notify your country's consular officials, you can request this notification now, or at any time in the future. After your consular officials are notified, they may call or visit you. Do you want us to notify your country's consular officials?

[235] Customs Directive, Number 4510-022, Dated May 19, 2000, *Consular Notification of Detained or Arrested Foreign Nationals* - requires that the arresting or detaining officer make these necessary notifications.

Mandatory Notification Countries and Jurisdictions – 8 C.F.R. Part 236.1(e)

Algeria	Guyana	Saint Lucia
Antigua and Barbuda	Hong Kong[2]	Saint Vincent and the Grenadines
Armenia	Hungary	Seychelles
Azerbaijan	Jamaica	Sierra Leone
Bahamas, The	Kazakhstan	Singapore
Barbados	Kiribati	Slovak Republic
Belarus	Kuwait	Tajikistan
Belize	Kyrgyzstan	Tanzania
Brunei	Malaysia	Tonga
Bulgaria	Malta	Trinidad and Tobago
China[1]	Mauritius	Tunisia
Costa Rica	Moldova	Turkmenistan
Cyprus	Mongolia	Tuvalu
Czech Republic	Nigeria	Ukraine
Dominica	Philippines	United Kingdom[3]
Fiji	Poland (non-permanent residents only)	U.S.S.R.[4]
Gambia, The	Romania	Uzbekistan
Georgia	Russian Federation	Zambia
Ghana	Saint Kitts and Nevis	Zimbabwe
Grenada		

[1] Notification is not mandatory in the case of persons who carry "Republic of China" passports issued by Taiwan. Such persons should be informed without delay that the nearest office of the Taipei Economic and Cultural Representative Office ("TECRO"), the unofficial entity representing Taiwan's interests in the United States, can be notified at their request.

[2] Hong Kong reverted to Chinese sovereignty on July 1, 1997, and is now officially referred to as the Hong Kong Special Administrative Region, or "SAR." Under paragraph 3(f)(2) of the March 25, 1997, U.S.-China Agreement on the Maintenance of the U.S. Consulate General in the Hong Kong Special Administrative Region, U.S. officials are required to notify Chinese officials of the arrest or detention of the bearers of Hong Kong passports in the same manner

as is required for bearers of Chinese passports—i.e., immediately, and in any event within four days of the arrest or detention.

[3] British dependencies also covered by this agreement are Anguilla, British Virgin Islands, Bermuda, Montserrat, and the Turks and Caicos Islands. Their residents carry British passports.

[4] Although the U.S.S.R. no longer exists, some nationals of its successor states may still be traveling on its passports. Mandatory notification should be given to consular officers for all nationals of such states, including those traveling on old U.S.S.R. passports. The successor states are listed separately above.

If the nation appears on this list, then:

- ✓ Notify that country's nearest consular officials, without delay, of the arrest/detention. Phone and fax numbers are at Addendum 1 at the end of this chapter. You may use the suggested fax sheet for making the notification.

- ✓ Tell the foreign national that you are making this notification. [Suggested statement to the foreign national].[236]

5. Keep a written record of the provision of notification and actions taken.

The State Department has historically been the enforcement entity for the VCCR, investigating reports of violations and apologizing to foreign governments and working with domestic law enforcement agencies to prevent future violations.[237] CBP officers should telephone the U.S. Department of State, Assistant Legal Advisor for Consular Affairs, immediately concerning any questions that arise in connection with these procedures at (202) 647-4415.

In the context of criminal cases, a vast majority of courts have refused to rule that a violation of the VCCR creates a private right of action in domestic courts.[238] Thus, there is no right in a criminal prosecution to have evidence

[236] **Statement 2:** When Consular Notification is Mandatory (For Translations, See Part Four). Because of your nationality, we are required to notify your country's consular representatives here in the United States that you have been arrested or detained. After your consular officials are notified, they may call or visit you. You are not required to accept their assistance, but they may be able to help you obtain legal counsel and may contact your family and visit you in detention, among other things. We will be notifying your country's consular officials as soon as possible.

[237] *Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 2000) (*en banc*).

[238] *United States v. Emuegbunam*, No. 00-1399 (6th Cir. October 5, 2001), citing Preamble to the Vienna Convention and Restatement (Third) of the Foreign Relations Law of the United States § 907 (1987).

excluded or an indictment dismissed due to a violation of the VCCR.[239] It should be noted, however, that the United States District Court for the Southern District of New York has held that a violation of the treaty may be asserted in a 42 U.S.C. § 1983 action for damages.[240] It remains to be seen, however, the extent to which other courts accept or reject this notion, but in all events CBP officers should be careful to adhere to CBP policies regarding notification of rights pursuant to the VCCR.

5.1770 Material Witnesses

A material witness is an individual whose testimony is necessary in a criminal proceeding. In some cases if the material witness is unlikely to appear if subpoenaed, either party can file a motion with the court requesting that the witness be held in custody until trial. The agency has three statutes at its disposal for holding witnesses prior to trial: 18 U.S.C. § 3144 (the government's general material witness statute); 8 U.S.C. § 1185 (which permits the agency to prevent an individual from departing the United States); and, 8 U.S.C. § 1324(d) (which allows the agency to hold certain alien smuggling witnesses).

5.1771 18 U.S.C. § 3144 Release and Detention of a Material Witness

The government's primary material witness statute, 18 U.S.C. § 3144 establishes the standard or release and detention of a material witness.[241] The statute is unique in that it authorizes the arrest and detention of individuals who have not committed, nor are even suspected of committing any crime, but

239 *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006); *United States v. Page*, 232 F.3d 536 (6th Cir. 2000); *United States v. Chaparro-Alcantara*, 226 F.3d 616, 618 (7th Cir. 2000), *cert. denied*, 121 S.Ct. 599 (2000); *United States v. Li*, 206 F.3d 56 (1st Cir. 2000), *cert. denied*, 121 S. Ct. 379 (2000); *United States v. Ovalle,* 2003 U.S. Dist. LEXIS 1426 (S.D.N.Y. 2003).

240 *Standt v. The City of New York*, 153 F. Supp. 2d 417 (S.D.N.Y. 2001). 42 U.S.C. § 1983 imposes liability on anyone who, under color of state law, deprives a person of any rights, privileges, or immunities secured by the Constitution and laws of the United States.

241 18 U.S.C. § 3144 – Release and Detention of a Material Witness. "If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of the title [18 U.S.C. § 3142]. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure."

who are likely to ignore a subpoena to testify.[242] The arrest of a material witness is conditioned upon meeting a two part standard. Either the prosecution or the defense may file an affidavit with the court indicating that: (1) the individual's testimony would be material; and, (2) that it is impracticable to secure the witnesses' attendance by subpoena.[243] If the affiant can establish both requirements, the court may order the arrest and detention of the witness.[244] However, an arrest under the material witness statute may not be used for purposes of obtaining evidence or engaging in discovery, and "it would be improper for the government to use [the material witness statute] for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established."[245]

Once the material witness has been arrested, he is entitled to all of the procedural due process rights found in 18 U.S.C. § 3142 (governing the pre-trial release of criminal defendants). Section 3142 entitles the witness an appearance before the court ordering his detention as a material witness.[246] Once before the court, the judge can: (1) release the witness without conditions; (2) release subject to condition; or, (3) order the witness's continued detention.[247] If the witness is unable to satisfy the conditions for release, then the witness can be detained until trial, or in some cases, released after a deposition is taken to preserve his testimony.[248]

A material witness may file written motions with the district court, including a request that he be released and deposed pursuant to Rule 15 of the Federal Rules of Criminal Procedure.[249] Rule 15(a) provides, in part, that, "[I]f a witness is detained pursuant to 18 U.S.C. § 3144, the court on written motion of the witness and upon notice to the parties may direct that the witness' deposition be taken and the witness must be released if the witness can demonstrate that his or her testimony can be adequately preserved by deposition."[250] The burden is on the witness to demonstrate that the deposition is an adequate alternative to the witness's live testimony and that "further detention is not necessary to

242 The history of the current statute dates back to authority passed by Congress in the First Judiciary Act of 1789. Act of Sept. 24, 1789, ch. 20 §§ 30, 33, 1 Stat. 73, 88-91 (1789)

243 *Bacon v. United States*, 449 F. 2d 933, 942-943 (9th Cir. 1971).

244 Although 18 U.S.C. § 3144 has existed in some form for over 200 years, the Supreme Court has only indirectly ruled on its Constitutionality. See, *Stein v. New York*, 346 U.S. 156 (1953) and *Barry v. United States ex.rel. Cunningham*, 279 U.S. 597 (1929).

245 *United States v. Awadallah*, 349 F. 3d 42, 59 (2d Cir. 2003).

246 *In Re Class Action Application For Habeas Corpus for all Material Witnesses in the Western District,* 612 F. Supp. 940 (W.D. Tex. 1985).

247 18 U.S.C. § 3142.

248 18 U.S.C. § 3144.

249 *Aguilar-Ayala v. Ruiz*, 973 F. 2d at 411, 413 (5th Cir. 1992).

250 Rule 15(a) of the Federal Rules of Criminal Procedure.

prevent a failure of justice."[251] Even if the witness can demonstrate that the deposition is an adequate alternative, the release may still be delayed for a reasonable time until the witness's deposition can be taken pursuant to the Federal Rules of Criminal Procedure.

Since the legal burden is on the material witness to demonstrate the adequacy of a deposition, the witness who is represented by counsel is in a better position to meet these requirements than an unrepresented witness.[252] As such, several courts have found that 18 U.S.C. §§ 3142 and 3144 require that counsel be appointed to represent indigent persons who are held as material witnesses.[253] Denial of the witness's motion for deposition testimony will be limited to "those instances in which the deposition would not serve as an adequate substitute for the witness's live testimony."[254] For example, the Fifth Circuit has found that "[w]hen a particular witness's testimony is the linchpin of the government's case, or when the witness's credibility is severely in doubt, the continued detention of that witness might be necessary to avert a failure of justice, especially if the continued detention would be relatively brief."[255] Depositions requested by the defendant are limited to testimony which is exculpatory, and not merely cumulative or corroborative of other evidence.[256] Furthermore, unlike in civil cases, depositions under the Federal Rules of Criminal Procedure are prohibited for the sole purpose of discovery.[257]

In exceptional circumstances, the court may also release a material witness upon the motion of a party and after the witness's deposition is taken.[258] Generally, an exceptional circumstance is determined by the materiality of the testimony and the likelihood that the witness will be unavailable to testify at trial.[259] Most circuits have not required an extensive showing to prove an exceptional circumstance with respect to alien witnesses. The Fourth Circuit held it was reasonable to depose, and allow the voluntary return of illegal alien material witnesses when "the witnesses could not make bail, had no place to stay, and there was no way to ensure that they would be present at the trial two

251 *Aguilar-Ayala v. Ruiz*, 973 F. 2d 411, 413 (5th Cir. 1992) and 18 U.S.C. § 3144.
252 *United States v. Salerno*, 481 U.S. 739, 748 (1987).
253 *In Re Class Action Application For Habeas Corpus for all Material Witnesses in the Western District,* 612 F. Supp. 940 (W.D. Tex. 1985).
254 *United States v. Lopez-Cervantes*, 918 F. 2d 111, 112 (10th Cir. 1990).
255 *Aguilar-Ayala v. Ruiz*, 973 F. 2d 411, 420 (5th Cir. 1992)
256 "Evidence is material…if there is a 'reasonable probability' that its disclosure would have caused a different result." *Kyles v. Whitley*, U.S. 419, 434 (1995).
257 *United States v. Fei Ye*, 436 F. 3d 1117, 1123 (9th Cir. 2006).
258 Fed. R. Crim. P. Rule 15(a)(1) – An alien may seek a writ of mandamus to compel a district court to schedule a videotaped deposition in instances where the testimony could be adequately preserved by videotaped deposition, as hardship to the alien and his family may qualify as exceptional circumstances. See, *Torres-Ruiz v. United States District Court*, 120 F. 3d 933 (9th Cir. 1997).
259 *United States v. Liner*, 435 F. 3d 920, 924 (8th Cir. 2006).

months later."[260] The Ninth Circuit has also held that hardship to the alien's family can be an exceptional circumstance where the testimony could adequately be preserved by deposition.[261]

The taking of a deposition under exceptional circumstances, however, does not ensure the admissibility of the deposition as evidence at trial.[262] The use of the released witness's deposition at trial is governed by the Federal Rules of Evidence.[263] Since depositions are out-of-court statements offered in court for their truthfulness, their admissibility is evaluated under the hearsay rules. Hearsay statements are inadmissible unless they qualify as an exception in the evidence rules or qualify for admission pursuant to statutory authority.[264]

The greater issue with regards to the release of a material witness and use of their deposition stems from the Sixth Amendment's Confrontation Clause.[265] For a more detailed discussion of the Confrontation Clause refer to Subsection 5.1940 of this chapter.

5.1772 8 U.S.C. § 1185 Travel Control of Citizens and Aliens

Title 8 U.S.C. § 1185 permits the executive branch to enact restrictions and prohibitions on the rights of individuals to enter and depart from the United States.[266] Further, it prohibits anyone from transporting or attempting to transport, a person into or out of the United States when there is a reason to believe that legal action has been taken to prohibit that departure.[267] The statute specifically prohibits false statements on applications to depart, and the use or provision of false or forged departure documents.[268]

The regulations implementing Section 1185, with respect to aliens, are found at 8 C.F.R. Part 215, "Controls of Aliens Departing from the United States." These regulations require that "no alien shall depart, or attempt to depart from the United States if his departure would be prejudicial to the interests of the United States under the provisions of 8 C.F.R. Part 215.3."[269] Departure is defined as

260 *United States v. Rivera*, 859 F. 2d 1204, 1207 (4th Cir. 1988).
261 *Torres-Ruiz v. United States District Court*, 120 F. 3d 933 (9th Cir. 1997).
262 *United States v. Guadian-Salazar*, 824 F. 2d 344, 346 n. 1 (5th Cir. 1987) – Border Patrol Agents took videotaped depositions and then released illegal aliens at the Mexican border. The court held that the deprivation of the defendant's Sixth Amendment right to confront the witnesses at trial was unconstitutionally prejudicial.
263 Fed. R. Crim. P. 15(f).
264 Fed. R. Evid. 801 and 802. See, *United States v. Yida*, 498 F. 3d 945 (9th Cir. 2007).
265 *Crawford v. Washington*, 541 U.S. 36 (2004).
266 8 U.S.C. § 1185(a)(1).
267 8 U.S.C. § 1185(a)(2).
268 8 U.S.C. § 1185(a)(3) – (7).
269 8 C.F.R. Part 215.2(a).

leaving the United States for any foreign place by land, sea, or air.[270] Any alien seeking to depart may be examined under oath and have his belongings inspected as a condition of departure.[271] If the alien refuses to cooperate with the examination or inspection he may be temporarily denied the right to depart.[272] In addition, a departure control officer, knowing or having reason to believe that the alien's departure would come within the ambit of 8 C.F.R. Part 215.3, shall order the alien, in writing, not to depart until such time as the order is revoked. The written order is final 15 days after issuance unless the alien requests a hearing challenging the order.[273] The hearing shall be before a special inquiry officer, and the alien has the right to present evidence, call witnesses, and exercise most traditional administrative due process rights.

5.1773 8 U.S.C. § 1324(d) Admissibility of Videotaped Witness Testimony

Extended detentions of alien witnesses have been successfully challenged in the courts, which have in turn ordered the government to depose and release the alien witnesses.[274] Releasing the witness can create several problems. Once the witness is released, he is frequently returned (or permitted to return) directly to his home country beyond the subpoena power of the United States courts. That, in turn, implicates the defendant's rights under the Confrontation Clause, as well as his right to compulsory process. The Fifth Circuit described the problem succinctly: "trial by deposition steps hard on the right of criminal defendants to confront their accusers.[275]

Subsection (d) of 8 U.S.C. § 3124 authorizes the admission of videotaped testimony, so long as the testimony was taken in a proceeding governed by the Rules of Evidence and the defendant was provided the opportunity to cross-examine the witnesses. It explicitly authorizes the admission of deposition testimony without requiring that the government demonstrate the witness is unavailable to testify. This conflicts with Rule 15 of the Federal Rules of Criminal Procedure, which also authorizes deposition testimony of material witnesses, but requires the government to establish unavailability.[276] Setting aside the standard established by *Crawford*, the Fifth and Ninth Circuits have both held that 1324(d) does not alleviate the government's obligation to

270 8 C.F.R. Part 215.1(h).
271 8 C.F.R. Part 215.2(c).
272 8 C.F.R. Part 215.2 (c) – (d).
273 8 C.F.R. Part 215.2(b).
274 See, *United States v. Aguilar-Ayala*, 973 F. 2d 411, 420 (5th Cir. 1992); *United States v. Rivera*, 859 F. 2d 1204, 1207 (4th Cir. 1988); *United States v. Allie*, 978 F. 2d 1401 (5th Cir. 1992); United States v. Lopez-Cervantes, 918 F. 2d 111 (10th Cir. 1992); *United States v. Eufracio-Torres*, 890 F. 2d 266 (10th Cir. 1989); *United States v. Guadian-Salazar*, 824 F. 2d 344 (5th Cir. 1987); and, *United States v. Fuentes-Galindo*, 929 F. 2d 1507 (10th Cir. 1991).
275 *United States v. Aguilar-Ayala*, 973 F. 2d 411, 420 (5th Cir. 1992).
276 Fed. R. Crim. P. 15(a).

demonstrate witness unavailability.[277] In the end, *Crawford* and Rule 15 require that the government prove the witness's unavailability and that he was subjected to cross-examination by the defendant prior to introduction of the videotaped testimony. Therefore, despite the language in Section 1324(d), it will rarely serve to legitimize the use of videotaped testimony of a material witness in a criminal proceeding.

5.1800 Rights Available to the Accused Prior to and During Trial

5.1810 Right to Compulsory Process
5.1820 Right to the Assistance of Counsel

Prior to criminal trial (and during trial), the accused continues to enjoy the Fifth Amendment rights discussed above; specifically, *Right to Due Process when deprived of life, liberty, or property, Right against being compelled in a criminal case to be a witness against oneself, and Right to be free from being placed in jeopardy twice for the same crime (Double Jeopardy).*

In addition, the Fifth Amendment states that "[N]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury…" Rules governing grand jury procedure concern the AUSA more than law enforcement and the portion of grand jury work critical to law enforcement has already been discussed above.

The only other significant pre-criminal trial rights are found in the Sixth Amendment: the rights to compulsory process and to the assistance of counsel.

5.1810 Right to Compulsory Process

The Sixth Amendment's Compulsory Process Clause, certainly, confers a distinct right, but is heavily linked with the Fifth Amendment's Due Process Clause. In *Taylor v. Illinois*,[278] the Court stated that:

> at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt.[279] Few rights are more fundamental than that of an accused to present witnesses in his own defense.[280] Indeed, this right is an essential attribute of the adversary system itself. We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of

277 *Crawford v. Washington*, 541 U.S. 36 (2004).
278 *Taylor v. Illinois*, 484 U.S. 400 (1988).
279 *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987).
280 *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

> the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.[281]
>
> The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact. The right to offer testimony is thus grounded in the Sixth Amendment even though it is not expressly described in so many words:
>
> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.[282]

On the other hand, the claim, "that the Sixth Amendment creates an absolute bar to the preclusion of the testimony of a surprise witness is just as extreme and just as unacceptable as the State's position that the Amendment is simply irrelevant. The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."[283] Furthermore, "[T]he defendant's right to compulsory process is itself designed to vindicate the principle that the 'ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.' [*citation omitted*]. Rules that provide for pretrial discovery of an opponent's witnesses serve the same high purpose. Discovery, like cross-examination, minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony. The State's interest in protecting itself against an eleventh-hour defense is merely one component of the broader public interest in a full and truthful disclosure of critical facts."[284]

5.1820 Right to the Assistance of Counsel

The Sixth Amendment, in part, states that "[I]n all criminal prosecutions, the accused shall enjoy the right…to have the assistance of counsel for his defense." This provision guarantees that "the conviction of the accused will be the product

281 *United States v. Nixon*, 418 U.S. 683, 709 (1974).
282 *Washington v. Texas*, 388 U.S. 14, 19 (1967).
283 *Taylor v. Illinois*, 484 U.S. 400 (1988).
284 *Id.*

of an adversary process, rather than the *ex parte* investigation and determination by the prosecutor."[285] This right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him.[286] One does not become an accused for right to counsel purposes simply because he has been detained by government authorities who contemplate filing criminal charges against him.[287] On the other hand, once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings[288] and if police deliberately elicit incriminating statements from him in the absence of a lawyer, the right will have been denied.[289] The "critical" stage has been interpreted by the Court to start at the time of formal charging, preliminary hearing, indictment, information, or arraignment (Sixth Amendment Right to Counsel analysis).[290] Note: Most Circuit Courts have concluded that issuance of a federal complaint does not qualify as a "formal charge" for purposes of the Sixth Amendment.[291] Whereas, the Supreme Court has

285 *Nix v. Williams*, 467 U.S. 431, 453 (1984).

286 *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

287 *United States v. Gouveia*, 467 U.S. 180 (1984). Thus, persons encountered at the border and detained for a monitored bowel movement or an x-ray, are neither "accused" in the sense intended by the Court nor are they subject to "adversarial criminal proceedings" as defined above. Accordingly, there is no Sixth Amendment right to counsel during such detentions or any other seizure prior to a preliminary examination, indictment or information following arrest. A CBP officer, however, must be especially alert when a suspect is in custody following the filing of an indictment or information, or has otherwise appeared before a judicial officer for a particular offense. In such circumstances the Sixth Amendment right to counsel has attached, even though there has been no occasion or opportunity for the suspect to have invoked his *Miranda* right to counsel. In such a circumstance the Sixth Amendment prohibition against police-initiated interrogation in the absence of counsel controls.

288 *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009); *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Wade*, 388 U.S. 218 (1967) – post-indictment pretrial line-up; *Gilbert v. California*, 388 U.S. 263 (1967) – in-court identification. Note: *United States v. Ash*, 413 U.S. 300 (1973) - The accused does not have a right to counsel at a post-indictment photographic display. *See also*, *Illinois v. Perkins*, 496 U.S. 292 (1990).

289 *Fellers v. United States*, 540 U.S 519 (2004); *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) – admissions to a jailhouse informant. See also, *Massiah v. United States*, 377 U.S. 201 (1964); *United States v. Henry*, 447 U.S. 264 (1980); and *Maine v. Moulton*, 474 U.S. 159 (1985) – informant wore a body wire to record defendant's statements related to the crime.

290 *Brewer v. Williams*, 430 U.S. 387 (1977); *Kirby v. Illinois*, 406 U.S. 682 (1972) – pre-indictment show-up; *Fellers v. United States*, 540 U.S 519 (2004); and, *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008).

291 *United States v. Boskic*, 545 F. 3d 69 (1st Cir 2008); *United States v. Duvall*, 537 F. 2d 15, 22 (2nd Cir 1976); *United States v. Santiago*, 180 F. Appx. 337, 339 (3rd Cir 2006); *United States v. Alvarado*, 440 F. 3d 191, 200 (4th Cir 2006);

identified custodial interrogation as such a "critical" stage (Fifth Amendment Right to Counsel analysis).[292]

The right to counsel may be waived by a defendant[293] and the defendant may do so whether represented by counsel or not.[294] Proof that the defendant received *Miranda* warnings and did not invoke his right to counsel qualifies as proof that he relinquished his right to counsel.[295] Of course, remember, any involuntarily obtained statements and evidence derived there from, will violate the Due Process Clause, and be precluded regardless of the above discussion.[296]

Furthermore, the Sixth Amendment right to counsel is offense specific.[297] Some lower courts in the intervening years interpreted this opinion as including not only the crimes charged, but all other closely related offenses arising out of the identical factual event.[298] This interpretation, however, was rejected by the Supreme Court in *Texas v. Cobb*.[299] In that case, Raymond Cobb, a 17-year-old accused of burglarizing a home, waived his *Miranda* rights and admitted to the burglary while denying any knowledge of the whereabouts of a mother and her 16-month-old daughter who had occupied the home at the time of the burglary. Cobb was later indicted on the burglary charge that fixed his Sixth Amendment right to counsel. While free on bond Cobb confessed to his father that he had murdered the mother during the burglary and buried alive the daughter with her mother. After being reported to the police by his father, Cobb was arrested on murder charges, waived his *Miranda* rights, confessed and was convicted of the murders. On appeal, the defense argued that Cobb's Sixth Amendment right to counsel precluded any attempts by the police to deliberately elicit information from Cobb about the "factually related" murders. The Supreme Court held, however, that even though the murders were closely related to the burglary, the burglary and murder offenses required different elements of proof and thus were separate offenses. Since Cobb's Sixth Amendment rights were specific to the burglary charges, Cobb had no right to the presence of his previously appointed

United States v. Harris, 45 F. 3d 431 (6th Cir 1994); *United States v. Moore*, 122 F. 3d 1154, 1156 (8th Cir 1997); *United States v. Pace*, 833 F. 2d 1307, 1312 (9th Cir 1987); *United States v. Langley*, 848 F. 2d 152, 153 (11th Cir 1988).

292 *Montejo v. Louisiana*, (2009).

293 *Patterson v. Illinois*, 487 U.S. 285 (1988); *Brewer v. Williams*, (1977).

294 *Michigan v. Harvey*, 494 U.S. 344 (1990).

295 *Patterson v. Illinois*, 487 U.S. 285 (1988).

296 *New Jersey v. Portash*, 440 U.S. 450 (1979) and *Mincey v. Arizona*, 437 U.S. 385 (1978).

297 *McNeil v. Wisconsin*, 501 U.S. 171 (1991).

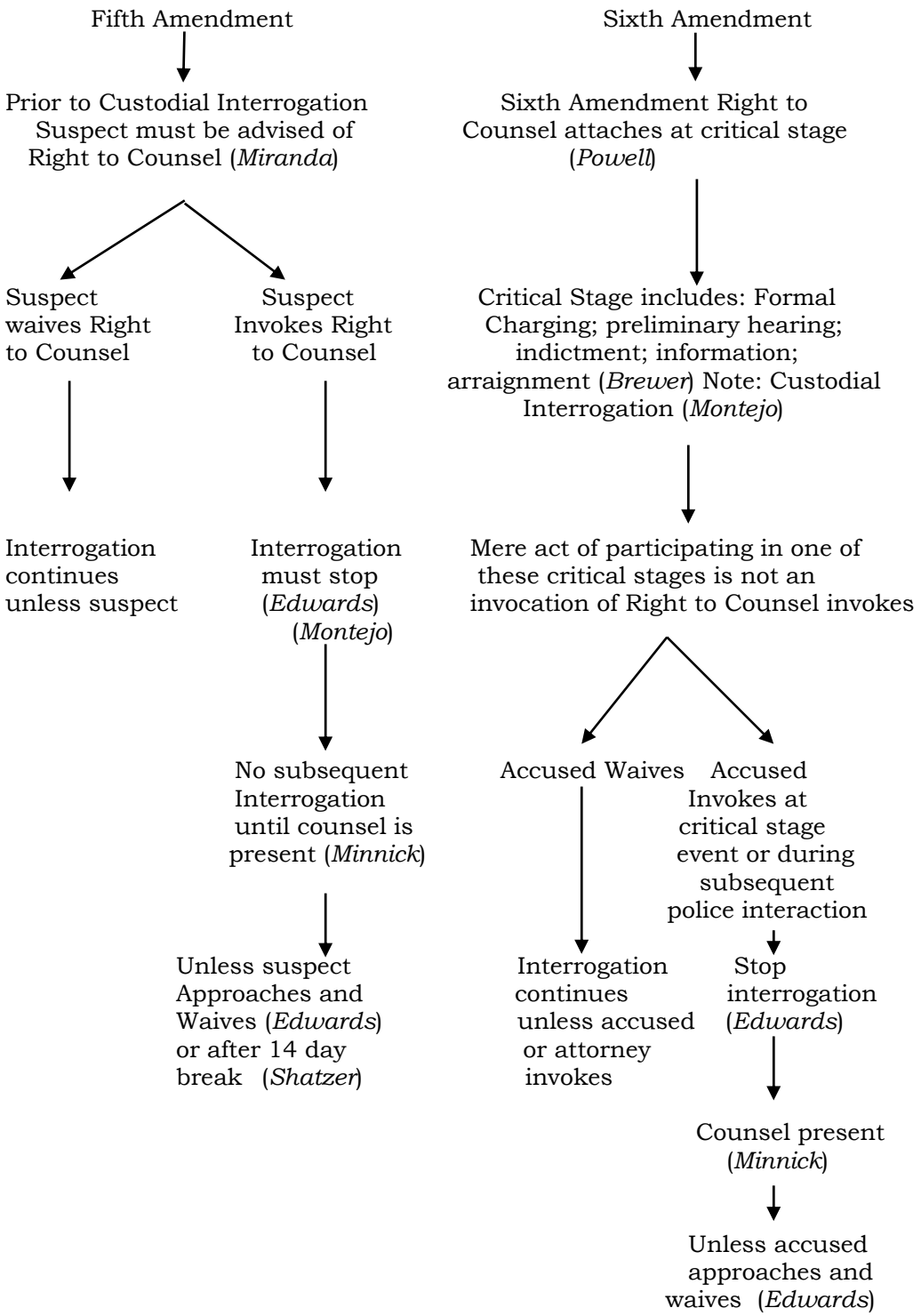
298 See *United States v. Covarrubias*, 179 F.3d 1219 (9th Cir. 1999); *United States v. Melgar*, 139 F.3d 1005 (4th Cir. 1998); *United States v. Doherty*, 126 F.3d 769 (6th Cir. 1997); *United States v. Arnold*, 106 F.3d 37 (3rd Cir. 1997); and *United States v. Williams*, 993 F.2d 451 (5th Cir. 1993).

299 *Texas v. Cobb*, 532 U.S. 162 (2001).

counsel during the interrogation concerning the murder charges, and his confession was admissible.[300]

[300] *Texas v. Cobb*, 532 U.S. 162 (2001), applying *Blockburger v. United States*, 284 U.S. 299 (1932).

Right to Counsel



Example 1 – Border Patrol Agent arrests an individual for alien smuggling. Prior to interrogating the suspect, he is given *Miranda* warnings. The suspect waives his Constitutional rights and agrees to make a statement. Mid-way through the statement, the suspect decides that he wants an attorney before he discusses the case further. The interrogation must stop (*Edwards*) and no subsequent interrogation will be permitted until counsel is present (*Minnick*). If the suspect re-approaches the agent and waives his right to counsel, then the interrogation may continue, without counsel (*Edwards*). After a 14 day break in custody, the suspect could be re-approached (*Shatzer*).

Example 2 – Same facts as in Example 1, except the suspect invokes his right to counsel immediately after receiving *Miranda* warnings. *Edwards* and *Minnick* control, with the *Shatzer* exception.

Example 3 – Border Patrol Agent arrests an individual for alien smuggling. The suspect is not given Miranda warnings and is not interrogated. The suspect is turned over to detention and removal in order to transport him to his initial appearance. At the initial appearance ("critical stage"), the Magistrate finds that the accused is indigent and appoints an attorney to represent him. While at the initial appearance, the accused does not invoke his right to counsel. The accused is held pending the grand jury hearing. Prior to meeting his attorney, the agent visits the accused in his cell in order to interrogate him. The agent Mirandizes the accused and the accused states that he understands his rights and agrees to speak with the agent about the alien smuggling operation. According to *Montejo*, the mere act of attending an initial appearance, where an attorney is appointed to represent the defendant, does not constitute an invocation of his right to counsel for Sixth Amendment purposes. If the accused receives proper warnings, he can choose to waive his right to an attorney, even if one has been appointed, already. If he invokes his right to counsel during this interview, then the interview must stop per *Edwards* and *Minnick*.

Example 4 – Same scenario as in Example 3, but during the course of the initial appearance, the accused requests a lawyer. No interrogation can take place until counsel is present, unless the accused approaches the agent and waives his rights.

Note: The key to this process is complete communication between those members of law enforcement who process the defendant. The Border Patrol Agent must communicate to Detention and Removal or the U.S. Marshal's Service whether the suspect was Mirandized and whether he invoked his rights. Likewise, those entities must advise the Patrol Agent or the ICE Agent exactly what transpired at the initial appearance.

5.1900 Sixth Amendment Trial Rights

5.1910 Right to Speedy and Public Trial
5.1920 Right to Jury Trial
5.1930 Right to Impartial Jury
5.1940 Right to Confrontation of Witnesses
5.1950 Introduction of Government Documents

5.1960 CNR
5.1970 Warrant of Deportation
5.1980 Deporting a Witness

5.1910 Right to Speedy and Public Trial

The Sixth Amendment provides that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial…." The Court has interpreted the speedy trial right in only a few cases.[301] The purpose of the speedy trial provision was described in *United States v. Ewell*,[302] as an, "important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." For these reasons, the Court has identified arrest as the critical event that triggers the protection.[303] Delay in bringing charges against a suspect does not violate the Sixth Amendment, but once arrested, the right protects the accused from undue delay. This is due, in part, to the language in the provision that clearly identifies the right of the *accused* (i.e., post-arrest), and because statutes of limitations prevent the government from delaying the case prior to arrest. As described by the Court in *Toussie v. United States*,[304] "[T]he purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past."

Note: The Court has reviewed the speedy trial provision in connection with the Interstate Agreement of Detainers Act provision that trial of a transferred prisoner shall commence within 120 days of the arrival of the prisoner.[305]

Note: A detained juvenile must be brought to trial within thirty (30) days from the date which such detention was begun unless additional delay was caused by the juvenile or his counsel, consented to by the juvenile and his counsel, or would be in the interest of justice in the particular case.[306]

301 *United States v. Marion*, 404 U.S. 307 (1971); *Dickey v. Florida*, 398 U.S. 30 (1970); *Smith v. Hooey*, 393 U.S. 374 (1969); *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *United States v. Ewell*, 383 U.S. 116 (1966); *Pollard v. United States*, 352 U.S. 354 (1957); *United States v. Provoo*, 350 U.S 857 (1955); *Beavers v. Haubert*, 198 U.S. 77 (1905); and, *Smith v. United States*, 360 U.S. 1 (1959).
302 *United States v. Ewell*, 383 U.S. 116 (1966).
303 *Untied States v. Marion*, 404 U.S. 307 (1971).
304 *Toussie v. United States*, 397 U.S. 112 (1970).
305 *Reed v. Farley*, 512 U.S. 339 (1994). 18 U.S.C. §2, Article IV(c).
306 18 U.S.C. § 5036. See also, *United States v. Juvenile Male*, 2010 U.S. App. LEXIS 1686 (January 26, 2010).

5.1920 Right to Jury Trial

The criminal defendant has exclusive control over exercising the right to select a trial by jury. Of course, like other rights, this right may be waived by the defendant, who may request a trial by judge.

5.1930 Right to Impartial Jury

Although the government participates in the jury selection process, law enforcement will generally have very little input. The prosecutor may choose to request assistance from the charging officer. Otherwise, law enforcement's role is minimal.

5.1940 Right to Confrontation of Witnesses

The Confrontation Clause of the Sixth Amendment provides: "[I]n all criminal prosecutions, the accused shall enjoy the right …to be confronted with the witnesses against him." The right to confront one's accusers is a concept that dates back to Roman times.[307] The Confrontation Clause found in the Sixth Amendment was meant to address the use, in criminal court, of witness statements taken prior to trial outside the presence of the accused without an opportunity to cross-examine.[308] It was also meant to prevent the use of testimonial statements, in criminal court, of a witness who did not appear at trial, but was otherwise available to testify.[309]

The Clause applies to witnesses who bear testimony against the accused and testimony is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact.[310] The Court in *Crawford* stated that, "[A]n accuser who makes a formal statement to government officers bears testimony in the sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement."[311] Some examples of testimonial statements include: ex parte in-court testimony or its functional equivalent --that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, and extrajudicial statements contained in formalized materials such as affidavits, depositions, prior testimony, or confessions.[312] Therefore, *Crawford* held that, "testimonial statements of witnesses absent from trial have been admitted only where the

307 *Coy v. Iowa*, 487 U.S. 1012 (1988).
308 *Crawford v. Washington*, 541 U.S. 36 (2004).
309 *Id.*
310 *Id.*
311 *Id.*
312 *White v. Illinois*, 502 U.S. 346 (1992).

declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.[313]

In *Davis v. Washington* and *Hammon v. Indiana*,[314] the Court addressed whether calls to a 911 operator during, and inquiries by the police on the scene following, a domestic incident were subject to the Confrontation Clause. The cases went much further in defining what statements are and are not testimonial for purposes of the Confrontation Clause. The Court held that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[315]

In addition to resolving both cases *Hammon* and *Davis* reviewed Supreme Court precedent to assist in clarifying what did and did not qualify as testimonial evidence subject to cross examination under the Confrontation Clause. Below is a summary of what the Court has found to be, and not be, testimonial thus far.

Testimonial

a. Testimony at prior trial is subject to the Confrontation Clause, except where petitioner had forfeited that right by procuring the witness's absence;[316]

b. Prior trial testimony of deceased witnesses which had been subject to cross-examination was admissible;[317]

c. Guilty pleas and jury conviction of others could not be admitted to show that property defendant received from them was stolen;[318]

d. Written deposition testimony previously subject to cross-examination was not admissible where the witness was available to testify;[319]

e. Facts regarding conduct of prior trial certified to by the judge, the clerk of court, and the official reporter did not relate to defendants' guilt or

313 *Crawford v. Washington*, 541 U.S. 36 (2004). Note: *Crawford* overruled *Ohio v. Roberts*, 448 U.S. 56 (1980).

314 Both cases were examined together and they share the same citation. *Davis v. Washington*, 547 U.S. 813 (2006).

315 "This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation." *Davis v. Washington*, 547 U.S. 813, 822 (2006).

316 *Reynolds v. United States*, 98 U.S. 145, 158 (1879).

317 *Mattox v. United States*, 156 U.S. 237, 240-244 (1895).

318 *Kirby v. United States*, 174 U.S. 47, 55-56 (1899).

319 *Motes v. United States*, 178 U.S. 458, 467, 470-471 (1900).

innocence and hence were not statements of "witnesses" under the Confrontation Clause.[320]

f. Sworn testimony in prior judicial proceedings or formal depositions under oath which invites the argument that the scope of the Clause is limited to that very formal category. [321]

g. The protections of the Confrontation Clause can not readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition[322]

h. "Interrogations by law enforcement officers …solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator.[323]

Nontestimonial

a. statements made unwittingly to a Government informant;[324]

b. statements from one prisoner to another. [325]

c. statements made to the police in answer to questions pertinent to resolving an ongoing emergency.[326]

d. the answers to questions asked by the police necessary to secure their own safety or the safety of the public[327]

e. business records and official records[328]

5.1950 Introduction of Government Documents

The Supreme Court has not specifically addressed the applicability of the Confrontation Clause to information contained in agency files and computer systems that was presented in either civil or criminal immigration contexts. Nonetheless, the circuit courts have begun to do so with a finding that documents in official agency immigration files and databases are not testimonial.

320 *Dowdell v. United States*, 221 U.S. 325, 330-331 (1911)
321 *Davis v. Washington*, 547 U.S. 813, 826 (2006).
322 *Davis v. Washington*, 547 U.S. 813, 826 (2006).
323 *Davis v. Washington*, 547 U.S. 813, 826 (2006). The Court reasoned that even "oral declarations" taken by the police were subject to severe consequences in the event of a deliberate falsehood. "In any event, we do not think it conceivable that the protections of the *Confrontation Clause* can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition."
324*Bourjaily v. United States*, 483 U.S. 171, 181-184 (1987).

325 *Dutton v. Evans*, 400 U.S. 74, 87-89 (1970) (plurality opinion)
326 *Davis v. Washington*, 547 U.S. 813, 827 (2006).
327 *Davis v. Washington*, 547 U.S. 813, 829 (2006).
328 *Crawford v. Washington*, 541 U.S. 36, 76 (2004).

5.1960 CNR

A Certificate of No Record or Certificate of Non-Existence ("CNR') is often introduced to prove that a person did not have prior permission to reenter the country. The government immigration databases are public records.[329] The government may introduce official, non-testimonial public records admissible under the Federal Rules of Evidence, to determine that the defendant was a previously deported alien found in the United States without permission.[330] The Federal Rules of Evidence define public records as "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to a duty imposed by law as to which matters there was a duty to report"[331] The A-file has been found to be such a public record.[332] Likewise the U.S. Central Index System is a public record created in connection with ongoing regulatory functions independent of prosecution and public officials are under a duty to accurately create records."[333]

Certificates of authenticity and CNRs reflect the state of those routinely kept business records existing prior to litigation.[334] Several Circuits have held that a CNR is nontestimonial in nature as it is certifying that a form 212 or other document does not exist, and this is similar enough to a business record that it is nontestimonial under *Crawford* and therefore presents no Confrontation Clause concerns.[335] Public records are not testimonial unless they include records created with an eye toward litigation and criminal prosecution such as matters observed by police officers or other law enforcement personnel in criminal cases.[336] Under the Federal Rules of Evidence, the absence of a public record or the nonoccurrence of a matter for which a record is regularly made is

329 *United States v. Mendez*, 514 F.3d 1035, 1044 (10th Cir. 2008); c*ert denied, Mendez v. United States*, 128 S. Ct. 2455 (2008); *rehearing denied, Mendez v. United States*, 129 S. Ct. 15 (2008).

330*United States v. Rueda-Riverez,* 396 F.3d 678, 680 (5th Cir. 2005).

331 Fed. R. Evid. 803(8)(A)-(B).

332 *United States v. Rueda-Riverez*, 396 F.3d 678, 680 (5th Cir. 2005); *citing, Gutierrez-Gonzales, 111 Fed. Appx.* 732 (5th Cir. 2004) (*unpublished).*

333 *United States v. Mendez*, 514 F.3d 1035, 1044 (10th Cir. 2008). *See also,* 8 U.S.C. §§ 1101, 1103, 1304; 8 C.F.R. §§ 103.1, 264.1 - for the authority and obligation to maintain these records.

334 *United States v. Earle*, 488 F.3d 537, 545 (1st Cir. 2007); *cert denied, Earle v. United States*, 128 S. Ct. 423 (2007).

335 *United States v. Urqhart*, 469 F.3d 745, 749 (8th Cir. 2006); *Unites States v. Cervantes-Flores*, 421 F.3d 825, 834 (9th Cir. 2005);*cert denied*, *Cervantes-Flores v. United States*, 547 U.S. 1114 (2006); *cert. denied*, *Cervantes-Flores v. United States*, 128 S. Ct. 244 (2007) (appeal following remand on sentencing issues). *United States v. Mendoza-Orellana, 133 F. App'x 68 (4th Cir. 2005)* (unpublished); *United States v. Rueda-Rivera, 396 F.3d 678 (5th Cir. 2005).*

336 *United States v. Mendez*, 514 F.3d 1035, 1044 (10th Cir. 2008). *See also* Fed. R. Evid. 803(10); and ,Fed. R. Evid. 803(10) advisory committee's note.

not excluded by the rule against hearsay even where the absence of a record is the focus or inquiry.[337] Therefore evidence that a particular immigration database did not contain a record is admissible under the *Rule 803(10)* exception.[338] "Where records are not prepared for litigation or criminal prosecution, but rather administrative and regulatory purposes, the principal evil at which the Confrontation Clause was directed is not implicated."[339] In *Crawford*, then Chief Justice Rehnquist suggested in his concurrence that public records and business records were not hearsay as have several of the Circuits since *Crawford* was decided.[340]

Applying *Crawford's* analysis generally requires a court to consider two threshold issues: (1) whether the out-of-court statement was hearsay, and (2) whether the out-of-court statement was testimonial.[341] Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. [342] The declarant in a record search matter is the person who actually performed the data search and did not discover a record pertaining to the defendant.[343] If the declarant is not made available to testify in court the CNR is hearsay as it contains statements made by a declarant, not present at trial, being offered into evidence to prove the truth of the matter asserted – that, after a diligent search no evidence was found that the defendant had obtained consent to reapply for admission to the United States. [344] However, as long as an agent or officer testifies at trial about the absence of entry documents and the relevant circumstances indicate an adequate search was performed, the testimony is not

337 Fed. R. Evid. 803(10); see also, Fed. R. Evid. 803(10) advisory committee's note.

338 *United States v. Mendez*, 514 F.3d 1035, 1044 (10th Cir. 2008).

339 Id., p. 1045.

340 *Crawford* at 56, Rehnquist, J. concurring; *See also, United States v. Torres-Villalobos*, 487 F.3d 607, 613 (8th Cir. 2007) (warrants of deportation are public records and not testimonial); *United States v. Feliz*, 467 F.3d 227, 237 (2d Cir. 2006) (holding autopsy reports are public records and not testimonial), *cert. denied,* 127 S. Ct. 1323 (2007); *United States v. Weiland*, 420 F.3d 1062, 1076-77 (9th Cir. 2005) (holding records of conviction and routine certifications of public records are not testimonial), cert. denied, 547 U.S. 1114 (2006); *United States v. Lopez-Moreno*, 420 F.3d 420, 437 (5th Cir. 2005) (holding ICE computer records are public records and not testimonial), *cert. denied*, 546 U.S. 1222, (2006).

341 *Crawford*, 541 U.S. at 68.

342 Fed. R. Evid. 801 (c).

343 *United States v. Mendez*, 514 F.3d 1035, 1044 (10th Cir. 2008).

344 *United States v. Earle*, 488 F.3d 537, 542 (1st Cir. 2007); *cert. denied, Earle v. United States,* 128 S. Ct. 423 (2007); s*ee Fed. R. Evid. 801(c)* (defining hearsay).

considered hearsay.[345] The Confrontation Clause "restricts only statements meeting the traditional definition of hearsay."[346]

Crawford gave three illustrative formulations of the "core class of 'testimonial' statements," *(1)* "ex parte in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,"[347] (2) "extrajudicial statements . . . obtained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,"[348] (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,"[349] In *United States v. Davis* the Supreme Court asked whether the facts surrounding a police interrogation indicated that its purpose was testimonial, if so *Crawford* applied and if it is not, Crawford does not apply to the admissibility of the statement.[350] This is in accord with the law developing in the Circuits, which have used a reasonable person test in assessing whether a statement is testimonial. Would "an objectively reasonable person in the declarant's shoes understand that the statement would be used in prosecuting the defendant at trial?"[351] The CNR does not fall into the specific categories of testimonial statements referred to in *Crawford*.[352]

5.1970 Warrant of Deportation

Introduction of Warrants of Deportation or Removal has been the subject of Confrontation Clause litigation. A Warrant of Deportation is a document executed by an officer or agent (and in some cases a contractor) that declares the person witnessed the alien depart the United States. The confrontation clause issue arises when the government introduces this document, instead of witness testimony, to establish that in fact the alien was previously removed during prosecutions for reentry under 8 U.S.C. §1326. Five circuits have

345 *United States v. Mendez*, 514 F.3d 1035, 1044 (10th Cir. 2008), *citing*. Fed. R. Evid. 801 (c); and *United States v. Valdez-Maltos*, 443 F.3d 910, 911 (5th Cir. 2006); *cert. denied*, 127 S. Ct. 265, (2006).
346 *United States v. Mendez*, 514 F.3d 1035, 1044 (10th Cir. 2008); citing *United States v. Faulkner*, 439 F.3d 1221, 1225 (10th Cir. 2006).
347 *United States v. Earle*, 488 F.3d 537, 542 (1st Cir. 2007); *cert. denied, Earle v. United States*, 128 S. Ct. 423 (2007); *citing, Crawford* at 51.
348 *United States v. Earle*, 488 F.3d 537, 543 (1st Cir. 2007).
349 *Id.*
350 Davis at 126 S. Ct. at 2277.
351 *United States v. Earle*, 488 F.3d 537, 543 (1st Cir. 2007); *United States v. Gilbertson*, 435 F.3d 790, 795-96 (7th Cir. 2006); *United States v. Hinton*, 423 F.3d 355, 359-60 (3d Cir. 2005); *United States v. Cromer*, 389 F.3d 662, 673-74 (6th Cir. 2004); *United States v. Saget*, 377 F.3d 223, 228-29 (2d Cir. 2004).
352 *United States v. Rueda-Riverez*, 396 F.3d 678, 680 (5th Cir. 2005).

addressed this issue, and all have concluded that the attesting witness's declaration is not "testimonial."[353]

The logic of the reporting circuits' seems to be clearly summed up by the Ninth Circuit in *United States v. Bahena-Cardenas*.[354] A warrant of deportation is not testimonial "because it [is] not made in anticipation of litigation, and because it is simply a routine, objective cataloging of an unambiguous factual matter."[355] The Eleventh Circuit went even further stating that "a warrant of deportation does not implicate adversarial concerns in the same way or to the same degree as testimonial evidence," because it is "recorded routinely and not in preparation for a criminal trial."[356]

5.1980 Deporting a Witness

Deporting a witness may cause a challenge based on the Confrontation Clause. The seminal case on deporting an alien witness prior to trial is *United States v. Valenzuela-Bernal*.[357] In *Valenzuela-Bernal* the defendant was arrested for smuggling three aliens. The defendant and his three alien passengers were interviewed by criminal investigators, and an AUSA decided that the passengers "possessed no evidence material to the prosecution or defense." Two of the passengers were deported to Mexico without the defendant having had an opportunity to interview them. The third passenger was kept as a material witness to provide testimony at trial. Defendant challenged the deportation of the two other witnesses as violating his rights to due process of law and to confront witnesses against him. He "made no attempt to explain how the deported passengers could assist him [in his defense.]" Instead he argued that his inability to interview the two remaining passengers prevented him from determining if they could aid in his defense.

In analyzing the case the Supreme Court noted that the executive branch has twin obligations to prosecute those violating U.S. law and to deport those who are unlawfully present. Expecting the government to, "[detain] alien eyewitnesses imposes substantial financial and physical burdens upon the Government, not to mention the human cost to potential witnesses who are

353 *United States v. Torres-Villalobos*, 487 F.3d 607 (8th Cir. 2007); *Garcia*, 452 F.3d at 41-42; *United States v. Valdez-Maltos*, 443 F.3d 910, 911 (5th Cir.) (*per curiam), cert. denied*, 127 S. Ct. 265 (2006); *United States v. Bahena-Cardenas*, 411 F.3d 1067, 1075 (9th Cir. 2005), *cert. denied*, 547 U.S. 1056, (2006); *United States v. Cantellano*, 430 F.3d 1142, 1145 (11th Cir. 2005), *cert. denied*, 547 U.S. 1034 (2006).

354 *United States v. Bahena-Cardenas,* 411 F.3d 1067(9th Cir. 2005), *cert. denied*, 547 U.S. 1056, (2006).

355 *United States v. Bahena-Cardenas,* 411 F.3d 1067, 1075 (9th Cir. 2005).

356 *United States v. Cantellano,* 430 F.3d 1142, 1145 (11th Cir. 2005), *cert. denied*, 547 U.S. 1034 (2006).

357 *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982).

incarcerated though charged with no crime."[358] "Because of Congressional immigration policy and practical concerns the Government has good reason to deport alien witnesses once it concludes they possess no evidence relevant to either the prosecution or the defense of a criminal case because more than the mere absence of testimony… [is necessary to establish]… a violation of the right to compulsory process for obtaining witnesses in [ones] favor." To establish a violation the defendant must demonstrate that he "was arbitrarily deprived of testimony that would have been relevant and material, and . . . vital to the defense." Thus the defense must show not simply that it was deprived of the witness's testimony, but rather the defense must make a plausible showing that the testimony would have been "both material and favorable to his defense."[359]

In reaching this decision the Court referenced the standard it had set forth many years earlier in *Brady v. Maryland*. "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." To prevail on a Brady claim the defendant must show that the evidence is favorable to the accused and is material to either guilt or punishment. As a result there is an implicit requirement that the suppressed evidence might have affected the outcome of the trial as evaluated in the context of the entire record.[360] "Where there is no reasonable doubt about guilt, whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."[361] In essence the standard is whether there "was any prejudice to the defendant from the delay or impairment of the ability to mount a defense."[362]

Of course the difficulty for the defense is that it is required to make this showing of materiality in most instances without having had an opportunity to interview the deported witnesses to determine what favorable information they possessed.[363] As a limited concession to the defense the Court found that defendant need not provide a detailed description of the lost testimony but it must demonstrate that the lost testimony would be material and favorable to the defense case. The Court indicated that the defense could show this through a

358 *Id.* Note: "Because of budget limitations and the unavailability of adequate detention facilities, it is simply impossible as a practical matter to prosecute many cases involving the transportation or harboring of large numbers of illegal aliens, where all the aliens must be incarcerated for a substantial period of time to avoid dismissal of the charges, even though the prosecution's case may be overwhelming. As a consequence, many valid and appropriate prosecutions are foregone." (*Internal quotations omitted.*)
359 *Id.*, at p. 866.
360 *Id.*; *United States v. Agurs* at 104.
361 *United States v. Valenzuela-Bernal*, 458 U.S. 858, 868 (1982); *United States v. Agurs* at *112-113*
362 *Id.*, at p. 869; *citing, United States v. MacDonald,* 435 U.S. 850, 858 (1978)
363 *Id.*, at p. 870.

proffer describing the material evidence that would have been provided rather than the evidence itself.[364] The defendant may also point to agreed facts, or the submission of additional facts in the form of a legal argument.[365] Sanctions are only warranted for deportation of alien witnesses where there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact.[366] Judges may defer ruling on motions for sanctions until after the presentation of evidence.[367]

The general rule from *Valenzuela-Bernal* is that the defendant claiming the Confrontation Clause violations must show "some reasonable basis to believe that the deported witness would testify to material and favorable facts."[368] In essence the defendant must show that the government acted in bad faith by removing the witness or allowing him to leave the United States. The Supreme Court has suggested that bad faith is an important consideration in determining whether a constitutional violation has occurred.[369] Thus the government must act in good faith that the illegal alien witness possesses no evidence favorable to the defense when deporting an illegal-alien witness.[370] The government may not deport a witness so as to purposefully deprive the defense of an opportunity to cross examine a favorable witness.[371]

For example in *United States v. Hudson*, a Border Patrol Agent arrested a defendant for assaulting him in the course of his official duties.[372] The AUSA accepted the case for prosecution. Nonetheless, the government deported both

364 *Id.*, at p. 874.
365 *Id.*, at p. 873. Since this type of showing is testimonial in nature, and constitutes evidence of the prejudice incurred as a result of the deportation the Court found that it should be verified by oath or affirmation of either the defendant or his attorney. *See* Fed. Rule Evid. 603; Fed. Rule Crim. Proc. 47.
366 *Id.*, at pp. 873-874*; referencing, Giglio v. United States,* 405 U.S. 150, 154 (1972).
367 *Id.*, at p. 874.
368 *United States v. McCullough*, 166 Fed. Appx. 469, 471 (11th Cir. 2006); *cert denied, McCullough v. United States*, 547 U.S. 1208 (2006). *See also, United States v. Saintil,* 753 F.2d 984, 987 (11th Cir. 1985) (internal marks omitted). In *McCullough* the defendant was being prosecuted for two violations of 8 U.S.C. §1324 relating to assisting her paramour to return to their home following his illegal reentry into the United States. While her criminal trial was pending, the government allowed the boyfriend to voluntarily depart the United States prior to either a deposition or cross examination. Without any specific analysis the Circuit court found that there is a difference between removal and allowing an alien to voluntarily depart the United States.
369 *United States v. Valenzuela-Bernal,* 458 U.S. 858, 867-872 (1982).
370 *Id.*, at p. 872.
371 *United States v. McCullough*, 166 Fed. Appx. 469, 472 (11th Cir. 2006); *cert eenied, McCullough v. United States*, 547 U.S. 1208 (2006); *United States v. Avila-Dominguez,* 610 F.2d 1266, 1270 (5th Cir. 1980); *citing, United States v. Avila-Dominguez,* 610 F.2d 1266, 1270 (5th Cir. 1980).
372 *United States v. Hudson,* 265 F. Supp. 2d 1299 (2003*).*

alien eyewitnesses to the altercation prior to the trial. This was in spite of the fact the that each alien's form I-213, Records of Deportable/Inadmissible Alien, indicated they were to be held as material witnesses in the *18 U.S.C. § 111* prosecution. The defendant introduced an affidavit from one of the aliens indicating he had seen everything. The 11th Circuit found that the failure to have the alien available for testimony called the agent's credibility into question. By deporting these witnesses, the Government had made the witnesses favorable testimony unavailable and amounted to a violation of the defendant's rights under the Sixth Amendment, as well as her rights to due process under the Fifth Amendment.[373] The district court specifically found that the Government's deportation of these witnesses was inherently unfair under the facts and circumstances of the case and dismissed the indictment.[374]

The Ninth Circuit has reached a similar decision in the removal context finding that that deporting an alien witness prior to an administrative removal hearing violated an alien's Confrontation Clause rights as guaranteed by federal statute in the immigration context.[375] The INA expressly requires that an alien be granted "a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government.[376] In addition 8 C.F.R. §1240.10 (a)(4) states that the Immigration Judge shall "advise the respondent that he or she will have a reasonable opportunity to examine and object to the evidence against him or her . . . and to cross examine witnesses presented by the government."[377]

In *Hernandez-Guadarrama* the alien sought to cross examine a witness in a removal hearing regarding the content of her hearsay affidavit given to the border patrol. The government had already deported the witness and the immigration judge placed the burden of producing the witness on the defense since she was from *Hernandez-Guadarrama's* home town. The Ninth Circuit found that this was in error as it is clear that the burden of producing a government declarant that a petitioner may wish to cross-examine is on the government, not the petitioner. The government may not evade its obligation to produce its witness by taking affirmative steps, such as deportation, that render the witness unavailable. Indeed, the government's burden is greater, not lesser, when it exercises custodial power over the witness in question. Because, in this case, the government failed to make any "reasonable effort" to produce the

373 *United States v. Hudson,* 265 F. Supp. 2d 1299, 1304 (2003); *citing to, United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982).

374 *See also*, *United States v. Beef, Incorporated*, 194 F. Supp. 2d 949 (D Neb. 2002).

375 *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674 (9th Cir. 2005); *interpreting,* 8 U.S.C. § 1229a(b)(4)(B); and 8 C.F.R. § 1240.10(a)(4).

376 8 U.S.C. § 1229a(b)(4)(B).

377 *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 681, Note 10 (9th Cir. 2005); The only limitation the statute places on that right is that the alien shall not be entitled "to examine such national security information as the Government may proffer" 8 U.S.C.A. § 1229a(b)(4)(B).

hearsay declarant, and indeed, took action to render her unavailable, the admission of her statement was fundamentally unfair.[378] A reasonable effort to procure a deported witness has been found to require more that simply issuing a subpoena or letter for the petitioner to serve on the witness.[379]

"Although the rules of evidence are not applicable to immigration hearings, the constitutional and statutory guarantees of due process require that the government's choice whether to produce a witness or to use a hearsay statement [not be] wholly unfettered."[380] "The test used in the Ninth Circuit is "whether the statement is probative and whether its admission was fundamentally fair. Thus, we require that the government must make a reasonable effort in INS proceedings to afford the alien a reasonable opportunity to confront the witnesses against him or her."[381] "The [government] may not use an affidavit from an absent witness 'unless the [government] first establishes that, despite reasonable efforts, it was unable to secure the presence of the witness at the hearing."[382]

An affidavit issued by a witness at risk of felony prosecution without cross examination is not from a disinterested witness and carries little evidentiary weight. Standing alone such an affidavit is insufficient evidence to prove removability under the clear, unequivocal, and convincing standard.[383] "A single affidavit from a self-interested witness not subject to cross-examination simply does not rise to the level of clear, unequivocal, and convincing evidence required to prove deportability." The court reversed the BIA's decision.[384]

In contrast to the Ninth Circuit's *Hernandez-Guadarrama* approach requiring the government present live witness testimony to corroborate the defendant's actions in smuggling aliens, the Fifth Circuit has admitted hearsay evidence from the A-File to prove that the individuals found with the defendant were aliens who were subsequently removed allowing the government to avoid holding witnesses for Confrontation Clause purposes.[385]

378 *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 682 (9th Cir. 2005).

379 *Cunanan v. INS, 856 F.2d 1373, 1375 (9th Cir. 1988)*; *Saidane v, INS, 129 F.3d 1063, 1065 (9th ir.1997). Hernandez-Garza, 882 F.2d at 948.*

380 *Hernandez-Guadarrama v. Ashcroft,* 394 F.3d 674 (9th Cir. 2005); *Saidane v. INS, 129* F.3d 1063, 1065 (9th Cir. 1997) ;*Baliza v. INS*, 709 F.2d 1231, 1233-34 (9th Cir. 1983).

381 *Id. See also Cunanan v. INS*, 856 F.2d 1373, 1375 (9th Cir. 1988).

382 *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 682 (9th Cir. 2005); *Ocasio v. Ashcroft*, 375 F.3d 105, 107 (1st Cir. 2004); *quoting Olabanji v. INS*, 973 F.2d 1232, 1234 (5th Cir. 1992); *See also*, *Saidane v. INS,* 129 F.3d 1063, 1065; *Hernandez-Garza v. INS*, 882 F.2d 945, 948 (5th Cir. 1989); *Dallo v. INS,* 765 F.2d 581, 586 (6th Cir. 1985).

383 *Id.*

384 *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 683 (9th Cir. 2005).

385 *United States v. Lopez-Moreno*, 420 F.3d 420 (2005); as amended, 2005 U.S. App. Lexis 22060; cert denied, *Lopez-Moreno v. United States,* 546 U.S. 1222 (2006).

Lopez-Moreno was driving a private, commercial, bus when he was stopped in Louisiana for a traffic violation. The state suspected the passengers were undocumented and called ICE. The responding ICE agent arrested all nine of the passengers for being unlawfully present and Lopez-Moreno for transporting them in violation of *1324(a)(1)(A)(v)(II)*, and *1324(a)(1)(B)(i)*.[386] The government took statements from each of the nine undocumented aliens. The aliens were deported without the defense having interviewed them. The defense filed a motion *in limine* to exclude the contents of the statements and other items in the A-files on Fifth and Sixth Amendment grounds.[387] The motion *in limine* was denied. The government did not introduce the passenger's sworn statements, but the government did introduce three items from the passengers' A-files: (1) the passengers' booking photographs;[388] (2) a photocopy of a Mexican voter identification card that one of the passengers had in his possession; and (3) a computer printout from an ICE computer showing the date of deportation date of each of the passengers.

The Fifth Circuit upheld the admission of the photocopy of the Mexican voter identification card finding they were not hearsay, and thus outside of the Confrontation Clause.[389] The Fifth Circuit also upheld the admission of the computer printouts, although hearsay, under the public records exception.[390] Under Rule 803 of the Federal Rules of Evidence, records made by a public agency are admissible, regardless of whether they would otherwise be excluded as hearsay. In *Crawford*, the Supreme Court stated that business records, which are analogous to public records, are by their nature not testimonial and not subject to the requirements of the Confrontation Clause.[391] (noting that "the Court's analysis of 'testimony' excludes at least some hearsay exceptions, such as business records and official records"). [392]

386 *Id.*, at p. 428.

387 *Id.*, at p. 429.

388 The court did not address the admissibility of the booking photos as there admissibility was not challenged on appeal.

389 FED. R. EVID. 801(c).

390 FED. R. EVID. 803(8), permits the introduction of, "Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

391 *Crawford,* 541 U.S. at 51, 56; *See also id. at 76* (*Rehnquist, C.J., concurring in judgment*)

392 *Crawford*, 541 U.S. at 51, 76 (*Rehnquist, C.J., concurring in judgment*), business records are not testimonial; *see also, United States v. Rueda-Rivera,* 396 F.3d 678, 680 (5th Cir. 2005) (*per curiam*); *United States v. Gutierrez-*

Addendum 1

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Albania Washington, DC (202) 223-4942; fax (202) 628-7342

Algeria Washington, DC (202) 265-2800; fax (202) 213-5134

Andorra New York, NY (212) 750-8064; fax (212) 750-6630 (U.N. Mission)

Angola Washington, DC (202) 785-1156; fax (202) 785-1258

Antigua and Barbuda Washington, DC (202) 362-5211; fax (202) 362-5225

Argentina Atlanta, GA (404) 880-0805; fax (404) 880-0806: Chicago, IL (312) 819-2660; fax (312) 819-2626: Houston, TX (713) 871-8935; fax (713) 871-0639: Los Angeles, CA (323) 954-9155; fax (323) 934-9076: Miami, FL (305) 373-1889; (305) 371-7108: New York, NY (212) 603-0400; fax (212) 541-7746: Washington, DC. (202) 238-6460; fax (202) 332-3171

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Azerbaijan Washington, DC (202) 842-0001; fax (202) 842-0004

Bahamas, The Miami, FL (305) 373-6295; fax (305) 373-6312: New York, NY (212) 421-6420-22; fax (212) 759-2135: Washington, D.C. (202) 319-2660; fax (202) 319-2668

Gonzales, 111 Fed. Appx. 732, 734 (5th Cir. 2004) (per curium, unpublished); (items in an alien's immigration file are akin to non-testimonial business records and the Confrontation Clause does not bar their admission.

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Greece Atlanta, GA (404) 261-3391/261-3313; fax (404) 262- 2798: Boston, MA (617) 523-0100; fax (617) 523-0511: Chicago, IL (312) 335-3915-7; fax (312) 335-3958: Houston, TX (713) 840-7522; fax (713) 840-0614: Los Angeles, CA (310) 826-5555; fax (310) 826-8670: New Orleans, LA (504) 523-1167; fax (504) 524-5610: New York, NY (212) 988-5500; fax (212) 734-8492: San Francisco, CA (415) 775-2103; fax (415) 776-6815: Washington, DC (202) 232-8222; fax (202) 939-5824

Grenada New York, NY (212) 599-0301; fax (212) 599-1540: Washington, DC (202) 265-2561; fax (202) 265-2468

Guatemala Chicago, IL (312) 332-1587 or (312) 332-3170; fax (312) 332-4256: Coral Gables, FL (305) 443-4828-29; fax (305) 443-4830: Houston, TX (713) 953-9531/-1127/-1512; fax (713) 953-9383: Los Angeles, CA (213) 365-9251/52; fax (213) 365-9245: New York, NY (212) 686-3837; fax (212) 447-6947: San Francisco, CA (415) 788-5651; fax 788-5653: Washington, DC (202) 745-4952; fax (202) 745-1908

Guinea Washington, DC (202) 483-9420; fax (202) 483-8688

Guinea-Bissau New York, NY (212) 338-9380 or 94; fax (212) 573-6094: Washington, DC (301) 947-3958; fax (301) 947-3958

Guyana New York, NY (212) 527-3215; fax (212) 527-3229: Washington, DC (202) 265-6900/01; fax (202) 232-1297

Haiti Boston, MA (617) 266-3660; fax (617) 266-4060: Chicago, IL (312) 922-4004; fax (312) 922-7122: Miami, FL (305) 859-2003-06; fax (305) 854-7441: New York, NY (212) 697-9767; fax (212) 949-7966: San Juan, PR (809) 764-1392; fax (809) 764-3109: Washington, DC (202) 332-4090-92; fax (202) 745- 7215

Holy See Washington, D. C. (202) 333-7121; fax (202) 337-4036

Honduras Chicago, IL (773) 342 – 8289; fax (773) 342-8293: Houston, TX (713) 622-7911; fax (713) 622-6540: Los Angeles, CA (213) 383-9244/383-9317; fax (213) 383-9306: Miami, FL (305) 447-6948/447-6375; fax (305) 447-9036: New Orleans, LA (504) 522-3118; fax (504) 523-0544: New York, NY (212) 269-3611-12; fax (212) 509-8391: San Francisco, CA (415) 392-0076; fax (415) 292-6726: Washington, DC (202) 223-0185; fax (202) 223-0202

Hong Kong (See China)

Hungary Los Angeles, CA (310) 473-9344; fax (310) 479-6443: New York, NY (212) 752-0669; fax (212) 755-5986: Washington, DC (202) 362-6730; fax (202) 966-8135/686-6412

Iceland[*] New York, NY (212) 593-2700; fax (212) 593-6269: Washington, DC (202) 265-6653; fax (202) 265-6656

India Chicago, IL (312) 595-0405 or 1410; fax (312) 595-0416/17: Houston, TX (713) 626-2148/49; fax (713) 626-2450: New York, NY (212) 879-7800; fax (212) 988-6423 or 861-3788: San Francisco, CA (415) 668-0682/83; fax (415) 668-2073/7968: Washington, DC (202) 939-7000; fax (202) 483-3972

Indonesia Chicago, IL (312) 938-0101; fax (415) 938-3148: Houston, TX (713) 785-1691; fax (713) 708-9644: Los Angeles, CA (213) 383-5126; fax (213) 487-3971: New York, NY (212) 879-0600; fax (212) 570-6206: San Francisco, CA (415) 474-9571; fax (415) 441-4320: Washington, DC (202) 775-5200; fax (202) 775-5365

[*] Note: Call the New York number (New York, NY (212) 421-6420-22; fax (212) 759-2135) for foreign nationals that are arrested/detained in New York, New Jersey, Connecticut, and Rhode Island; all others call the Washington, DC number.

Iran Washington, DC (202) 965-4990

Iraq Washington, DC (202) 483-7500; fax (202) 462-5066

Ireland Boston, MA (617) 267-9330; fax (617) 267-6375: Chicago, IL (312) 337-1868; (fax) (312) 337-1954: New York, NY (212) 319-2555; fax (212) 980-9475: San Francisco, CA (415) 392-4214; fax (415) 392-0885: Washington, DC (202) 462-3939; fax (202) 232-5993

Israel Atlanta, GA (404) 875-7851; fax (404) 874-5364: Boston, MA (617) 542-0041; fax (617) 338-4995: Chicago, IL (312) 297-4800; fax (312) 297-4855: Houston, TX (713) 627-3780; fax (713) 622-2128/627-0149: Los Angeles, CA (323) 852-5500; fax (323) 852-5555: Miami, FL (305) 358-8111; fax (305) 371-5034: New York, NY (212) 499-5301; fax (212) 499-5355: Philadelphia, PA (215) 546-5556; fax (215) 545-3986: San Francisco, CA (415) 398-8885; fax (415) 398-8589: Washington, D. C. (202) 364-5500; fax (202) 364-3607

Italy Boston, MA (617) 542-0483/4; fax (617) 542-3998: Chicago, IL (312) 467-1550/51; fax (312) 467-1335: Detroit, MI (313) 963-8560; fax (313) 963-8180: Houston, TX (713) 850-7520/1; fax (713) 850-9113: Los Angeles, CA (310) 826-5998/3832 & 207-6254; fax (310) 820-0727: Miami, FL (305) 374-6322; fax (305) 374-7945: New York, NY (212) 737-9100; fax (212) 249-4945: Philadelphia, PA (215) 592-7329; fax (215) 592-9808: San Francisco, CA (415) 931-4924/292-9210; fax (415) 931-7205: Washington, DC (202) 612-4400; fax (202) 518-2151

Jamaica Miami, FL (305) 374-8431; fax (305) 577-4970: New York, NY (212) 935-9000; fax (212) 832-0411: Washington, DC (202) 452-0660; fax (202) 452-0081

Japan Agana, Guam (671) 646-1290; fax (671) 649-2620: Anchorage, Alaska (907) 279-8428; fax (907) 279-9271: Atlanta, GA (404) 892-2700; fax (404) 881-6321: Boston, MA (617) 973-9772; fax (617) 542-1329: Chicago, IL (312) 280-0400; fax (312) 280-9568: Detroit, MI (313) 567-0120; fax (313) 567-0274: Honolulu, HI (808) 536-2226; fax (808) 537-3276: Houston, TX (713) 652-2977; fax (713) 651-7822: Kansas City, MO (816) 471-0111; fax (816) 472-4248: Los Angeles, CA (213) 617-6700; fax (213) 617-6727: Miami, FL (305) 530-9090; fax (305) 530-0950: New Orleans, LA (504) 529-2101; fax (504) 568-9847: New York, NY (212) 371-8222; fax (212) 319-6357: Portland, OR (503) 221-1811; fax (503) 224-8936: Saipan (670) 234-7201; fax (670) 234-8764: San Francisco, CA (415) 777-3533; fax (415) 974-3660: Seattle, WA (206) 682-9107; fax (206) 624-9097: Washington, DC (202) 238-6700; fax (202) 328-2187

Jordan Washington, DC (202) 966-2664; fax (202) 966-3110

Kazakhstan New York, NY (212) 888-3024; fax (212) 888-3025: Washington, DC (202) 232-5488; fax (202) 232-3541

Kenya New York, NY (212) 486-1300; fax (212) 688-0911: Washington, DC (202) 387-6101; fax (202) 462-3829

Kiribati Honolulu, HI (808) 521-7703; fax (808) 542-5159 (honorary consul)

Korea, North New York, NY (212) 972-3105; fax (212) 972-3154 (U.N. Mission)

Korea, South Agana, Guam (671) 471-6488; fax (671) 477-6391: Anchorage, Alaska (907) 561-5488; fax (907) 563-0313: Atlanta, GA (404) 522-1611; fax (404) 521-3169: Boston, MA (617) 348-3660; fax (617) 348-3670: Chicago, IL (312) 822-9485; fax (312) 822-9849: Honolulu, HI (808) 595-6109; fax (808) 595-3046: Houston, TX (713) 961-0186; fax (713) 961-3340: Los Angeles, CA (213) 385-9300; fax (213) 385-1849: Miami, FL (305) 372-1555; fax (305) 371-6559: New York, NY (212) 752-1700; fax (212) 888-6320: San Francisco, CA (415) 921-2251; fax (415) 921-5946: Seattle, WA (206) 441-1011; fax (206) 441-7912: Washington, DC (202) 939-5634; fax (202) 342-1597

Kuwait Washington, DC (202) 966-0702; fax (202) 966-0517

Kyrgyzstan Washington, DC (202) 338-5141/42; fax (202) 338-5139

Laos Washington, DC (202) 332-6416/17; fax (202) 332-4923

Latvia Washington, DC (202) 726-8213; fax (202) 726-6785

Lebanon Detroit, MI (313) 567-0233: Los Angeles, CA (323) 467-1253/1254; fax (323) 467-2935: New York, NY (212) 744-7905: Washington, DC (202) 939-6300; (202) 939-6324

Lesotho Washington, DC (202) 797-5533; fax (202) 234-6815

Liberia New York, NY (212) 687-1025: Washington, DC (202) 723-0437; fax (202) 723-0436

Libya New York, NY (212) 752-5775; fax (212) 593-4787

Liechtenstein New York, NY (212) 599-0220; fax (212) 599-0064

Lithuania New York, NY (212) 354-7849; fax (212) 354-7911: Washington, DC (202) 234-5860; fax (202) 328-0466

Luxembourg New York, NY (212) 888-6664; fax (212) 888-6116: San Francisco, CA (415) 788-0816; fax (415) 788-0985: Washington, DC (202) 265-4171; fax (202) 328-8270

Macedonia, The Former Yugoslav Republic of New York, NY (212) 317-1727; fax (212) 317-1484: Washington, DC (202) 337-3063; fax (202) 337-3093

Madagascar New York, NY (212) 986-9491: Washington, DC (202) 265-5525; fax (202) 265-3034

Malawi Washington, DC (202) 797-1007; fax (202) 265-0976

Malaysia Los Angeles, CA (213) 892-1238; fax (213) 982-9031: New York, NY (212) 490-2722; fax 490-8576: Washington, DC (202) 328-2700; fax (202) 483-7661

Maldives New York, NY (212) 599-6195; fax (212) 972-3970 (U.N. Mission)

Mali Washington, DC (202) 332-2249, 939-8950; fax (202) 332-6603

Malta New York, NY (212) 725-2345; fax (212) 779-7097: Washington, DC (202) 462-3611/12; fax (202) 387-5470

Marshall Islands New York, NY (212) 983-3040; fax (212) 983-3202: Washington, DC (202) 234-5414; fax (202) 232-3236

Mauritania Washington, DC (202) 232-5700; fax (202) 319-2623

Mauritius Washington, DC (202) 244-1491/92; fax (202) 966-0983

Mexico Albuquerque, NM (505) 247-2147; fax (505) 842-9490: Atlanta, GA (404) 688-3258; fax (404) 521-3256: Austin, TX (512) 478-2866; fax (512) 478-8008: Boston, MA (617) 426-4942; fax (617) 426-5795: Brownsville, TX (512) 542-4431; fax (512) 542-7267: Calexico, CA (714) 357-3863; fax (714) 357-6284: Chicago, IL (312) 855-1380; fax (312) 855-9257: Corpus Christi, TX (512) 882-3375; fax (512) 882-9324: Dallas TX (214) 630-7341; fax (214) 630-3511: Del Rio, TX (512) 755-2352; fax (512) 775-9451: Denver, CO (303) 830-0523; (303) 830-0704: Detroit, MI (313) 965-1868; fax (313) 965-7720: Eagle Pass, TX (512) 773-9255; fax (512) 773-9397: El Paso, TX (915) 533-3644; fax (915) 532-7163: Fresno, CA (209) 233-3065; fax (209) 233-5638: Houston, TX (713) 524-2300; (713) 523-6244: Laredo, TX (512) 723-6369; fax (512) 723-1741: Los Angeles, CA (213) 351-6815; fax (213) 389-9186: McAllen, TX (512) 686-0243/44; fax (512) 686-4901: Miami, FL (305) 441-8780; fax (305) 441-7180: Midland, TX (915) 687-2334; fax (915) 687-3952: New Orleans, LA (504) 522-3596; fax (504) 522-3597: New York, NY (212) 689-0456; fax (212) 545-8197: Nogales, AZ (602) 287-2521; fax (602) 287-3175: Oxnard, CA (805) 483-4684: Philadelphia, PA (215) 922-4262; fax (215) 923-7281: Phoenix, AZ (602) 242-7398; fax (602) 242-2957: Sacramento, CA (916) 363-3885; fax (916) 363-0625: Salt Lake City, UT (801) 521-8502 fax (801) 521-0534: San Antonio, TX (512) 227-9145; fax (512) 227-1817: San Bernadino, CA (714) 889-9836; fax (714) 889-8285: San Diego, CA (619) 231-8414 fax (619) 231-4802: San Francisco, CA (415) 392-5554; fax (415) 392-3233: San Jose, CA (408) 294-3414; fax (408) 294-4506: San Juan, PR (809) 764-0258; fax (809) 250-0042: Santa Ana, CA (714) 835-3069: Seattle, WA (206) 448-3526; fax (206) 448-4771: St. Louis, MO (314) 436-3233; fax (314) 436-2695: Tucson, AZ (602) 882-5595; fax (602) 882-8959: Washington, DC (202) 736-1000; fax (202) 234-4498

Micronesia, Federated States of Washington, DC (202) 223-4383; fax 202-223-4391

Moldova New York, NY (212) 682-3523; fax (212) 682-6274: Washington, DC (202) 667-1130; fax (202) 667-1204

Monaco New York, NY (212) 286-0500; fax (212) 286-1574

Mongolia Washington, DC (202) 337-7117; fax (202) 298-9227

Morocco New York, NY (212) 758-2625: Washington, DC (202) 462-7982; fax (202) 265-0161

Mozambique Washington, DC (202) 293-7146; fax (202) 835-0245
Namibia Washington, DC (202) 986-0540; fax (202) 986-0443

Nauru Honolulu, HI (808) 532-7821

Nepal New York, NY (212) 370-4188/-4199; fax (212) 953-2038: Washington, DC (202) 667-4550; fax (202) 667-5534

Netherlands Chicago, IL (312) 856-0110; fax (312) 856-9218: Houston, TX (713) 622-8000; fax (713) 622-3581: Los Angeles, CA (310) 268-1598; fax (310) 312-0989: New York, NY (212) 246-1429; fax (212) 333-3603: Washington, DC (202) 244-5300; fax (202) 362-3430

New Zealand Los Angeles, CA (310) 207-1605; fax (310) 207-3605: New York, NY (212) 832-4038; fax (212) 832-7602: Washington, D. C. (202) 328-4800; fax (202) 667-5227

Nicaragua Houston, TX (713) 272-9628: Los Angeles, CA (213) 252-1170; fax (213) 252-1177: Miami, FL (305) 220-6900; fax (305) 220-8794: New Orleans, LA (504) 523-1507; fax (504) 523-2359: New York, NY (212) 983-1981; fax (212) 983-2646: San Francisco, CA (415) 765-6821; fax (415) 765-6826: Washington, DC (202) 939-6570; fax (202) 939-6542

Niger New York, NY (212) 421-3260; fax (212) 483-3169: Washington, DC (202) 483-4224-27; fax (202) 483-3169

Nigeria New York, NY (212) 850-2228; fax (212) 687-1476: Washington, DC (202) 986-8400; fax (202) 775-1385

Norway Houston, TX (713) 521-2900; fax (713) 521-9473: Miami, FL (305) 358-4386; fax (305) 374-4369: Minneapolis, MN (612) 332-3338; fax (612) 332-1386: New York, NY (212) 421-7333; fax (212) 754-0583: San Francisco, CA (415) 986-0766-8; fax (415) 986-3318: Washington, DC (202) 944-8939; fax (202) 337-0870

Oman Washington, DC (202) 387-1980; fax (202) 745-4933

Pakistan Los Angeles, CA (310) 441-5114; fax (310) 441-9256: New York, NY (212) 879-5800: Washington, DC (202) 939-6209; fax (202) 232-4142

Palau Washington, DC (202) 452-6814; fax (202) 452-6281

Panama Atlanta, GA (404) 525-2772: Houston, TX (713) 493-5997: Miami, FL (305) 371-7031: New Orleans, LA (504) 525-3458: New York, NY (212) 840-2450: Washington, DC (202) 483-1407; fax (202) 483-8416

Papua New Guinea Washington, DC (202) 745-3680; fax (202) 745-3679

Paraguay Los Angeles, CA (310) 820-5451; fax (310) 820-5461: Miami, FL (305) 477-4002: New Orleans, LA (504) 522-7424: New York, NY (212) 432-0733: Washington, DC (202) 483-6960-62; fax (202) 234-4508

Peru Chicago, IL (312) 853-6173; fax (312) 704-6969: Houston, TX (713) 781-5000; fax (713) 781-1739: Los Angeles, CA (213) 252-5910; fax (213) 252-8130: Miami, FL (305) 374-1305; fax (305) 381-6027: New York, NY (212) 481-7410; fax (212) 481-8606: Patterson, NJ (201) 278-2221; fax (201) 278-0254: San Francisco, CA (415) 362-7136; fax (415) 362-2836: San Juan, PR (787) 250-0391; fax (787) 250-0319: Washington, DC (202) 833-9868; fax (202) 659-8124

Philippines Agana, Guam (671) 646-4620; fax (671) 649-1868: Chicago, IL (312) 332-6458/59; fax (312) 332-3657: Honolulu, HI (808) 595-6316; fax (808) 595-2581: Los Angeles, CA (213) 639-0980-85; fax (213) 639-0990: New York, NY (212) 764-1330/764-1334; fax (212) 382-1146: San Francisco, CA (415) 433-6666/69; fax (415) 421-2641: Washington, DC (202) 467-9300; fax (202) 328-7614

Poland Chicago, IL (312) 337-8166; fax (312) 337-7841: Los Angeles, CA (310) 442-8500; fax (310) 442-8515: New York, NY (212) 889-8360; fax (212) 779-3062: Washington, DC (202) 232-4517; fax (202) 328-2152

Portugal Boston, MA (617) 536-8740: Los Angeles, CA (310) 277-1491: New York, NY (212) 246-4580; fax (212) 459-0190: Newark, NJ (201) 622-7300: Providence, RI (401) 272-2003/9456: San Francisco, CA (415) 346-3400: Washington, DC (202) 332-3007; fax (202) 462-3726

Qatar Washington, DC (202) 274-1600; fax (202) 237-0061

Romania Los Angeles, CA (310) 444-0043; fax (310) 445-0043: New York, NY (212) 682-9120-9122; fax (212) 972-8463: Washington, DC (202) 232-4747; fax (202) 232-4748

Russia New York, NY (212) 348-0926, 2626; fax (212) 831-9162: San Francisco, CA (415) 929-1035, fax (415) 929-0306: Seattle, WA (206) 728-

1910; fax (206) 728-1871: Washington, DC (202) 939-8907; fax 202-939-8917

Rwanda Washington, DC (202) 232-2882; fax (202) 232-4544

Saint Kitts and Nevis Washington, DC (202) 686-2636; fax (202) 686-5740

Saint Lucia New York, NY (212) 697-9360: Washington, DC (202) 364-6792; fax (202) 364-6728

Saint Vincent and the Grenadines New York, NY (212) 687-4490 (UN Mission): Washington, DC (202) 364-6730; fax (202) 364-6736

Samoa New York, NY (212) 599-6196; fax (212) 599-0797

San Marino New York, NY (212) 465-1012 (UN Mission)

Sao Tome and Principe New York, NY (212) 697-4211; fax (212) 687-8389 (UN Mission): Washington, DC (202) 986-7732; fax (202) 387-5935 (honorary consul)

Saudi Arabia Houston, TX (713) 785-5577; fax (713) 785-1163: Los Angeles, CA (310) 479-6000; fax (310) 478-6646: New York, NY (212) 752-2740; fax (212) 688-2719: Washington, DC (202) 342-3800

Senegal Washington, DC (202) 234-0540; fax (202) 332-6315

Serbia and Montenegro Washington, DC (202) 332-0333; fax (202) 332-3933

Seychelles New York, NY (212) 972-1785; fax (212) 972-1786

Sierra Leona Washington, DC (202) 939-9261 fax (202) 483-1793

Singapore Los Angeles, CA (714) 476-2330; fax (714) 476-8301: San Francisco, CA (415) 928-8508; fax (415) 673-0883: Washington, DC (202) 537-3100; fax (202) 537-0876

Slovakia Washington, DC (202) 965-5160; fax (202) 965-5166

Slovenia Washington, DC (202) 332-9332; fax (202) 667-4563

Solomon Islands New York, NY (212) 599-6192; (UN Mission); fax (212) 661-8925

Somalia New York, NY (212) 599-6193 (UN Mission)

South Africa Chicago, IL (312) 939-7929 & 7932; fax (312) 939-2588: Los Angeles, CA (323) 651-0902; fax (323) 651-5969: New York, NY (212) 213-

4880; fax (212) 213-0102: Washington, DC (202) 232-4400/; fax (202) 232-3402

Spain Boston, MA (617) 536-2506/27; fax (617) 536-8512: Chicago, IL (312) 782-4588; fax (312) 782-1635: Houston, TX (713) 783-6200; fax (713) 783-6166: Los Angeles, CA (213) 938-0158; fax (213) 938-2502: Miami, FL (305) 446-5511/12/13; fax (305) 446-0585: New Orleans, LA (504) 525-4951 & 7920; fax (504) 525-4955: New York, NY (212) 355-4080; fax (212) 644-3751: San Francisco, CA (415) 922-2995/96 fax (415) 931-9706: San Juan, PR (809) 758-6090; fax (809) 763-0190: Washington, DC (202) 728-2330; fax (202) 728-2302

Sri Lanka Los Angeles, CA (323) 634-0479/1079/1082; fax (323) 634-1095: Washington, DC (202) 483-4025-4028; fax (202) 232-7181

Sudan New York, NY (212) 421-2680: Washington, DC (202) 338-8565; fax (202) 667-2406

Suriname Miami, FL (305) 593-2697; fax (305) 599-1034: Washington, D. C. (202) 244-7488; fax (202) 244-5878

Swaziland Washington, DC (202) 234-5002; fax (202) 234-8254

Sweden Los Angeles, CA (310) 445-4008: fax (310) 473-2229: New York, NY (212) 583-2550; fax (212) 755-2732: Washington, DC (202) 467-2600; fax (202) 467-2699

Switzerland Atlanta, GA (404) 870-2000; fax (404) 870-2011: Chicago, IL (312) 915-0061; fax (312) 915-0388: Houston, TX (713) 650-0000; fax (713) 650-1321: Los Angeles, CA (310) 575-1145; fax (310) 576-1982: New York, NY (212) 758-2560; fax (212) 207-8024: San Francisco, CA (415) 788-2272; fax (415) 788-1402: Washington, DC (202) 745-7900; fax (202) 387-2564

Syria Washington, DC (202) 232-6313; fax (202) 234-9548

Taiwan Taipei Economic and Cultural Representative Office (TECRO) Agana, Guam (671) 472-5865; fax (671) 472-5869: Atlanta, GA (404) 872-1234; fax (404) 873-3474: Boston, MA (617) 737-2050; fax (617) 737-1684: Chicago, IL (312) 616-0100; fax (312) 616-1490: Honolulu, HI (808) 595-6347; fax (808) 595-6542: Houston, TX (713) 626-7445; fax (713) 626-1202: Kansas City, MO (816) 531-1298; fax (816) 531-3066: Los Angeles, CA (213) 389-1215; fax (212) 383-3245: Miami, FL (305) 443-8917; fax (305) 444-4796: New York, NY (212) 317-7300; fax (212) 754-1549: San Francisco, CA (415) 362-7680; fax (415) 362-5382: Seattle, WA (206) 441-4586; fax (206) 441-4320: Washington, DC (202) 895-1800; fax (202) 363-0999

Tajikistan New York, NY (212) 472-7645/744-2196

Tanzania Washington, DC (202) 939-6125; fax (202) 797-7408

Thailand Chicago, IL (312) 236-2447-48; fax (312) 236-1906: Los Angeles, CA (323) 962-9574-77; fax (323) 962-2128: New York, NY (212) 745-1770; fax (212) 754-1907: Washington, DC (202) 944-3600; fax (202) 944-3611

Togo Washington, DC (202) 234-4212; fax (202) 232-3190

Tonga Honolulu, HI (808) 521-5149; fax (808) 521-5264 (honorary consul): San Francisco, CA (415) 781-0365; fax (415) 781-3964: New York (917) 369-1025; fax (917) 369-1024

Trinidad and Tobago Miami, FL (305) 374-2199; fax (305) 374-3199: New York, NY (212) 682-7272; fax (212) 986-2146: Washington, DC (202) 467-6490; fax (202) 785-3130

Tunisia Washington, DC (202) 862-1850; fax (202) 862-1858

Turkey Chicago, IL (312) 263-0644; fax (312) 263-1449: Houston, TX (713) 623-5849; fax (713) 623-6639: Los Angeles, CA (323) 937-0118; fax (323) 932-0061: New York, NY (212) 949-0160; fax (212) 983-1293: Washington, DC (202) 612-6700; fax (202) 612-6744

Turkmenistan Washington, DC (202) 588-1500; fax (202) 588-0697

Tuvalu (See Listing for United Kingdom)

Uganda Washington, DC (202) 726-7100-02; fax (202) 726-1727

Ukraine Chicago, IL (312) 642-4388; fax (312) 642-4385: New York, NY (212) 371-5690; fax (212) 371-5547: Washington, DC (202) 333-0606; fax (202) 333-0817

United Arab Emirates Washington, DC (202) 955-7999; fax (202) 337-7029

United Kingdom Atlanta, GA (404) 542-5856: Boston, MA (617) 248-9555; fax (617) 248-957: Cleveland, OH (216) 621-7674: Dallas, TX (214) 637-3600: Houston, TX (713) 659-6270; fax (713) 659-7094: Los Angeles, CA (310) 477-3322; fax (310) 575-1450: Miami, FL (305) 374-1522: Orlando, FL (407) 426-7855; fax (407) 426-9343: New York, NY (212) 752-8400; fax (212) 754-3062: San Francisco, CA (415) 981-3030; fax (415) 434-2018: Seattle, WA (206) 622-9255: Washington, DC (202) 588-6500; fax (202) 588-7870

Uruguay Coral Gables, FL (305) 443-9764; fax (305) 443-7802: New York, NY (212) 753-8581; fax (212) 394-5777: Santa Monica, CA (310) 394-5777; fax (310) 394-5140: Washington, DC (202) 331-1313-16; fax (202) 331-8142

Uzbekistan New York, NY (212) 754-7403; fax (212) 486-7998: Washington, DC (202) 887-5300; fax (202)293-6804

Vanuatu New York, NY (212) 593-0144; fax (212) 593-0219 (U.N. Mission)

Venezuela Baltimore, MD (301) 962-0362-64: Boston, MA (617) 266-9355/68: Chicago, IL (312) 236-9655: Houston, TX (713) 961-5141: Miami, FL (305) 577-4214; fax (305) 372-5167: New Orleans, LA (504) 522-3284: New York, NY (212) 826-1660: Philadelphia, PA (215) 627-7900: San Francisco, CA (415) 421-5172: San Juan, PR (809) 725-4055: Washington, DC (202) 342-2214; fax (202) 342-6820

Vietnam San Francisco, CA (415) 922-1577; fax (415) 922-1848: Washington, DC (202) 861-0737; fax (202) 861-0917

Yemen Detroit, MI (313) 271-0840: San Francisco, CA (415) 989-3636: Washington, D. C. (202) 965-4760; fax (202) 337-2017

Zambia New York, NY (212) 758-1110; fax (212) 972-7360: Washington, DC (202) 265-9717-19; fax (202) 332-0826

Zimbabwe Washington, DC (202) 332-7100; fax (202) 483-9326

ADDENDUM 1 – A

Successor states of the former USSR (April 20, 1993)

ARMENIA	Embassy of the Republic of Armenia 122 C. St., N.W., Suite 360 Washington, D.C. 20001 (202) 628-5766 Fax (202) 628-5769
AZERBAIJAN	1515 L. Street, N.W. Washington, D.C. 20036 (202) 973-0365
BELARUS	Embassy of Belarus 1611 K. St., N.W., Suite 619 Washington, D.C. 20005 (202) 638-2954; Fax (202)638-3058
GEORGIA	Contact Russian Federation (202) 628-7511 or 628-8548
KAZAKHSTAN	Embassy of Kazakhstan 3421 Massachusetts Ave., N.W. Washington, D.C. 20007 (202) 333-4507; Fax (202) 333-4509
KYRGYZSTAN	Embassy of Kyrgyzstan 1511 K. St., N.W., Suite 705 Washington, D.C. 20005 (202) 347-3732; Fax (202) 347-3718
MOLDOVA	Moldova Mission to the U.N. 573-577 Third Ave. New York, N.Y. 10016 (212) 682-3523; Fax (212) 682-6274
RUSSIAN FEDERATION	Embassy of Russian Federation 1125 16th St., N.W. Washington, D.C. 20036 (202) 628-7511 or 628-8548; Fax (202) 347-5028
TAJIKISTAN	Tajikistan Mission to the U.N. (c/o Russian Mission to the U.N.) 136 East 67th Avenue New York, N.Y. 10021 (212) 472-7645

TURKMENISTAN	Turkmenistan Mission to the U.N. 136 East 67th Avenue New York, N.Y. 10021 (212) 472-5921; Fax (212) 628-0252
UKRAINE	Embassy of Ukraine 1828 L. St., N.W. Washington, D.C. 20036 (202) 296-6960; Fax (202) 296-2450
UZBEKISTAN	Uzbekistan Mission to the U.N. 122 W. 27th St., 8th Floor New York, N.Y. 10001 (212) 675-3922; Fax (212) 675-3334

For updates contact: Assistant Legal Adviser for Consular Affairs, U.S. Department of State, Washington, D.C. 20520; telephone (202) 647-4415; fax (202) 736-7559.

ADDENDUM 1 – B

Successor entities of the former Socialist Federal Republic of Yugoslavia

BOSNIA	Washington, D.C.	(202) 745-8000 Ext. 7457
CROATIA	Washington, D.C.	(202) 543-5580
MACEDONIA	Washington, D.C.	(202) 682-0519
MONTENEGRO	Washington, D.C.	(202) 462-6566
SERBIA	Washington, D.C.	(202) 462-6566
SLOVENIA	Washington, D.C.	(202) 828-1650

Successor entities of the former Socialist Federal Republic of Czechoslovakia

CZECH REPUBLIC	Washington, D.C.	(202) 363-6315
SLOVAK REPUBLIC	Washington, D.C.	(202) 363-6315 Ext. 48

April 20, 1993*

- Latest Update available at publication. For future updates contact: Assistant Legal Adviser for Consular Affairs, U.S. Department of State, Washington, D.C. 20520; telephone (202) 647-4415; fax (202) 736-7559.

Addendum 2

Suggested Fax Sheet for Notifying Consular Officers of Arrests or Detentions

Date: _____

Time: _____

To: Embassy of _____, Washington, DC

or

Consulate of _____, _____, _____

(Country) (City) (State)

From:

Name: _____

Office: _____

Street Address: _____

City: _____

State: _____

ZIP Code: _____

Telephone: (____)_____

Fax: (____)_____

Subject: NOTIFICATION OF ARREST/DETENTION OF A NATIONAL OF YOUR COUNTRY

We arrested/detained the following foreign national, whom we understand to be a national of your country, on _____, _____.

Mr./Ms. _____

Date of birth: _____

Place of birth: _____

Passport number: _____

Date of passport issuance: _____

Place of passport issuance: _____

To arrange for consular access, please call _____ between the hours of _____ and _____. Please refer to case number _____ when you call.

Comments:

Addendum 3

Questions About Foreign Nationals

Q. Who is a "foreign national"?
A. For the purposes of consular notification, a "foreign national" is any person who is not a U.S. citizen.

Q. Is a foreign national the same as an "alien"?
A. Yes. The terms "foreign national" and "alien" are used interchangeably.

Q. Is a person with a U.S. "green card" considered a foreign national?
A. Yes. Lawful permanent resident aliens, who have a resident alien registration card (INS Form I-551), commonly known as a "green card," retain their foreign nationality and must be considered "foreign nationals" for the purposes of consular notification.

Q. Do I have to ask everyone I arrest or detain whether he or she is a foreign national?
A. No, although some law enforcement entities do routinely ask persons taken into detention whether they are U.S. Citizens. If a detainee claims to be a U.S. citizen in response to such a question, you generally can rely on that assertion and assume that consular notification requirements are not relevant. If you have reason to question whether the person you are arresting or detaining is a U.S. citizen, however, you should inquire further about nationality so as to determine whether any consular notification obligations apply.

Q. Short of asking all detainees about their nationality, how might I know that someone is a foreign national?
A. A foreign national may present a foreign passport or an alien registration document as identification. If a person presents a document that indicates birth outside the United States or claims to have been born outside the United States, he or she may be a foreign national. (Most, but not all, persons born in the United States are U.S. citizens; most, but not all, persons born outside the United States are not.) Unfamiliarity with English may also indicate foreign nationality. Such indicators could be a basis for asking the person whether he/she is a foreign national.

Q. What about undocumented and "illegal" aliens?
A. All foreign nationals are entitled to consular notification and access, regardless of their visa or immigration status in the United States. Thus "illegal" aliens have the same rights to consular assistance as do "legal" aliens. There is no reason, for purposes of consular notification, to inquire into a person's legal status in the United States.

Q. What about dual nationals?
A. A person who is a national/citizen of two or more countries other than the United States should be treated in accordance with the rules applicable to each of those countries. A person who is a citizen of the United States and an-other

country may be treated exclusively as a U.S. citizen when in the United States. In other words, consular notification is not required if the detainee is a U.S. citizen. This is true even if the detainee's other country of citizenship is a mandatory notification country.

Questions About Who Is Responsible for Consular Notification

Q. Who is actually responsible for notification?
A. The responsibility for consular notification, whether in the case of an arrest and detention, a death, or the appointment of a guardian for a foreign national, lies with what are generally called "competent authorities." This term is understood to mean those officials, whether federal, state, or local, who are responsible for legal action affecting the foreign national and who are competent, within their legal authorities, to give the notification required. This interpretation makes sense as a practical matter: compliance with the notification requirements works best when it is assumed by those government officials closest to the foreign national's situation and with direct responsibility for it.

Q. Who is responsible for notification of arrests and detentions?
A. The law enforcement officers who actually make the arrest or who assume responsibility for the alien's detention ordinarily should make the notification.

Q. What is the responsibility of judicial officials and prosecutors for notification of arrests and detentions?
A. Because they do not hold foreign nationals in custody, judicial officials and prosecutors are not responsible for notification. The Department of State nevertheless encourages judicial officials who preside over arraignments or other initial appearances of aliens in court to inquire at that time whether the alien has been provided with consular notification as required by the VCCR and/or any bilateral agreement providing for mandatory notification. The Department also encourages prosecutors to make similar inquiries. Inquiries such as these will help promote compliance with the consular notification procedures and facilitate the provision of consular assistance by foreign governments to their nationals.

Q. Who is responsible for notification of deaths and of sea and air wrecks?
A. Notification should be made by the appropriate state or local authority, be it a coroner or a probate court official. In cases of serious injury, wrecks, accidents, or major disasters (such as an airline crash), the competent authority may vary, but government officials responsible for such situations should ensure that notification is given when required.

Q. Who is responsible for notification of appointments of guardians?
A. Notification should be made by probate court officials or by representatives of the state or local equivalent of an attorney general, or by any other appropriate official involved in the guardianship process.

Q. Why are state and local government officials expected to provide such notification?
A. State and local governments must comply with the consular notification and access obligations because these obligations are embodied in treaties that are the law of the land under the Supremacy Clause of the United States Constitution. The federal government, however, would be responsible for a dispute with a foreign government concerning obligations under the relevant treaties.

Questions About When Consular Notification Should Be Given

Q. What kinds of detentions are covered by this obligation?
A. The VCCR provides for informing the foreign national of the right to consular notification and access if the national is "arrested or committed to prison or to custody pending trial or is detained in any other manner." While there is no explicit exception for short detentions, the Department of State does not consider it necessary to follow consular notification procedures when an alien is detained only momentarily, e.g., during a traffic stop. On the other hand, requiring a foreign national to accompany a law enforcement officer to a place of detention may trigger the consular notification requirements, particularly if the detention lasts for a number of hours or overnight. The longer a detention continues, the more likely it is that a reasonable person would conclude that the Article 36 obligation is triggered.

Q. Do we have to inform and notify even when the detention is only while a traffic citation is written, or for a similar brief time?
A. No. The VCCR on its face requires informing a foreign national that a consular official may be notified whenever a foreign national is arrested or detained in any manner, without distinguishing arrests that do not result in a significant detention. The purpose of this requirement, however, is to ensure that a government does not place an alien in a situation in which the alien cannot receive assistance from his/her own government. When an alien is cited and immediately released, this consideration is not relevant because the alien is free to contact consular officials independently. The Department of State therefore does not consider brief routine detentions, such as for traffic violations or accident investigations, to be the type of situation contemplated by the VCCR.

Q. If we have a foreign national detained in a hospital, do we have to provide consular notification?
A. Yes, if the foreign national is detained pursuant to governmental authority (law enforcement, judicial, or administrative) and is not free to leave. He/she must be treated like a foreign national in detention, and appropriate notification must be provided.

Q. Are aliens in immigration detention covered by the consular notification requirement?
A. Yes, as a general matter. Consular notification is provided for in the Immigration and Naturalization Service's regulations (8 C.F.R. 236.1(e)). The Department of State does not, however, ordinarily consider aliens who are found

inadmissible at a port of entry and required to remain there until they can depart to be detained within the meaning of the VCCR. Immigration officials may permit such aliens access to consular officials as a matter of discretion, however—e.g., in situations where the detention becomes prolonged because onward transportation is significantly delayed.

Q. Do I have to give a foreign national consular notification even if I give the Miranda warning?
A. Yes. Consular notification should not be confused with the Miranda warning, which is given regardless of nationality to protect the individual's constitutional rights against self-incrimination and to the assistance of legal counsel. Consular notification is given as a result of international legal requirements, so that a foreign government can provide its nationals with whatever consular assistance it deems appropriate. You should follow consular notification procedures with respect to detained foreign nationals in addition to providing Miranda or other warnings when required.

Q. If the alien's government is aware of the case and helping with our investigation, should we still go through the process of notification?
A. Yes. It is important to distinguish between a government's consular officials and other officials, such as law enforcement officers, who have different functions and responsibilities. Even if law enforcement officials of the alien's country are aware of the detention and are helping to investigate the crime in which the alien was allegedly involved, it is still important to ensure that consular notification procedures are followed.

Questions About How Consular Notification Should Be Given

Q. How quickly do I need to inform the detainee of the right to consular notification?
A. The VCCR requires that a foreign national be notified "without delay" of the right to consular assistance. There should be no deliberate delay, and notification should occur as soon as reasonably possible under the circumstances. Once foreign nationality is known, advising the national of the right to consular notification should follow promptly. In the case of an arrest followed by a detention, the Department of State would ordinarily expect the foreign national to have been advised of the possibility of consular notification by the time the foreign national is booked for detention. The Department encourages judicial authorities to confirm during court appearances of foreign nationals that consular notification has occurred as required.

Q. Does the notification to the foreign national have to be in writing?
A. No. You may inform the detainee orally or in writing. Providing the notification in writing may be helpful, however, particularly when the foreign national does not clearly understand English. A sample notification statement is on page 7 of this booklet; translations of the statement into a number of foreign languages are in Part Four. In addition, the Department of State strongly recommends that a written record of the fact of notification be maintained.

Q. If the foreign national requests that consular officials be notified, how quickly do I have to do so?
A. This notification should also occur "without delay" after the foreign national has requested that it be made. The Department of State also considers "without delay" here to mean that there should be no deliberate delay, and that notification should occur as soon as reasonably possible under the circumstances. The Department of State would normally expect notification to consular officials to have been made within 24 hours, and certainly within 72 hours. On the other hand, the Department does not normally consider notification of arrests and detentions to be required outside of a consulate's regular working hours. In some cases, however, it will be possible and convenient to leave a message on an answering machine at the consulate or to send a fax even though the consulate is closed. (If a message is left on an answering machine, the Department of State encourages a follow-up call during normal business hours to ensure that it was received.) In addition, in cases of emergencies (such as deaths or serious accidents), efforts should be made to contact consular officials outside of normal hours.

Q. In the case of a "mandatory notification" country, how quickly must the notification be provided to consular officials?
A. The bilateral agreements that provide for mandatory notification use such formulations as "without delay" and "immediately." A few provide that notification should occur immediately and not later than within two, three, or four days. Thus, the same guidance as above would generally apply: there should be no deliberate delay, and notification should occur as soon as reasonably possible under the circumstances.

Q. Can we simplify the process by always notifying consular officials, regardless of the alien's wishes, instead of worrying about which countries are "optional" and which are "mandatory?"
A. No. You should not adopt a policy of notifying consular officers in every case regardless of whether notification is mandatory. The VCCR provides for giving the foreign national the option of having consular officials notified in part because of a concern that some foreign nationals will not want the fact of their arrest or detention disclosed unnecessarily. In some cases, a foreign national may be afraid of his/her government and may wish to apply for refugee status/asylum in the United States. The privacy wishes of the foreign national should therefore be respected unless there is a mandatory notification requirement. Only in mandatory notification cases should you notify consular officials regardless of the alien's wishes.

Q. When we notify the consulate, should we tell them the reasons for the detention?
A. Generally you may use your discretion in deciding how much information to provide consistent with privacy considerations and the applicable international agreements. Under the VCCR, the reasons for the detention do not have to be provided in the initial communication. The detainee may or may not want this information communicated. Thus we suggest that it not be provided unless requested specifically by the consular officer, or if the detainee authorizes the

disclosure. Different requirements may apply if there is a relevant bilateral agreement. (Some of the bilateral agreements require that the reasons for the detention be provided upon request.) If a consular official insists that he/she is entitled to information about an alien that the alien does not want disclosed, the Department of State can provide guidance.

Q. Isn't it wrong to follow "mandatory notification" procedures if the alien doesn't want his consular officials notified? What about the alien's privacy interests? What if the alien is afraid of his own government?
A. If the alien is from a "mandatory notification" country, notification must be given even if the alien objects or claims to be afraid. If the alien is an asylum seeker, arrangements can be made to protect the alien while ensuring that his/her government's right to notification is protected. Under no circumstances should the fact that a foreign national has applied for asylum or withholding of removal be revealed to that national's government. Specific guidance on such cases may be obtained from the Department of State.

Q. If the foreign national is from a "mandatory notification" country and I notify the consulate as required, should I tell the foreign national?
A. Yes. The alien should always be told that his consulate has been notified. While the mandatory notification agreements generally do not expressly require that the national be informed of such notification, informing the national is provided for in the VCCR. Most countries with which the United States has a bilateral agreement also belong to the VCCR.

Q. Can I comply with consular notification requirements by simply letting the detained alien have access to a telephone?
A. Not necessarily. It is the responsibility of the government officials responsible for the detention to ensure that consular notification is made. If the alien is from a mandatory notification country, you must ensure that notification is given to the consular officials; permitting the alien access to a phone, without taking further action, will not be sufficient for this purpose. If the alien is not from a mandatory notification country but wants consular notification, simply making a phone available also may not be sufficient. There must be adequate arrangements to ensure that the alien is actually able to make contact with his/her consular officials, and the responsible law enforcement officials must be able to confirm that contact was in fact made.

Q. Is there a guiding principle I can follow in applying the consular notification requirements?
A. Yes. Remember, always, that these are mutual obligations. In general, you should treat the foreign national as you would want an American citizen to be treated in a similar situation in a foreign country. This means prompt, courteous notification to the foreign national of the possibility of consular assistance, and prompt, courteous notification to the foreign national's nearest consular officials so that they can perform whatever consular services they deem appropriate.

Questions About Failure To Notify

Q. If we failed to provide notification at the time of arrest and the alien is still in custody, what should we do?
A. Consular notification is "better late than never." You should follow the instructions in this booklet as soon as you become aware that a foreign national is in detention but consular notification procedures were not followed. A foreign government may commence providing consular assistance at any time, and should be given the opportunity to do so.

Q. If we failed to provide consular notification but the alien is receiving consular assistance, should we still go through the process of notification?
A. If the foreign national has already established contact with his/her consular officials, the Department of State does not consider it necessary to remedy a failure to provide consular notification by going through the procedures described in this booklet. The consular notification procedures are a mechanism to ensure that a foreign government can provide consular assistance to its nationals who are detained. Once the foreign government's consular officials are aware of the detention it is not necessary, for the mere sake of formality, to follow consular notification procedures. If the foreign government officials involved are not consular officials, however (e.g., if they are law enforcement officials), then consular notification procedures should still be followed.

Q. If we failed to provide consular notification and the alien has already been released from detention, should we still go through the process of notification?
A. If the alien is still involved in proceedings related to the reasons for which he/she was originally detained, the Department of State would recommend that he/she be advised of the possibility of consular assistance even if no longer detained, because consular assistance could still be useful. If proceedings against the alien have ended, so that consular assistance is unlikely to have any continuing relevance, the Department does not consider that it is necessary to provide notification.

Q. What is the remedy if we failed to give consular notification?
A. If the foreign national is still in detention, you should provide notification as soon as you become aware that it was not provided. This will ensure that the foreign government is given the opportunity to provide consular assistance for the remaining period of detention. If the Department of State receives a complaint that consular notification was not provided, it will take appropriate action. For example, the Department may request the relevant facts from the detaining federal, state, or local authority; discuss the matter with the foreign government involved; apologize on behalf of the Government of the United States to the concerned foreign government for a failure to provide consular notification; intervene to ensure that consular access is permitted; or seek to work with the involved federal, state, or local detaining officials to improve future compliance. Some aliens are attempting to obtain judicial remedies (such as new trials or sentencing hearings) for failures to give notification. Others have sought executive clemency. For further information on these developments,

consult with the appropriate federal or state authorities, or call the Department of State.

Questions About Consular Access and Assistance

Q. What can we expect a consular officer to do once notified?
A. A consular officer may do a variety of things to assist a foreign national. The consular officer may speak with the detained foreign national over the phone and/or arrange one or more consular visits to meet with the detainee about his/her situation and needs. A consular officer may assist in arranging legal representation, monitor the progress of the case, and seek to ensure that the foreign national receives a fair trial (e.g., by working with the detainee's lawyer, communicating with prosecutors, or observing the trial). The consular officer may speak with prison authorities about the detainee's conditions of confinement, and may bring the detainee reading material, food, medicine, or other necessities, if permitted by prison regulations. A consular officer frequently will be in touch with the detainee's family, particularly if they are in the country of origin, to advise them of the detainee's situation, morale, and other relevant information. The actual services provided by a consular officer will vary in light of numerous factors, including the foreign country's level of representation in the United States and available resources. For example, some countries have only an Embassy in Washington, DC, and will rarely be able to visit their nationals imprisoned in locations remote from there. Other countries have consulates located in many major U.S. cities and may regularly perform prison visits throughout the United States. Each country has discretion in deciding what level of consular services it will actually provide.

Q. Can we rely on the consular officer to arrange for legal counsel?
A. No. If the foreign national has a right to counsel and requests that he/she be given a court-appointed lawyer, the usual process of arranging counsel should be followed. While a consular officer is permitted to assist in arranging counsel, the consular officer may or may not actually choose to take such action.

Q. Is a consular officer entitled to act as legal counsel for a detained alien?
A. No. Consular officers are not permitted to practice law in the United States. They may, however, participate in litigation as "friends of the court," and they may assist an alien and his/her legal counsel in preparation of the alien's defense.

Q. Do I have to permit a consular officer to have access to a detainee?
A. Yes. Consular officers are entitled to visit and to communicate with their detained nationals. This is true even if the foreign national has not requested a visit. The consular officer must refrain from taking action on behalf of the foreign national if so requested by the national, however.

Q. Are consular officers entitled to visit whenever they want to?
A. No. Law enforcement authorities may make reasonable regulations about the time, place, and manner of consular visits to detained foreign nationals. Those regulations cannot, however, be so restrictive that the purpose of consular

assistance is defeated. These matters are addressed in Article 36 of the VCCR. The Department urges law enforcement authorities to grant foreign consular officials liberal access to detained persons, granting the consular officer every courtesy and facility consistent with local laws and regulations. Liberal visiting privileges are particularly important when consular officers have to travel long distances to visit their nationals.

Q. Do consular officers have to comply with prison security regulations?
A. Yes. If the consular officer questions having to follow a particular security rule, the consular officer should be advised to address the question to the Department of State. Such questions may arise occasionally because, while not exempt from security regulations, under rules relating to the privileges and immunities of diplomatic and consular officers, consular officers conducting prison visits are entitled to be treated with respect.

Q. Can a consular officer be subject to search prior to visiting a prisoner?
A. Yes. Even though a consular officer has certain privileges and immunities, the officer must comply with applicable prison security rules. On the other hand, because a consular officer is entitled to be treated with respect, any search of a consular officer should not be unnecessarily intrusive.

Q. Is a consular officer entitled to meet privately with a detained foreign national?
A. Yes, as a general rule. The VCCR entitles consular officers to converse with their nationals. It does not explicitly state that such conversations may be private, but some of the bilateral agreements do contain such explicit requirements. The Department of State believes that consular officers should normally be able to converse in private. This does not mean, however, that the conversation cannot be observed for security reasons. If a consular officer insists upon a private meeting but the detained national objects to meeting privately, you should seek guidance from the Department of State.

Q. Is there a guiding principle I can follow in providing consular access?
A. Yes. Remember, always, that these are mutual obligations. In general, you should permit a consular officer the same access to a foreign national that you would want an American consular officer to have to an American citizen in a similar situation in a foreign country.

Questions About Contacting the Department of State

Q. Do we need to notify the U.S. Department of State when we detain a foreign national?
A. No. Your obligations are to inform the detainee of the right to consular notification, and to make the notification to the detainee's embassy or consulate if the detainee requests or if the detainee is from a "mandatory notification" country. You do not need to inform the State Department about the detention, and in fact we generally prefer that you not do so, since informing the State Department often causes confusion about whether the foreign consulate has been informed properly in a timely manner. On the other hand, it may be

appropriate to in-form us of unusual cases, provided that this is not done in lieu of making any required notification to a foreign consulate. Also, if you have questions about the VCCR consular notification obligation or related matters, the Department stands ready to help with information and advice.

Q. How can I get answers to other questions?
A. Additional inquiries may be directed to the Office of the Assistant Legal Adviser for Consular Affairs, L/CA, Room 5527A, U.S. Department of State, Washington, DC 20520; telephone number 202-647-4415; facsimile number 202-736-7559. Urgent telephone inquiries after regular business hours may be directed to the State Department Operations Center, 202-647-1512.

Addendum 4

ALABAMA

Peace Officer Status – None

Specific Arrest Authority – None

Private Person Arrest Authority – Ala. Code § 15-10-7(a)

A private person may arrest another for any public offense:

(1) Committed in his presence;

(2) Where a felony has been committed, though not in his presence, by the person arrested; or

(3) Where a felony has been committed and he has reasonable cause to believe that the person arrested committed it.

Uniform Criminal Extradition Act – Adopted: Ala. Code § 15-9-41

ALASKA

Peace Officer Status – Alaska Stat. § 01.10.060(a)(7)

The statutory definition of "peace officer" includes "an officer whose duty it is to enforce and preserve the public peace," although Federal officers are not specifically mentioned.

Specific Arrest Authority – Alaska Stat. §§ 18.65.010; 18.65.080

The commissioner of public safety may appoint qualified police officers of the Federal Government as special officers if the commissioner considers them necessary to aid and assist the division of state troopers in the enforcement of the criminal laws. Alaska Stat. § 18.65.010(a).

Special officers may prevent crime, pursue and apprehend offenders, obtain legal evidence, institute criminal proceedings, execute warrants of arrest or search and seizure, or other criminal process issuing from any court of the state. A special officer may make arrests in the same manner as a member of the division of state troopers. Alaska Stat. § 18.65.010(b).

A state trooper may execute any lawful warrant or order of arrest, and make an arrest without warrant for a violation of law committed in the presence of the state trooper. Alaska Stat. § 18.65.080.

Private Person Arrest Authority – Alaska Stat. § 12.25.030(a)

A private person or a peace officer without a warrant may arrest a person:

(1) for a crime committed or attempted in the presence of the person making the arrest;

(2) when the person has committed a felony, although not in the presence of the person making the arrest; or,

(3) when a felony has in fact been committed, and the person making the arrest has reasonable cause for believing the person to have committed it.

Uniform Criminal Extradition Act – Adopted: Alaska Stat. § 12.70.130

ARIZONA

Peace Officer Status – Ariz. Rev. Stat. §§ 13-3875(B), 13-3883

A Federal peace officer who is employed by an agency of the United States and who has completed the basic training curriculum for that agency shall possess and exercise all law enforcement powers of peace officers in Arizona for one year, including, if directed by the officer's employer, the capability to enforce the criminal laws of Arizona if the Federal peace officer:

(1) Submits to the sheriff a written request for certification as a peace officer in Arizona, and

(2) Submits evidence that the officer has been certified as a Federal peace officer, is authorized by Federal law to engage in or supervise the prevention, detection, investigation or prosecution of a violation of Federal law and is authorized by Federal law to make arrests, serve warrants and carry firearms.

Peace officers may make warrantless arrests when:

(1) A felony has been committed and the peace officer has probable cause to believe the person to be arrested has committed the felony.

(2) A misdemeanor has been committed in his presence and the peace officer has probable cause to believe the person to be arrested has committed the offense.

Specific Arrest Authority – None

Private Person Arrest Authority – Ariz. Rev. Stat. § 13-3884

A private person may make an arrest:

(1) When the person to be arrested has in his presence committed a misdemeanor amounting to a breach of the peace, or a felony.

(2) When a felony has been in fact committed and he has reasonable ground to believe that the person to be arrested has committed it.

Uniform Criminal Extradition Act – Adopted: Ariz. Rev. Stat. § 13-3854

ARKANSAS

Peace Officer Status – See below

Specific Arrest Authority – Ark. Code Ann. § 16-81-106

"United States Customs and Border Protection special agents, inspectors, and patrol officers" may "act as officers for the arrest of offenders against the laws of this state and shall enjoy the same immunity, if any, to the same extent and under the same circumstances as certified state law enforcement officers...."

An arrest may be made without a warrant [1] where the offense is committed in the officer's presence, or [2] where the officer has reasonable grounds for believing that the person arrested has committed a felony, or, [3] in the case of a misdemeanor, where the officer has probable cause to believe that the person has committed a battery upon another person, the officer finds evidence of bodily harm, and the officer reasonably believes that there is danger of violence unless the person alleged to have committed the battery is arrested without delay.

Private Person Arrest Authority – Ark. Code Ann. § 16-81-106(d)

A private person may make an arrest where he or she has reasonable grounds for believing that the person arrested has committed a felony.

Uniform Criminal Extradition Act – Adopted: Ark. Code Ann. § 16-94-214(a)

CALIFORNIA

Peace Officer Status – See below

Specific Arrest Authority – Cal. Penal Code §§ 830.8, 836(a)

Cal. Penal Code § 830.8 provides:

(a) Federal criminal investigators and law enforcement officers are not California peace officers, but may exercise the powers of arrest of a peace officer in any of the following circumstances:

(1) Any circumstances specified in Section 836 [see below] or Section 5150 of the Welfare and Institutions Code [pertaining to violent, mentally ill persons] for violations of state or local laws.

(2) When these investigators and law enforcement officers are engaged in the enforcement of [F]ederal criminal laws and exercise the arrest powers only incidental to the performance of these duties.

(3) When requested by a California law enforcement agency to be involved in a joint task force or criminal investigation.

(4) When probable cause exists to believe that a public offense that involves immediate danger to persons or property has just occurred or is being committed.

In all of these instances, the provisions of Section 847 [requiring the person making the arrest to bring the arrestee to a magistrate or a peace officer] shall apply. **These investigators and law enforcement officers, prior to the exercise of these arrest powers, shall have been certified by their agency heads as having satisfied the training requirements of Section 832, or the equivalent thereof.** [Emphasis added.]

Cal. Penal Code § 836(a) provides:

A peace officer may arrest a person in obedience to a warrant, or … without a warrant … whenever any of the following circumstances occur:

(1) The officer has probably cause to believe that the person to be arrested has committed a public offense in the officer's presence.

(2) The person arrested has committed a felony, although not in the officer's presence.

(3) The officer has probable cause to believe that the person to be arrested has committed a felony, whether or not a felony, in fact, has been committed.

Private Person Arrest Authority – Cal. Penal Code § 837

A private person may arrest another:

(1) For a public offense committed or attempted in his presence.

(2) When the person arrested has committed a felony, although not in the private person's presence.

(3) When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.

Uniform Criminal Extradition Act – Adopted: Cal. Penal Code § 1551.1

Persons accused of crimes in other states may only be arrested by peace officers.

COLORADO

Peace Officer Status – Yes; Colo. Rev. Stat. 16-3-110(1)(b)

Specific Arrest Authority – Colo. Rev. Stat. §§ 16-3-101, 16-3-102, 16-3-110(2)

A peace officer may arrest a person any time of day or night when:

(1) He has a warrant commanding that such person be arrested; or

(2) Any crime has been or is being committed by such person in his presence; or

(3) He has probable cause to believe that an offense was committed and has probable cause to believe that the offense was committed by the person to be arrested.

Private Person Arrest Authority – Colo. Rev. Stat. § 16-3-201

"A person who is not a peace officer may arrest another person when any crime has been or is being committed by the arrested person in the presence of the person making the arrest."

Uniform Criminal Extradition Act – Colo. Rev. Stat. § 16-19-115

CONNECTICUT

Peace Officer Status – Limited

Peace officer status for "any special agent of the federal government authorized to enforce the provisions of Title 21 of the United States Code." Conn. Gen. Stat. § 53a-3(9)

Specific Arrest Authority – None

Private Person Arrest Authority – Conn. Gen. Stat. § 53a-22

Conn. Gen. Stat. § 53a-22(f) provides:

A private person acting on his or her own account is justified in using reasonable physical force upon another person when and to the extent that he or she reasonably believes such to be necessary to effect an arrest or to prevent the escape from custody of an arrested person whom he or she reasonably believes to have committed an offense….

State v. Smith, 63 Conn. App. 228, 238, 775 A.2d 313, 321 (2001), provides:

> According to the plain language of the statute, a private citizen may use reasonable force in arresting an individual whom he reasonably believes has committed an offense. If the arrested individual did not commit an offense, however, regardless of the reasonableness of the private citizen's belief, the latter is not justified in making a citizen's arrest. There is no requirement in § 53a-22 that the citizen making the arrest must also have witnessed the commission of the offense or have come upon the scene shortly after its occurrence, nor has our Supreme Court put such a gloss on the statute.

Uniform Criminal Extradition Act – Adopted: Conn. Gen. Stat. § 54-170

DELAWARE

Peace Officer Status –

It is unclear whether CBP officers are peace officers under Delaware law. Del.Code Ann. tit. 11 § 1901 defines "peace officer" as "any public officer authorized by law to make arrests in a criminal case." However, *United States v. Moderaki*, 280 F.Supp. 633 (Dist. Del. 1968) suggests that Customs officers may be peace officers under Delaware law. *Moderaki* held that Postal Inspectors are not "peace officers" in Delaware based largely on the fact that Postal Inspectors do not have clear authority to arrest and specifically contrasted Postal Inspectors' unclear arrest authority with that of Customs officers, which is "granted … in no uncertain terms." *Id.* at 638.

Specific Arrest Authority – Del. Code Ann. tit 11 § 1912

Delaware law provides that a sworn federal law-enforcement officer, who is authorized by law to make arrests, shall have the same legal status and immunity from suit as a member of the Delaware State Police when making arrests provided:

(1) The federal officer reasonably believes that the person arrested committed or is committing a felony in the officer's presence; or

(2) The federal officer is rendering assistance to a Delaware peace officer in an emergency or at the Delaware peace officer's request.

Private Person Arrest Authority – *Delaware v. Lawrence*, 2001 Del. C.P. Lexis 22 (2001) recognizes common-law right of citizen's arrest, but holds it is not applicable to motor vehicle violations per 21 Del. C. § 701.

Uniform Criminal Extradition Act – Adopted: 11 Del. Code 2530.

DISTRICT OF COLUMBIA

Peace Officer Status – None

Specific Arrest Authority – D.C. Code Ann. §§ 23-501, 23-581.

An investigative officer or agent of the United States may arrest without a warrant:

(1) A person who he has probable cause to believe has committed or is committing a felony;

(2) A person who he has probable cause to believe has committed or is committing an offense in his presence;

(3) A person who he has probable cause to believe has committed or is about to commit certain offenses and, unless immediately arrested, may not be apprehended, may cause injury to others, or may tamper with, dispose of, or destroy evidence; and

(4) A person whom he has probable cause to believe has committed certain offenses, if the officer has reasonable grounds to believe that, unless the person is immediately arrested, reliable evidence of alcohol or drug use may become unavailable or the person may cause injury or property damage.

Private Person Arrest Authority – D.C. Code Ann. § 23-582(b)

A private person may arrest another without a warrant when there is probable cause to believe a felony or certain offenses designated by statute are being committed in the presence of the person making the arrest. A private person may arrest another in aid of a law enforcement officer or special policeman, or other person authorized to make an arrest.

Uniform Criminal Extradition Act – Adopted: D.C. Code Ann. § 23-704

FLORIDA

Peace Officer Status – None

Specific Arrest Authority – Fla. Stat. 901.1505 (1-2)

Any "federal law enforcement officer" empowered to arrest for violations of the United States code, carry firearms in performance of his or her duties, and who has received law enforcement training equivalent to that required of state officers may make a warrantless arrest. Warrantless arrests are authorized where the federal officer is on duty and encounters any person who commits a violent state misdemeanor or felony in the officer's presence, or where the officer reasonably believes he or she has committed such a violation.

Private Person Arrest Authority –

Citizens in the state of Florida have a common law right to arrest for a felony committed in their presence or for a felony that they know was committed if they have probable cause to believe and do believe that the arrested person is guilty. *Phoenix, et al. v. State of Florida*, 455 So. 2d 1024 (1984).

Uniform Criminal Extradition Act – Adopted: Fla. Stat. §§ 941.01 - 941.30.

GEORGIA

Peace Officer Status – Ga. Code Ann. § 35-9-15

The sheriff or the chief or director of a law enforcement agency of this state or of any political subdivision thereof may appoint, a law enforcement officer of the United States as a law enforcement officer of this state for the purpose of providing mutual assistance in the enforcement of the laws of this state or of the United States.

For purposes of this Code, to qualify as a "law enforcement officer of the United States or any state," "the appointee must necessarily possess the requisite qualifications to **hold the position of law enforcement officer** within that officer's home jurisdiction." 1999 Op. Att'y Gen. No. 99-6 (emphasis added).

Specific Arrest Authority – None

Private Person Arrest Authority – Ga. Code Ann. § 17-4-60

A private person may arrest an offender if the offense is committed in his presence or within his immediate knowledge. If the offense is a felony and the offender is escaping or attempting to escape, a private person may arrest him upon reasonable and probable grounds of suspicion.

Citizens effecting an arrest under this statute are cautioned that the phrases "in his presence" and "within his immediate knowledge" are synonymous: the citizen effecting the arrest must have first-hand knowledge of the crime. *See Peidmont*

Hotel Co. v. Henderson, 72 S.E. 51 (Ga. Ct. App. 1911); *Johnson v. Jackson*, 230 S.E.2d 756 (Ga. Ct. App. 1976).

Uniform Criminal Extradition Act – Adopted: Ga. Code Ann. § 17-13-34

GUAM

Peace Officer Status – 8 G.C.A. § 5.55(l)

Specific Arrest Authority – 8 G.C.A. § 20.15

A peace officer may make an arrest in obedience to a warrant, or may, without a warrant, arrest a person whenever the officer has reasonable cause to believe that the person to be arrested has committed an offense in the officer's presence; when the person arrested has committed a felony, although not in the officer's presence; whenever the officer has reasonable cause to believe that the person to be arrested has committed a felony or misdemeanor whether or not a felony or misdemeanor has in fact been committed; or a person who has escaped from jail or prison or the lawful custody of a peace officer.

Use of Force – 8 G.C.A. § 20.45

Any peace officer who has reasonable cause to believe that a person to be arrested has committed an offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance.

HAWAII

Peace Officer Status – None

Specific Arrest Authority – H.R.S. 803-16.

An officer of the United States Customs and Border Protection Service or the Citizenship and Immigration Services, without a warrant, may arrest a person if:

(1) The officer is on duty;

(2) One or more of the following situations exists:

(A) The person commits an assault or other crime involving physical harm, defined and punishable under chapter 707, against the officer or against any other person in the presence of the officer;

(B) The person commits an offense against public order, defined and punishable under chapter 711, in the presence of the officer;

(C) The officer has probable cause to believe that a crime as provided in subparagraph (A) or (B) has been committed and has probable cause to believe that the person to be arrested has committed the crime;

(D) The officer has probable cause to believe that a felony has been committed and probable cause to believe the person to be arrested has committed the felony; or

(E) The officer has received information by written, telegraphic, telephonic, radio, or other authoritative source that a law enforcement officer holds a warrant for the person's arrest; and

(3) The Director of the Hawaii district office for the Customs and Border Protection Service, or the Citizenship and Immigration Services, as the case may be, certifies to the State that the officer has received proper training within the agency to enable that officer to enforce or administer this section.

Private Person Arrest Authority – H.R.S. 803-2; H.R.S. 803-3; H.R.S. 803-4.

A private person may arrest another for:

(1) the commission of crime in the person's presence;

(2) breach of peace or other offense has been committed and the offender attempts escape;

(3) where a crime has been committed and a person is found near the place where the crime was committed and is attempting to hide or escape which creates a reasonable suspicion that the person is the offender.

Uniform Criminal Extradition Act – Adopted: H.R.S. 832-14.

IDAHO

Peace Officer Status – None; *see* Idaho Code §§ 19-501, 19-5101(d)

Specific Arrest Authority – None

Private Person Arrest Authority – Idaho Code § 19-604

A private person may arrest another:

(1) for a public offense committed or attempted in his presence;

(2) when the person arrested has committed a felony, although not in his presence; or,

(3) when a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

Uniform Criminal Extradition Act – Adopted: Idaho Code § 19-4514

ILLINOIS

Peace Officer Status – 720 ILCS 5/2-13

CBP officers authorized to make arrests for violations of federal criminal laws have arrest authority as peace officers:

(1) for violations of laws concerning unlawful use of weapons,

(2) for purposes of assisting an Illinois peace officer in an arrest,

(3) when the commission of a any offense under Illinois law is directly observed by the officer, and

(4) for statutes involving the false personation of a peach officer, false personation of a peace officer while carrying a deadly weapon, and aggravated false personation of a peace officer.

Specific Arrest Authority – None

Private Person Arrest Authority – 725 ILCS 5/107-3

A citizen may arrest another provided there are reasonable grounds to believe an offense (other than violation of an ordinance) is being committed.

Uniform Criminal Extradition Act – Adopted: 725 ILCS 225/14**.**

INDIANA

Peace Officer Status – None

Specific Arrest Authority – Ind. Code Ann. § 35-33-1-1 (2010)

A person who:

(1) is employed full time as a **federal** enforcement **officer;**

(2) is empowered to effect an arrest with or without warrant for a violation of the United States Code; and

(3) is authorized to carry firearms in the performance of the person's duties;

may act as an officer for the arrest of offenders against the laws of this state where the person reasonably believes that a felony has been or is about to be committed or attempted in the person's presence.

Private Person Arrest Authority – Ind. Code § 35-33-1-4

Any person may arrest another if:

(1) the other person committed a felony in his presence;

(2) a felony has been committed and he has probable cause to believe the other person committed the felony;
(3) a misdemeanor involving a breach of peace is being committed in his presence and the arrest is necessary to prevent the continuance of the breach of peace.

Uniform Criminal Extradition Act – Adopted: Ind. Code Ann. § 35-33-10-3(15).

IOWA

Peace Officer Status – None

Specific Arrest Authority – Iowa Code § 804.7A

Federal law enforcement officers who are authorized to carry firearms and make arrests, with or without a warrant, for federal violations may make an arrest:

when he has reasonable grounds for believing that an indictable public offense has been committed and has reasonable grounds for believing that the person to be arrested has committed it; or he is rendering assistance to a peace officer of this state in an emergency or at the request of the peace officer.

Private Person Arrest Authority – Iowa Code § 804.9

A private person may make an arrest:

(1) for a public offense committed or attempted in the person's presence;

(2) when a felony has been committed, and the person has reasonable ground for believing that the person to be arrested has committed it.

Uniform Criminal Extradition Act – Adopted: Iowa Code § 820.14.

KANSAS

Peace Officer Status – None

Specific Arrest Authority – None

Private Person Arrest Authority – K.S.A. § 22-2403

A person may arrest another person when:

(1) A felony has been or is being committed and the person making the arrest has probable cause to believe that the arrested person is guilty; or

(2) any crime, other than a traffic infraction *or a cigarette or tobacco infraction*, has been or is being committed by the arrested person in the view of the person making the arrest.

Uniform Criminal Extradition Act – Adopted: K.S.A. § 22-2714.

KENTUCKY

Peace Officer Status – None

Specific Arrest Authority – None

Private Person Arrest Authority – K.R.S. § 431.005

A private person may make an arrest when a felony has been committed in fact and there is probable cause to believe that the person being arrested has committed it.

Uniform Criminal Extradition Act – Adopted: K.R.S. § 440.280.

LOUISIANA

Peace Officer Status – None

Specific Arrest Authority – None

Private Person Arrest Authority – La. Code Crim. Proc. art. 214

A private person may make an arrest when the person arrested has committed a felony, whether in or out of his presence.

Uniform Criminal Extradition Act – Not Adopted.

MAINE

Peace Officer Status – Me. Rev. Stat. Ann. title 25, § 1502-A

Peace officer status or equivalent authority (does not use term "peace officer"). An officer of an agency of the United States Department of Homeland Security who has received requisite state training may enforce Maine law when a state crime is committed, to assist a state or local law enforcement officer in an emergency or at the request of the state or local law enforcement officer, or when the agent has received information from an authoritative source that a state or local law enforcement officer holds a warrant for the person's arrest.

Specific Arrest Authority – Me. Rev. Stat. Ann. title 25, § 1502-A

An officer of an agency of the United States Department of Homeland Security that has administrative and enforcement jurisdiction over immigration, customs or border security matters and who has received training in Maine criminal law and Maine law on the use of force has the power to enforce state law when one or more of the following situations exist.

A. The federal officer has an articulable and reasonable suspicion to believe that the person to be stopped has committed, is committing or is about to commit a state crime or has probable cause to believe that the person to be arrested has committed or is committing a state crime.

B. The federal officer is providing assistance to a state, county or municipal law enforcement officer in an emergency or at the request of the state, county or municipal law enforcement officer.

C. The federal officer has received information from an authoritative source that a state, county or municipal law enforcement officer holds a warrant for the person's arrest.

Private Person Arrest Authority – Me. Rev. Stat. Ann. title 17-A, § 16

A private person with probable cause may arrest for murder, Class A, B and C crimes actually committed or in the process of being committed, certain Class D and E crimes committed in a public place and in the presence of the person making the arrest.

Uniform Criminal Extradition Act – Adopted: Me. Rev. Stat. Ann. title 15, § 214

MARYLAND

Peace Officer Status – None

Specific Arrest Authority – Md. Criminal Procedure Code Ann. § 2-104

Federal officers who are authorized to make an arrest with or without a warrant for violations of the United States Code and who are authorized to carry firearms in the performance of their duties, may exercise the same powers of arrest as Maryland police officers if they are:

(1) participating in a joint investigation with a state or local law enforcement agency;

(2) rendering assistance to a police officer;

(3) acting at the request of a local police officer or a state police officer; or

(4) An emergency exists.

Officers acting under the authority granted in this statutory provision must make certain notifications in accordance with the statute. Md. Criminal Procedure Code Ann. § 2-104(c)

Private Person Arrest Authority – In Maryland citizen's arrest is governed by case law not statute.

A private person may arrest another without a warrant only when:

(1) there is a felony being committed in his or her presence or when a felony has in fact been committed whether or not in his presence, and the arrester has probable cause to believe the person being arrested has committed it; or

(2) a misdemeanor, amounting to a breach of the peace is being committed in his or her presence or view.

Stevenson v. State of Maryland, 287 Md. 504, 510 (Md. 1980); *Great Atlantic Pacific Tea Co. v. Paul*, 256 Md. 643, 655 (Md. 1970).

Uniform Criminal Extradition Act – Adopted: Md. Criminal Procedure Code Ann. § 9-114.

MASSACHUSETTS

Peace Officer Status – None

Specific Arrest Authority – None

Private Person Arrest Authority –

Under common law, a private citizen may lawfully arrest another who has in fact committed a felony. *Commonwealth v. Claiborne*, 423 Mass. 275 (1996).

Uniform Criminal Extradition Act – Adopted: Mass. Ann. Laws Chapter 276, § 20B

MICHIGAN

Peace Officer Status – MCL § 764.15d

CBP officers authorized under federal law to make arrests, with or without a warrant, for violations of federal law and authorized by federal law to carry a firearm in the performance of duties, may arrest persons for state law violations in the following situations:

1) The federal officer possesses a state warrant for the arrest of the person for a felony,

2) The federal officer has received positive information from an authoritative source, in writing or by telegraph, telephone, teletype, radio, computer, or other means, that another federal law enforcement officer or a peace officer possessed a state warrant for the arrest of the person for a felony,

3) The federal officer is participating in a joint investigation conducted by a federal agency and a state or local law enforcement agency,

4) The federal officer is acting pursuant to the request of a state or local law enforcement officer or agency,

5) The federal officer is responding to an "emergency." The statute defines an emergency as a sudden or unexpected circumstance that requires immediate action to protect the health, safety, welfare, or property of a person from actual or threatened harm or for an unlawful act.

See Lewandowski v. Nuclear Mgmt. Co., LLC, 272 Mich. App. 120 (2006) (only Federal law enforcement officers, not all federal employees, have authority under Mich. Comp. Laws § 764.15d).

Specific Arrest Authority – MCL § 764.15(2)

A CBP officer, without a warrant, may arrest a person for a state law violation if

the officer is on duty and has received training in the laws of Michigan equivalent to the training provided for local police officers, if one or more of the following situations exist:

1) The person commits an assault or an assault and battery on the officer.

2) The person commits an assault or an assault and battery on any other person in the officer's presence or commits any felony.

3) The officer has reasonable cause to believe a felony has been committed and reasonable cause to believe the person committed it, and the reasonable cause is not founded on a customs search.

4) The officer has received positive information by written, telegraphic, teletypic, telephonic, radio, electronic, or other authoritative source that a peace officer or a court holds a warrant for the person's arrest.

Private Person Arrest Authority – MCL § 764.16

A private person may make an arrest in the following situations:

1) For a felony committed in the private person's presence.

2) If the person to be arrested has committed a felony although not in the private person's presence.

3) If the private person is summoned by a peace officer to assist the officer in making an arrest.

Uniform Criminal Extradition Act – Adopted: MCL § 780.13

MINNESOTA

Peace Officer Status – Minn. Stat. § 626.8453.

A "qualified federal law enforcement officer" has the authority of a peace officer **only** when: 1) assigned to a special purpose task force created under a written memorandum of understanding between the federal law enforcement agency and a local government or state agency that has been filed with the Minnesota Board of Peace Officer Standards and Training; and, 2) acting with the scope of the written memorandum.

Specific Arrest Authority – Minn. Stat. §§ 629.30, 629.34

A CBP officer may arrest without a warrant when:

(1) the officer is on duty within the scope of assignment and one of the following situations exist:

a) the person commits an assault in the fifth degree against the officer;

b) the person commits an assault in the fifth degree against any person in the presence of the officer, or commits a felony;

c) the officer has reasonable cause to believe a felony has been committed and reasonable cause to believe that the person committed it, or;

d) the officer has received positive information by written, teletypic, telephonic, radio, or other authoritative source that a peace officer holds a warrant for the person's arrest.

(2) the assistance of the officer has been requested by another Minnesota law enforcement agency.

Private Person Arrest Authority – Minn. Stat. § 629.37

A private person may arrest another without a warrant under the following circumstances:

(1) For a public offense committed or attempted in the arresting person's presence;

(2) When the person arrested has committed a felony, although not in the arresting person's presence; or

(3) When a felony has in fact been committed, and the arresting person has reasonable cause for believing the person arrested to have committed it.

Uniform Criminal Extradition Act – Adopted: Minn. Stat. §§ 629.01 – 629.29; *see, specifically,* § 629.14.

MISSISSIPPI

Peace Officer Status – None

Specific Arrest Authority - Miss. Code Ann. § 99-3-1.

Federal law enforcement officers may make arrests only in cooperation with local law enforcement officers.

Private Person Arrest Authority – Miss. Code Ann. § 99-3-7.

An officer or private person may arrest any person without warrant,

(1) For an indictable offense committed, or a breach of the peace threatened or attempted in his presence; or

(2) When a person has committed a felony, though not in his presence; or

(3) When a felony has been committed, and he has reasonable ground to suspect and believe the person proposed to be arrested to have committed it; or

(4) On a charge, made upon reasonable cause, of the commission of a felony by the party proposed to be arrested.

And in all cases of arrests without warrant, the person making such arrest must inform the accused of the object and cause of the arrest, except when he is in the actual commission of the offense, or is arrested on pursuit.

Uniform Criminal Extradition Act – Not Adopted.

MISSOURI

Peace Officer Status – None

Specific Arrest Authority – § 70.820 R.S.Mo.

A CBP officer who is empowered to effect an arrest with or without a warrant for violation of the United States Code and who is authorized to carry a firearm in the performance of the his official duties as a federal law enforcement officer may arrest on view, and without a warrant, at any place within this state, any person the officer sees asserting physical force or using trouble compulsion for the purpose of causing or creating a substantial risk of death or serious physical injury to any person, or any person the officer sees committing a dangerous felony ...

> Such an officer has the same authority as a law enforcement officer of this state while rendering assistance at the request of any law enforcement officer of this state; or is effecting an arrest or providing assistance as part of a bona fide task force or joint investigation in which law enforcement officers of this state are participating.

Private Person Arrest Authority

Missouri recognizes the common law citizen's arrest allowing such arrests on a showing of a commission of a felony and reasonable grounds to suspect the arrested party committed it, or to prevent a breach of the peace. *Missouri v. Devlin*, 745 S.W.2d 850 (Mo. App. 1988).

Uniform Criminal Extradition Act – Adopted: R.S. Mo. § 548.141.

MONTANA

Peace Officer Status – None

Specific Arrest Authority – Mont. Code Ann., § 46-6-412

A CBP officer may make an arrest without a warrant if the officer is on duty and one or more of the following situations exist:

> (1) A person commits or attempts to commit an offense in the officer's presence.
>
> (2) The officer believes on reasonable grounds that the person is committing an offense or that the person committed an offense and the circumstances require his immediate arrest.
>
> (3) The officer believes on reasonable grounds that a warrant for the person's arrest has been issued in this state.
>
> (4) The officer believes on reasonable grounds that a felony warrant for the person's arrest has been issued in another jurisdiction.

Private Person Arrest Authority – Mont. Code Ann., § 46-6-502

> (1) A private person may arrest another when there is probable cause to believe that the person is committing or has committed an offense and the existing circumstances require the person's immediate arrest.
>
> (2) A private person making an arrest shall immediately notify the nearest available law enforcement agency or peace officer and give custody of the person arrested to the officer or agency.

Uniform Criminal Extradition Act – Adopted: Mont. Code Ann. §§ 46-30-101 – 46-30-413; *see, specifically,* § 46-30-301.

NEBRASKA

Peace Officer Status – None

Specific Arrest Authority – None

Private Person Arrest Authority – R.R.S. Neb. § 29-402

A private person may, without warrant, arrest any person, if a petit larceny or a felony has been committed, and there is reasonable ground to believe the person arrested is guilty of such offense, and may detain him until legal warrant can be obtained.

Uniform Criminal Extradition Act – Adopted: R.R.S. Neb. § 29-742.

NEVADA

Peace Officer Status – None

Specific Arrest Authority – None

Private Person Arrest Authority – Nev. Rev. Stat. §171.126

A private person may arrest another:

> (1) For a public offense committed or attempted in the person's presence;
>
> (2) When the person arrested has committed a felony, although not in the person's presence;
>
> (3) When a felony has been in fact committed, and the private person has reasonable cause for believing the person arrested to have committed it.

Uniform Criminal Extradition Act – Adopted: Nev. Rev. Stat. §179.205

NEW HAMPSHIRE

Peace Officer Status – N.H. Rev. Stat. Ann § 594:1 (2010).

The terms "officer" or "peace officer" are defined to include any "person authorized to make arrests in a criminal case." No case has been located which interpreted this definition to include or exclude CBP officers or any other federal law enforcement officer.

Specific Arrest Authority – None

Private Person Arrest Authority – N.H. Rev. Stat. Ann § 627:5 (IV) (2010).

"A private person acting on his own is justified in using non-deadly force upon another when and to the extent that he reasonably believes it necessary to arrest or prevent the escape from custody of such other whom he reasonably believes to have committed a felony and who in fact has committed that felony: but he is justified in using deadly force for such purpose only when he reasonably believes it necessary to defend himself or a third person from what he reasonably believes to be the imminent use of deadly force."

Uniform Criminal Extradition Act – Adopted: N.H. Rev. Stat. Ann. § 612:14 (2010)

NEW JERSEY

Peace Officer Status – None

Specific Arrest Authority – N.J. Stat. § 2A:154-5 (2010)

Federal officers[393] who are empowered to effect an arrest, with or without a warrant, for United States Code violations and who are authorized to carry firearms in the performance of their duties, may act as an officer for the arrest of offenders against the laws of New Jersey where the federal officer reasonably believes that a crime of the first, second or third degree (where the potential sentence is eighteen months or more) is being or is about to be committed.

Private Person Arrest Authority – N.J. Stat. § 2A:169-3 (2010)

Whenever an offense is committed in his presence, a private person may apprehend without warrant or process any disorderly person, and take him before any magistrate of the county where apprehended.

Uniform Criminal Extradition Act – Adopted: N.J. Stat. § 2A:160-22 (2010)

NEW MEXICO

Peace Officer Status – N.M. Stat. Ann. § 29-1-11(E) (2010)

[393] The New Jersey statute only provides these powers to "Customs Inspectors." It did not provide such powers to Immigration Inspectors. Therefore, it is arguable that CBPOs are only covered by the New Jersey statute when they are performing Customs functions.

"All persons who are duly commissioned federal law enforcement officers employed by the … United States customs service; immigration and naturalization service … and other appropriate federal officers whose primary duty is law enforcement related, who are assigned in New Mexico and who are required to be designated by the county sheriff on a case-by-case basis in the county in which they are working, are recognized and authorized to act as New Mexico peace officers and have all the powers of New Mexico peace officers to enforce state laws in New Mexico, including the power to make arrests for violation of state laws. The department of public safety shall maintain a registry that lists the name and affiliated federal agency of every federal law enforcement officer recognized and authorized to act as a New Mexico peace officer pursuant to the provisions of this subsection."

Specific Arrest Authority – None

Private Person Arrest Authority –

"Citizen's arrest is a power historically extended only to cases involving the commission of a felony, though later extended to citizens for a breach of the peace occurring in their presence." *N.M. v. Emmons,* 161 P.3d 920; 2007 N.M. App. LEXIS 56 (N.M.Ct. App. 2007)

Uniform Criminal Extradition Act – Adopted: N.M. Stat. Ann. § 31-4-1 *et al.*

NEW YORK

Peace Officer Status – (Limited Peace Officer Powers Granted)

Specific Arrest Authority – – N.Y. Crim. Proc. §§ 2.15, 2.20, 140.25 (2011)

Federal law enforcement officers, including Customs and Border Protection Officers and Border Patrol Agents,[394] have the following powers:

(a) The power to make warrantless arrests pursuant to [N.Y. Crim Proc. Law §] 140.25

(This statute concerns arrests made without a warrant for any offense actually committed in the officer's presence or when the officer has reasonable cause to believe that such person has committed such offense in his presence. The officer is also authorized to make an arrest under a

[394] New York statutes provide this authority to "Customs Inspectors" and "Immigration Inspectors." New York courts have interpreted this authority to apply to "Customs and Border Patrol Agents" People v. Boyea, 844 N.Y.S.2d 156 (2007) and Border Patrol Agents, People v. Brenno, 834 N.Y.S.2d 850 (2007) .

criminal statute when "by nature of his particular employment or by express provision of law, [the officer] is required or authorized to enforce" the criminal statute if the crime is committed or believed by him to have been committed "within the geographical area of such . . . officer's employment." Outside of the geographical area of his employment, the officer is only authorized to make such an arrest "during or immediately after the allegedly criminal conduct or during the alleged perpetrator's immediate flight therefrom.")

* * *

(b) the power to use physical force and deadly physical force in making an arrest or preventing and escape pursuant to section 35.30 of the penal law (which statute delineates the situations in which deadly force is justified);

(c) the power to carry out warrantless searches whenever such searches are constitutionally permissible and acting pursuant to their special duties;

* * *

(h) The power to possess and take custody of firearms not owned by the peace officer, for the purpose of disposing, guarding, or any other lawful purpose, consistent with his duties as a peace officer.

Private Person Arrest Authority – N.Y. Crim. Proc. § 140.30 (2011).

Arrest without a warrant; by any person; when and where authorized

1. Subject to the provisions of subdivision two, any person may arrest another person (a) for a felony when the latter has in fact committed such felony, and (b) for any offense when the latter has in fact committed such offense in his presence.

2. Such an arrest, if for a felony, may be made anywhere in the state. If the arrest is for an offense other than a felony, it may be made only in the county in which such offense was committed**.**

Uniform Criminal Extradition Act – Adopted: N.Y. Crim. Proc. 570.34

NORTH CAROLINA

Peace Officer Status – None

Specific Arrest Authority – N.C. Gen. Stat. § 15A-406 (2010)

* * *

(b) A federal law enforcement officer is authorized under the following circumstances to enforce criminal laws anywhere within the State:

(1) If the federal law enforcement officer is asked by the head of a state or local law enforcement agency, or his designee, to provide temporary assistance and the request is within the scope of the state or local law enforcement agency's subject matter and territorial jurisdiction; or

(2) If the federal law enforcement officer is asked by a state or local law enforcement officer to provide temporary assistance when at the time of the request the state or local law enforcement officer is acting within the scope of his subject matter and territorial jurisdiction.

(c) A federal law enforcement officer shall have the same powers as those invested by statute or common law in a North Carolina law enforcement officer, and shall have the same legal immunity from personal civil liability as a North Carolina law enforcement officer, while acting pursuant to this section.

(d) A federal law enforcement officer who acts pursuant to this section shall not be considered an officer, employee, or agent of any state or local law enforcement agency.

(e) For purposes of the Federal Tort Claims Act, a federal law enforcement officer acts within the scope of his office or employment while acting pursuant to this section.

(f) Nothing in this section shall be construed to expand the authority of federal officers to initiate or conduct an independent investigation into violation of North Carolina law.

Private Person Arrest Authority – None, but see N.C. Gen. Stat. § 15A-404 (2010). Detention of offenders by private persons

(a) No Arrest; Detention Permitted. -- No private person may arrest another person except as provided in G.S. 15A-405 (assisting a peace officer). A private person may detain another person as provided in this section.

(b) When Detention Permitted. -- A private person may detain another person when he has probable cause to believe that the person detained has committed in his presence:

(1) A felony,

(2) A breach of the peace,

(3) A crime involving physical injury to another person, or

(4) A crime involving theft or destruction of property.

(c) Manner of Detention. -- The detention must be in a reasonable manner considering the offense involved and the circumstances of the detention.

(d) Period of Detention. -- The detention may be no longer than the time required for the earliest of the following:

(1) The determination that no offense has been committed.

(2) Surrender of the person detained to a law-enforcement officer as provided in subsection (e).

(e) Surrender to Officer. -- A private person who detains another must immediately notify a law-enforcement officer and must, unless he releases the person earlier as required by subsection (d), surrender the person detained to the law-enforcement officer.

Uniform Criminal Extradition Act – Adopted: N.C. Gen. Stat. § 15A-734 (2010)

NORTH DAKOTA

Peace Officer Status – N.D. Cent. Code § 29-05-10

North Dakota defines "peace officer" to include "any state or federal law enforcement officer."

Specific Arrest Authority – N.D. Cent. Code, § 29-06-15

A CBP officer may arrest without a warrant when:

(1) The officer is on duty; (2) One or more of the following situations exist:

a) The person commits an assault or other crime, defined and punishable under chapter 12.1-17 ("Assaults, Threats, Coercion, Harassment"), against the officer or against any other person in the presence of the officer;

b) The officer has reasonable cause to believe that a crime, as defined in paragraph 1 (*see below*), has been committed and reasonable cause to believe that the person to be arrested has committed it;

c) The officer has reasonable cause to believe that a felony has been committed and reasonable cause to believe that the person to be arrested has committed it;

d) The officer has received positive information from an authoritative source that a peace officer holds a warrant for the person's arrest; and

(3) The officer has received training in the laws of this state equivalent to the training provided for a police officer under chapter 12-62.

Paragraph 1, as referenced in 2(b) above, provides:

(1) A law enforcement officer, without a warrant, may arrest a person:

a) For a public offense, committed or attempted in the officer's presence and for the purpose of this subdivision, a crime must be deemed committed or attempted in the officer's presence when what the officer observes through the officer's senses reasonably indicates to the officer that a crime was in fact committed or attempted in the officer's presence by the person arrested.

b) When the person arrested has committed a felony, although not in the officer's presence.

c) When a felony in fact has been committed, and the officer has reasonable cause to believe the person arrested to have committed it.

d) On a charge, made upon reasonable cause, of the commission of a felony by the party arrested.

e) For the public offenses, not classified as felonies and not committed in the officer's presence as provided for under section 29-06-15.1.

f) On a charge, made upon reasonable cause, of driving or being in actual physical control of a vehicle while under the influence of alcoholic beverages.

g) For the offense of violating a protection order under section 14-07.1-06, an order prohibiting contact under section 12.1-31.2-02, or for an assault involving domestic violence under section 14-07.1-11.

h) On a charge, made upon reasonable cause, of being under the influence of volatile chemical vapors in violation of section 19-03.1-22.1.

New subsection of § 29-06-15 approved and filed April 26, 2011:

If a law enforcement officer has reasonable cause to believe an individual has violated a lawful order of a court of this state which requires the individual to participate in the twenty-four seven sobriety program authorized in sections 54-12-27 through 54-12-31, the law enforcement officer may take the individual into custody without a warrant. An individual taken into custody under this subsection may not be released on bail or on the individual's personal recognizance unless the individual has made a personal appearance before a magistrate.

Private Person Arrest Authority – N.D. Cent. Code, § 29-06-20

A private person may arrest another:

1)For a public offense committed or attempted in the arresting person's presence.

2) When the person arrested has committed a felony, although not in the arresting person's presence.

3) When a felony has been in fact committed, and the arresting person has reasonable grounds to believe the person arrested to have committed it.

***See also* N.D. Cent. Code § 29-06-02 ("Who May Make an Arrest")**

Uniform Criminal Extradition Act – Adopted: N.D. Cent. Code §§ 29-30.3-01 – 29-30.3-26; *see, specifically,* § 29-30.3-04.

OHIO

Peace Officer Status – None

Specific Arrest Authority – None

But see Ohio Rev. Code Ann. § 9.88 (2011) (Ohio extends civil immunity to Federal law enforcement officers who provide assistance to state or local law enforcement officers at their request or in the event of an emergency

Private Person Arrest Authority – Ohio Rev. Code Ann. § 2935.04 (2011).

When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained.

See State v. Payton, 1990 Ohio App. LEXIS 1545 (Ohio Ct. App. 1990) and

Uniform Criminal Extradition Act – Adopted: Ohio Rev. Code Ann. § 2963.12 (2011)

OKLAHOMA

Peace Officer Status – 21 Ok. St. Ann. § 99 (2011)

The term "peace officer" means any sheriff, police officer**,** federal law enforcement officer, or any other law enforcement officer whose duty it is to enforce and preserve the public peace.

Every United States Marshal, Marshals Service deputy or other federal law enforcement officer who is employed full-time as a law enforcement officer by the federal government, who is authorized by federal law to conduct any investigation of, and make any arrest for, any offense in violation of federal law shall have the same authority, and be empowered to act, as peace officers within the State of Oklahoma in rendering assistance to any law enforcement officer in an emergency, or at the request of any officer, and to arrest any person committing any offense in violation of the laws of this state.

Specific Arrest Authority – None

Private Person Arrest Authority – 22 Ok. St. Ann. § 202

A private person may arrest another:

(1) For a public offense committed or attempted in his presence;

(2) When the person arrested has committed a felony although not in his presence;

(3) When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.

Uniform Criminal Extradition Act – Adopted: 22 Ok. St. Ann. §§ 1141.1 *et al.*

OREGON

Peace Officer Status – None; *see* Or. Rev. Stat. § 133.005(3)

Specific Arrest Authority – Or. Rev. Stat. §§ 133.005(2), 133.245, 161.615, 414.805

A "Federal officer" is a special agent or law enforcement officer employed by a Federal agency who is empowered to effect an arrest with or without a warrant for violations of the United States Code and who is authorized to carry firearms in the performance of duty. Or. Rev. Stat. § 133.005(2).

Upon certification by the Department of Public Safety Standards and Training that a Federal officer has received proper training, the Federal officer may arrest a person:

(1) for any crime committed in the Federal officer's presence if the Federal officer has probable cause to believe the person committed the crime;

(2) for any felony, or for a misdemeanor punishable by confinement exceeding six months, if the Federal officer has probable cause to believe the person committed the crime;

(3) when rendering assistance to, or at the request of, an officer who is commissioned and employed by a public agency as a peace officer to enforce the criminal laws of Oregon or laws or ordinances of a public agency; or,

(4) when the Federal officer has received positive information in writing or by telephone, telegraph, teletype, radio, facsimile machine or other authoritative source that a peace officer holds a warrant for the person's arrest.

The Federal officer:

(1) shall inform the person to be arrested of the Federal officer's authority and reason for the arrest;

(2) may use physical force as is justifiable and authorized of a peace officer under Oregon law;

(3) shall take the arrested person before a magistrate or deliver the arrested person to a peace officer without unnecessary delay;

(4) retains authority over the arrested person only until the person appears before a magistrate or until the law enforcement agency having general jurisdiction over the area in which the arrest took place assumes responsibility for the person; and,

(5) when making an arrest for a non-Federal offense under the circumstances provided in this section shall have the same immunity from suit as a state or local law enforcement officer.

Or. Rev. Stat. §§ 133.245, 161.615, 414.805.

Private Person Arrest Authority – Or. Rev. Stat. §§ 133.225, 165.255

A private person may arrest another person for any crime committed in the presence of the private person if the private person has probable cause to believe the arrested person committed the crime. A private person making such an arrest shall, without unnecessary delay, take the arrested person before a magistrate or deliver the arrested person to a peace officer. In order to make the arrest a private person may use physical force as is justifiable under Or. Rev. Stat. § 165.255.

Uniform Criminal Extradition Act – Adopted: Or. Rev. Stat. § 133.805

PENNSYLVANIA

Peace Officer Status- None

Pennsylvania courts have not specifically addressed whether federal law enforcement officers are considered peace officers in Pennsylvania. And there are no decisions addressing whether federal law enforcement officers may conduct arrests for offenses considered felonies under Pennsylvania law. The Pennsylvania Supreme Court has held, however, that federal law enforcement officers may not conduct arrests for state traffic violations or misdemeanors. *See Commonwealth v. Price*, 672 A.2d 280, 282 (Pa. 1996) (stating that evidence obtained as a result of a traffic stop conducted by an FBI agent was inadmissible because the agent was "not authorized under either state or federal law nor under common law to arrest for traffic offenses or for misdemeanor crimes").

Specific Arrest Authority – None

Private Person Arrest Authority – common law

A private person may arrest another when a felony has been committed and the private person making the arrest reasonably suspects that the person being arrested committed the felony. *See Commonwealth v. Corley*, 491 A.2d 829 (Pa. 1985).

Uniform Criminal Extradition Act – 42 Pa. Cons. Stat. § 9135 (2010)

PUERTO RICO

Peace Officer Status – P.R. Laws Ann. Title 34A, Ap. II R. 11

A peace officer may make an arrest without the corresponding warrant:

(a) When he has reasonable grounds to believe that the person about to be arrested has committed the offense in his presence. In this case the arrest shall be made immediately or within a reasonable time after the commission of the offense. Otherwise, the officer shall request that a warrant of arrest be issued.

(b) When the person arrested has committed a felony, although not in the officer's presence.

(c) When he has reasonable cause for believing that the person about to be arrested has committed a felony, regardless of whether or not the said offense was in fact committed.

For the purposes of these rules, an officer or peace officer is a person whose duty it is to protect people and property, and maintain public order and safety. This includes, but is not limited to, all members of the Puerto Rico Police

Department and Municipal Police, Agents of the Special Investigations Bureau of the Department of Justice, and Bailiffs of the Judicial Branch.

All federal or state public employees are also considered limited peace officers, with the authority vested in them by law to make arrests when performing their special responsibilities and duties.

Special Provisions.

Act No. 20 of January 20, 1995, as amended by Act No. 137 of August 9, 1995 and Act No. 98 of April 23, 2004, and amended again by arts. 1 and 2 of Act No. 206 of September 27, 2006, provides:

"Article 1.-- Federal peace officers of the Department of Homeland Security, . . . U.S. Customs and Border Protection . . . with the authority to make arrests when performing their duties as such, when carrying out their responsibilities, and acting according to the limitations imposed by the enabling act of their agency, shall be deemed peace officers in Puerto Rico and shall exercise the powers to arrest in the same manner and subject to the same substantive and procedural provisions as the peace officers of Puerto Rico, pursuant to Rule 11 of the Rules of Criminal Procedure.

"Article 2.-- For the purposes of this Act, the term "peace officers" shall mean any special agents, officers, and officials of the Department of Homeland Security . . . U.S. Customs and Border Protection . . . whose duty it is to maintain the public order and who have the permission or authorization to make arrests when performing their regular duties.

"Article 3.-- Said federal peace officers may act pursuant to the provisions of this Act once they have received orientation on the applicable constitutional and legal precepts in accordance with the legal system of Puerto Rico.

"Article 4.-- Said federal peace officers who, when performing the duties vested in them by this Act, are sued for damages in their personal capacity, when the cause of action is due to an alleged violation of civil rights, shall be covered by the provisions of Act No. 104 of June 29, 1955, as amended [secs. 3077 et seq. of Title 32], provided that the Federal Government does not provide them with said protection. The Government of Puerto Rico may pay the judgments resulting from civil actions arising from the wrongful or negligent acts of said officers, even when the Federal Government provides them with legal representation during the course of the same.

Specific Arrest Authority – None

Private Person Arrest Authority – P.R. Laws Ann. Title 34, Ap. II R. 12 (2008)

A private person may arrest another:

(1) For an offense committed or attempted in his presence. In this case the arrest shall be made immediately;

(2) When a felony has been in fact committed, and he has reasonable cause for believing that the person arrested committed it.

Uniform Criminal Extradition Act – Adopted: 34 L.P.R.A. § 1881m (2008) – Arrest without a warrant – The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant, upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one (1) year, but when so arrested the accused must be taken before a magistrate of a Court of First Instance with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in § 1881*l* of this title; and thereafter his answer shall be heard as if he had been arrested on a warrant.

RHODE ISLAND

Peace Officer Status – R.I. Gen. Laws § 12-7-21 (15) (2011)

Under R.I. Gen. Law § 12-7-21(15), "a peace officer is defined as…any federal law enforcement officer."

Under R.I. Gen. Law § 12-7-4, a peace officer may make a warrantless arrest for a felony whenever:

(1) The officer has reasonable ground to believe that a felony has been or is being committed and that the person to be arrested has committed or is committing it;

(2) The person to be arrested in fact has committed or is committing a felony; and in that case it shall be immaterial that the officer did not believe him or her guilty on unreasonable ground or on unreasonable ground entertained belief in his or her guilt.

Finally, under R.I. Gen. Laws § 12-7-3 (2011), a peace officer also may without a warrant arrest a person if the officer has reasonable cause to believe that the person is committing or has committed a misdemeanor or petty misdemeanor and the officer has reasonable ground to believe that the person cannot be arrested later or may cause injury to himself or herself or others or loss or damage to property unless immediately arrested.

Specific Arrest Authority – None

Private Person Arrest Authority – common law

A citizen can arrest another without a warrant, if he has reasonable cause to believe that a felony has been committed and that the person to be arrested committed it. *Monterio v. Howard*, 334 F.Supp. 411 (D. RI. 1971).

Uniform Criminal Extradition Act – Adopted: R.I. Gen. Laws § 12-9-17 (2011)

SOUTH CAROLINA

Peace Officer Status –None

Specific Arrest Authority – S.C. Code Ann. § 23-1-212 (2009).

"(A) For purposes of this section, "federal law enforcement officer" means the following persons who are employed as full-time law enforcement officers by the federal government and who are authorized to carry firearms while performing their duties:

* * * *
(5) United States Customs Service officers;"

Since CBP officers are customs officers as well, they are considered law enforcement officers by the federal government and authorized to carry firearms while performing their duties. Under the South Carolina statute, they are authorized to provide temporary assistance to South Carolina state or local law enforcement agencies. They are not permitted to "initiate or conduct an independent investigation into a violation of South Carolina law," but may arrest when felony or misdemeanor is committed in the officer's presence. S.C. Code Ann. § 23-1-212 (2009).

Private Person Arrest Authority – S.C. Code Ann. §§ 17-13-10; 17-13-20 (2009).

Upon (a) view of a felony committed, (b) certain information that a felony has been committed or (c) view of a larceny committed, any person may arrest the felon or thief and take him to a judge or magistrate, to be dealt with according to law. S.C. Code Ann. § 17-13-10.

S.C. Code Ann. § 17-13-20 (2009) delineates the additional circumstances where citizens may arrest; means to be used.

A citizen may arrest a person in the nighttime by efficient means as the darkness and the probability of escape render necessary, even if the life of the person should be taken, when the person:
(a) has committed a felony;

(b) has entered a dwelling house without express or implied permission;

(c) has broken or is breaking into an outhouse with a view to plunder;

(d) has in his possession stolen property; or

(e) being under circumstances which raise just suspicion of his design to steal or to commit some felony, flees when he is hailed.

Uniform Criminal Extradition Act – Not Adopted.

SOUTH DAKOTA

Peace Officer Status – S.D. Codified Laws §§ 23A-45-9(9), 23A-45-9(13)

Section 23A-45-9(13) defines a "peace officer" as a law enforcement officer**.** In Section 23A-45-9(9), "law enforcement officer" is defined as an officer or employee of the state or any of its units of local government, **or of the United States**, or an employee of a railroad or express company while on duty, who is responsible for the prevention or detection of crimes or for the enforcement of the criminal or highway traffic laws of the state. Section 23A-45-9(9) further provides that the definition of "law enforcement officer" shall not be construed as extending the territorial jurisdiction, statutory jurisdiction, or statutory authority of any law enforcement officer included within the definition.

Specific Arrest Authority – S.D. Codified Laws § 23A-3-25

Section 23A-3-25 describes the extent of a federal law enforcement officer's authority as follows:

"Any federal law enforcement officer holds the same authority as a state or local law enforcement officer in this state when making an arrest for a nonfederal crime under any of the following circumstances:

(1) The officer has reasonable grounds to believe that a state felony has been committed and that the person arrested committed such felony;

(2) The officer is rendering assistance to a state or local law enforcement officer in an emergency or at the request of the state or local law enforcement officer; or

(3) The officer is participating in a task force composed of state or local law enforcement officers and federal law enforcement officers."

Private Person Arrest Authority – S.D. Codified Laws § 23A-3-3

A private person may arrest another:

(1) For a public offense, other than a petty offense, committed or attempted in his presence; or

(2) For a felony that has been in fact committed although not in his presence, if he has probable cause to believe the person to be arrested committed it.

Uniform Criminal Extradition Act – Adopted: S.D. Codified Laws §§ 23-24-1 – 23-24-39; *see, specifically,* § 23-24-16.

TENNESSEE

Peace Officer Status – None

Specific Arrest Authority – Tenn. Code. Ann. § 38-3-113 (2010)

38-3-113. Federal officers making arrests for nonfederal offenses.

A sworn federal law enforcement officer, who in official capacity is authorized by law to make arrests, shall, when making an arrest in this state for a nonfederal offense, have the same legal status and immunity from suit as a state or local law enforcement officer if the arrest is made under the following circumstances:

(1) The officer reasonably believes that the person arrested has committed a felony in the officer's presence or is committing a felony in the officer's presence;

(2) The officer reasonably believes the person arrested has committed a misdemeanor that amounts to a breach of the peace in the officer's presence or is committing such a misdemeanor in the officer's presence; or

(3) The officer is rendering assistance to a law enforcement officer of this state in an emergency or at the request of the officer.

Private Person Arrest Authority – Tenn. Code Ann. § 40-7-109.

A private person may arrest another:

(1) For a public offense committed in the arresting person's presence;

(2) When the person arrested has committed a felony, although not in the arresting person's presence; or

(3) When a felony has been committed, and the arresting person has reasonable cause to believe that the person arrested committed it.

Uniform Criminal Extradition Act – Adopted: Tenn. Code Ann. § 40-9-104

TEXAS

Peace Officer Status – None

Specific Arrest Authority – Tex Code Crim. Proc. Art. 2.122

Art. 2.122. Special Investigators

(a) The following named criminal investigators of the United States shall not be deemed peace officers, but shall have the powers of arrest, search and seizure as to felony offenses only under the laws of the State of Texas:

* * *

(3) Special Agents of the United States Immigration and Customs Enforcement;

* * *

(10) Special Agents of the United States Citizenship and Immigration Services; and

* * *

c) A Customs and Border Protection Officer of the United States Customs and Border Protection or a Border Patrol agent, immigration enforcement agent, or deportation officer of the Department of Homeland Security is not a peace officer under the laws of this state but, on the premises of a port facility designated by the commissioner of the United States Customs and Border Protection as a port of entry for arrival in the United States by land transportation from the United Mexican States into the State of Texas or at a permanent established border patrol traffic check point, has the authority to detain a person pending transfer without unnecessary delay to a peace officer if the agent or officer has probable cause to believe that the person has engaged in conduct that is a violation of Section 49.02, 49.04, 49.07, or 49.08, Penal Code, regardless of whether the violation may be disposed of in a criminal proceeding or a juvenile justice proceeding.

Private Person Arrest Authority – Tex. Code Crim. Proc. Art. 14.01(2010)

Art.1401. Offense Within View

a) A peace officer or any other person, may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace.

Uniform Criminal Extradition Act – Adopted: Tex. Code Crim. Proc. Art. 51.13 § 14

UTAH

Peace Officer Status – U.C.A. § 53-13-102. Peace officer classifications

The following officers may exercise peace officer authority only as specifically authorized by law:

(1) law enforcement officers;

(2) correctional officers;

(3) special function officers; and

(4) federal officers.

Specific Arrest Authority – U.C.A. § 53-13-106 (2010)

§ 53-13-106. Federal officers -- State law enforcement authority

(1) (a) "Federal officer" includes:

* * *

(iii) a special agent of the United States Department of Homeland Security, excluding a customs inspector or detention removal officer;

(b)(i) Federal officers listed in Subsection (1)(a) have statewide law enforcement authority relating to felony offenses under the laws of this state. This Subsection (1)(b)(i) takes precedence over Subsection (2).

(c) The council may designate other federal peace officers, as necessary, if the officers:

(i) are persons employed full-time by the United States government as federally recognized law enforcement officers primarily responsible for the investigation and enforcement of the federal laws;

(ii) have successfully completed formal law enforcement training offered by an agency of the federal government consisting of not less than 400 hours; and

(iii) maintain in-service training in accordance with the standards set forth in Section 53-13-103.

(2) Except as otherwise provided under Title 63L, Chapter 1, Federal Jurisdiction, and Title 77, Chapter 9, Uniform Act on Fresh Pursuit, a federal officer may exercise state law enforcement authority only if:

(a) the state law enforcement agencies and county sheriffs with jurisdiction enter into an agreement with the federal agency to be given authority; and

(b) except as provided in Subsection (3), each federal officer employed by the federal agency meets the waiver requirements set forth in Section 53-6-206.

(3) A federal officer working as such in the state on or before July 1, 1995, may exercise state law enforcement authority without meeting the waiver requirement.

(4) At any time, consistent with any contract with a federal agency, a state or local law enforcement authority may withdraw state law enforcement authority from any individual federal officer by sending written notice to the federal agency and to the division.

(5) The authority of a federal officer under this section is limited to the jurisdiction of the authorizing state or local agency, and may be further limited by the state or local agency to enforcing specific statutes, codes, or ordinances.

Private Person Arrest Authority – U.C.A. § 77-7-3

A private person may arrest another:

(1) For a public offense committed or attempted in his presence; or

(2) When a felony has been committed and he has reasonable cause to believe the person arrested has committed it.

Uniform Criminal Extradition Act – Adopted: U.C.A. § 77-30-14

VERMONT

Peace Officer Status – None

Specific Arrest Authority – Rule 3, Vermont Rules of Criminal Procedure (20 V.S.A. § 2222)

A federal law enforcement officer (including "a special agent, border patrol agent or immigration inspector of the Immigration and Naturalization Service, U.S. Department of Justice; or an officer or inspector of the U.S. Customs Service of the Department of the Treasury") certified by the commissioner of public safety to have received training in Vermont criminal law and having taken an oath to uphold the constitution of the state of Vermont is authorized to arrest for violations of Vermont law if the officer determines that it is necessary to do any of the following:

1) Protect an individual in the presence of the officer from the imminent infliction of serious bodily injury.
2) Provide immediate assistance to an individual who has suffered or is threatened with serious bodily injury.
3) Prevent the escape of any individual whom the officer reasonably believes has committed a crime in the presence of the officer.
4) Prevent the escape of any individual whom the officer reasonably believes has committed a felony under Vermont law.

Private Person Arrest Authority –

Private citizens may arrest for misdemeanors committed in their presence that rise to the level of breaches of the peace. *State v. Hart*, 149 Vt. 104 (1987); *Vermont v. Barber*, 157 Vt. 228 (1990).

Uniform Criminal Extradition Act – Adopted: 13 V.S.A. § 4954

The arrest of a person may be lawfully made by an officer or a private citizen without a warrant upon reasonable information that the accused stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one year. When so arrested, the accused shall be taken before a superior judge, assistant judge of the superior court, or judge of a district court as soon as may be and complaint shall be made against him or her under oath setting forth the ground for the arrest as in section 4953 of this title; and thereafter his or her answer shall be heard as if he or she had been arrested on a warrant.

VIRGIN ISLANDS

Peace Officer Status – None

Specific Arrest Authority – None

Private Person Arrest Authority – Title 5, § 3563 of the Virgin Islands Code

A private person may arrest another—

(1) for a public offense committed or attempted in his presence;

(2) when the person arrested has committed a felony, although not in his presence; or

(3) when a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.

Uniform Criminal Extradition Act – Adopted: Title 5, § 3814 of the Virgin Islands Code

The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in section 3813 of this title; and thereafter his answer shall be heard as if he had been arrested on a warrant.

VIRGINIA

Peace Officer Status – Virginia Code Annotated § 19.2-12

A CBP officer is a "conservator of the peace" while engaged in the performance of official duties.

Specific Arrest Authority – Virginia Code Annotated §§ 19.2-18, 19.2-19, and 19.2-81.

Every conservator of the peace shall have authority to arrest without a warrant in the following instances:

a. Any person threatens to kill or injure another or to commit violence or injury against his person or property.
b. Any person who commits any crime in the presence of the officer and any person whom he has reasonable grounds or probable cause to suspect of having committed a felony not in his presence.
c. At the scene of any accident involving a motor vehicle, watercraft, or motorboat, or at any hospital or medical facility to which any person involved in such accident has been transported, or in the apprehension of any person charged with the theft of any motor vehicle, on any of the highways or waters of the Commonwealth, upon reasonable grounds to believe, based upon personal investigation, including information obtained from eyewitnesses, that a crime has been committed by any person then and there present, apprehend such person without a warrant of arrest. For purposes of this section, "the scene of any accident" shall include a reasonable location where a vehicle or person involved in an accident has been moved at the direction of a law-enforcement officer to facilitate the clearing of the highway or to ensure the safety of the motoring public.

d. Within three hours of the alleged offense, arrest without a warrant at any location any person whom the officer has probable cause to suspect of driving or operating a motor vehicle, watercraft or motorboat while intoxicated, whether or not the offense was committed in such officer's presence.
e. Persons duly charged with a crime in another jurisdiction upon receipt of a photocopy of a warrant or a capias, telegram, computer printout, facsimile printout, a radio, telephone or teletype message, in which photocopy of a warrant, telegram, computer printout, facsimile printout, radio, telephone or teletype message shall be given the name or a reasonably accurate description of such person wanted and the crime alleged.
f. An alleged misdemeanor not committed in his presence when the officer receives a radio message from his department or other law-enforcement agency within the Commonwealth that a warrant or capias for such offense is on file.
g. An alleged misdemeanor not committed in their presence involving shoplifting, carrying a weapon on school property, assault and battery, brandishing a firearm, or destruction of property, when such property is located on premises used for business or commercial purposes, or a similar local ordinance, when any such arrest is based on probable cause upon reasonable complaint of the person who observed the alleged offense.

NOTE: Specific Arrest Authority regarding boating and licensing laws – see Va. Code Ann. 29.1-205:

> *Any . . . officers of the customs as defined by 19 U.S.C. 1709(b), in the conduct of their official duties in uniform, shall have the same power to make arrests under Chapter 7 (29.1-700* et seq.*) of Title 29.1 as conservation police officers."*

The arrest power described here is restricted to authorities under Title 29, Chapter 7 of the Virginia Code, which covers only boating and licensing.

Private Person Arrest Authority –

Under Virginia common law, an arrest for a felony, without a warrant, is permitted when the felony has actually occurred and the arresting citizen has "reasonable grounds for believing that the person arrested was the one who committed it." *Hall v. Commonwealth*, 389 S.E.2d 921 (Va. Ct. App. 1990). *See Tharp v. Commonwealth*, 270 S.E.2d 752 (Va. 1980); *Moore v. Oliver*, 347 F. Supp. 1313 (W.D. Va. 1972). A private person also has arrest authority for any breach of the peace committed in his/her presence, whether it is a felony or misdemeanor. *Hudson v. Commonwealth*, 585 S.E.2d 583 (2003). Breach of the peace is defined as any offense "disturbing the public peace, or a violation of

public order or public decorum. Actual personal violence is not an essential element in the offense." *Id.*

Uniform Criminal Extradition Act – Adopted: Va. Code Ann. § 19.2-100

The arrest of a person may be lawfully made also by any peace officer or private person without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year. But when so arrested the accused shall be taken before a judge, magistrate or other officer authorized to issue criminal warrants in this Commonwealth with all practicable speed and complaint made against him under oath setting forth the ground for the arrest as in the preceding section; and thereafter his answer shall be heard as if he had been arrested on a warrant.

WASHINGTON

Peace Officer Status – None

Rev. Code Wash. § 10.93.020(6) defines a "Federal peace officer" as "any employee or agent of the United States government who has the authority to carry firearms and make warrantless arrests and whose duties involve the enforcement of criminal laws of the United States." However, Rev. Code Wash. § 10.93.100 provides that "Federal peace officers shall have no additional powers by virtue of this chapter but shall be limited to those powers already vested by law or hereafter created by separate enactment."

Specific Arrest Authority – None

Rev. Code Wash. § 10.88.330(2) purports to provide officers "of the United States customs service or the immigration and naturalization service" with specific arrest authority. However, the importance of this section has been vitiated by the Washington State Supreme Court's decision in *State v. Bradley*, 105 Wash. 2d 898, 901 (1986), which provided:

> The purpose of [Rev. Code Wash. §] 10.88 is to establish a summary executive procedure for the extradition of persons accused of a crime in a different jurisdiction.... [Rev. Code Wash. §] 10.88.330 thus controls the warrantless arrests of persons charged with crimes by another state, not the warrantless arrests of persons found to [have committed crimes] in this state.

Private Person Arrest Authority

Washington State has no statute explicitly authorizing arrests by private persons. *State v. Gonzalez*, 24 Wash. App. 437, 439 (1979). However, Washington State recognizes the common-law doctrine of a "citizen's arrest." This doctrine provides that "an individual can make a citizen's arrest when a felony or a misdemeanor that constitutes a breach of the peace is committed in that individual's presence." *State v. Malone*, 106 Wash. 2d 607, 610 n.1 (1986).

Uniform Criminal Extradition Act – Adopted: Rev. Code Wash. § 10.88.330(1)

WEST VIRGINIA

Peace Officer Status – None

Specific Arrest Authority – None

Private Person Arrest Authority –

A private person, without a warrant, may arrest another for a misdemeanor committed in his/her presence when that misdemeanor constitutes a breach of the peace. *State v. Gustke*, 516 S.E.2d 283 (W. Va. 1999). A private person, without a warrant, may arrest another for a felony committed in his/her presence. *See State. v. Farmer,* 454 S.E.2d 378 (1994).

Uniform Criminal Extradition Act – Adopted: W. Va. Code § 5-1-9(e)

The arrest of a person may be lawfully made also by any peace officer, or a private person, without a warrant, upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or by imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him or her under oath setting forth the ground for the arrest as in the preceding section and thereafter his or her answer shall be heard as if he or she had been arrested on a warrant. Correctional officers may, additionally, make complaint against persons in their custody for whom they have a reasonable belief stand accused of crimes, punishable by death or confinement for a term exceeding one year, in the courts of another state.

WISCONSIN

Peace Officer Status – Wisconsin Statues Annotated §§ 175.05(1)(c)

"Peace officer" includes sheriffs, undersheriffs, deputy sheriffs, police officers, railroad police officers appointed under s. 192.47, constables, marshals, deputy marshals, and federal law enforcement officers.

Specific Arrest Authority – Wis. Stat. § 175.40(7)(a).

A CBP officer who is empowered to arrest for violations of the United States Code, and who is authorized to carry firearms in the performance of duty, may, while engaged in the performance of official duties:

> (1) make an arrest for a violation of state law or render aid or assistance if the officer has reasonable grounds for believing that a felony has been or is being committed in his or her presence and has reasonable grounds for believing that the person to be arrested has committed the felony; or
>
> (2) render assistance to a Wisconsin law enforcement officer in an emergency or at the request of the Wisconsin law enforcement officer.

Private Person Arrest Authority –

Wisconsin recognizes the common law rule permitting a warrantless arrest when a misdemeanor involving breach of the peace or a felony is committed in the person's presence. *City of Waukesha v. Gorz*, 479 N.W.2d 221 (Wisc. App. 1991).

Uniform Criminal Extradition Act – Adopted: Wis. Stat. § 976.03(14).

The arrest of a person may be lawfully made also by an officer or a private citizen without a warrant upon reasonable information that the accused stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one year; but when so arrested the accused must be taken before a judge with all practicable speed and complaint must be made against the accused under oath setting forth the ground for the arrest as in sub. (13); and thereafter the accused's answer shall be heard as if the accused had been arrested on a warrant.

WYOMING

Peace Officer Status- Wyo. Stat. § 6-1-104(a)(vi)(G); § 7-2-101(a)(iv):

It is unclear whether CBP officers are peace officers under Wyoming Law. Wyo. Stat. § 6-1-104(a)(vi)(G) defines "peace officer" to include "federal law enforcement agents," but the term "federal law enforcement agent" has not been further defined. And Title 6 does not identify what authority a peace officer has. "Peace officer" is also defined in Title 7 (Criminal Procedure), Chapter 2 of Wyo. Stats, § 7-2-101(a)(iv); however, "federal law enforcement agent" is not included

in this definition. Title 7 identifies the authority peace officers have but that title contains its own definition of peace officer that does not include "federal law enforcement agent." There are no Attorney General Opinions and no Wyoming case decisions that state CBP Officers are peace officers in Wyoming.

Specific Arrest Authority – None

Private Person Arrest Authority – Wyo. Stat. § 7-8-101.

A private person may arrest another for:

(1) a felony committed in his presence;

(2) a felony which has been committed, even though not in his presence, if he has probable cause to believe the person to be arrested committed it; or

(3) the following misdemeanors are committed in his presence:

a) a misdemeanor of larceny; or

b) a misdemeanor property destruction.

Uniform Criminal Extradition Act – Adopted: Wyo. Stat. § 7-3-214

The arrest of a person may be lawfully made by an officer or a private citizen without a warrant upon reasonable information that the accused is charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one (1) year. When arrested under this section the accused shall be taken before a judge or magistrate as soon as possible and complaint shall be made against him under oath setting forth the ground for the arrest as in W.S. 7-3-213. Thereafter his answer shall be heard as if he had been arrested on a warrant.

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Chapter Six

Border Patrol Enforcement Operations

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6.000 Introduction

The mission of the United States Border Patrol is "to prevent the entry of terrorists and their weapons of terrorism: to enforce the laws that protect America's homeland by the detection, interdiction, and apprehension of those who attempt to illegally enter or smuggle any person or contraband across our Nation's sovereign borders."[1] The Border Patrol accomplishes this mission by deploying agents to form a "defense in depth" using several enforcement techniques that are traditional to the Border Patrol but generally unique in law enforcement: linewatch, roving patrol, immigration checkpoints, transportation checks and city patrol. The purpose of this chapter is to examine the legal character of encounters resulting from the use of these enforcement techniques. The chapter will first review agents' statutory authority to conduct Border Patrol operations before analyzing each of the enforcement techniques in turn.

6.100 Statutes Relevant to Border Patrol Operations

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A Border Patrol agent is both an immigration officer and a customs officer. The next several paragraphs will examine statutes that specify the authority of immigration officers and customs officers and will demonstrate how these statutes affect the way Border Patrol agents accomplish their mission.

When reviewing these statutes, it is critically important to remember that no statute can empower an agent to do that which the Constitution prohibits him from doing. For example, in *Almeida-Sanchez v. United States*,[2] Border Patrol agents stopped a vehicle without reasonable suspicion and searched it without probable cause, relying on the fact that their actions were authorized by a literal reading of *Immigration and Nationality Act* (hereinafter "INA") § 287(a)(3) (*see* § 6.140, *infra*). The Supreme Court reversed the conviction, reminding the Government "that no Act of Congress can authorize a violation of the Constitution."[3] It is axiomatic that any search or seizure must be performed in a constitutionally reasonable manner, regardless of what the wording of a given statute would purport to authorize.

[1] *Border Patrol Handbook.*
[2] *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).
[3] *Id.* at 272.

6.110 Questioning Aliens

There are two immigration statutes that give Border Patrol agents the authority to question aliens: INA § 235(a)(3)[4] and INA § 287(a)(1)[5].

INA § 235(a)(3) allows immigration officers to "inspect alien applicants for admission" – e.g., to question aliens seeking to be allowed into the United States. Because an alien who is present in the United States but has not been admitted[6] is deemed to be "an applicant for admission,"[7] this statute authorizes Border Patrol agents to inspect aliens who have physically entered the United States at places other than ports of entry.

INA § 287(a)(1) allows immigration officers to interrogate aliens and those they believe to be aliens to determine whether they are lawfully present in the United States.

6.120 Administering Oaths and Taking Statements

Immigration officers have the authority to administer oaths and take statements. INA § 235(a)(5)[8] authorizes immigration officers to require applicants for admission to state under oath information regarding their purposes and intentions of entering the United States in order to be granted entry. INA §§ 235(d)(3)[9] and 287(b)[10] authorize immigration officers "to

[4] INA § 235(a)(3)/8 U.S.C. § 1225(a)(3): "All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers."

[5] INA § 287(a)(1)/8 U.S.C. § 1357(a)(1): "Any officer of employee of the Service authorized by regulations prescribed by the Attorney General shall have power without warrant … to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States…."

[6] INA § 101(a)(13)(A)/8 U.S.C. § 1101(a)(13)(A): "The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."

[7] INA § 235(a)(1)/8 U.S.C. § 1225(a)(1): "An alien present in the United States who has not been admitted … shall be deemed … an applicant for admission."

[8] INA § 235(a)(5)/8 U.S.C. § 1225(a)(5): "An applicant for admission may be required to state under oath any information sought by an immigration officer regarding the purposes and intentions of the applicant in seeking admission to the United States, including the applicant's intended length of stay and whether the applicant intends to remain permanently or become a United States citizen, and whether the applicant is inadmissible."

[9] INA § 235(d)(3)/8 U.S.C. § 1225(d)(3): "[A]ny immigration officer shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, transit through, or reside in the United States or

administer oaths and to take and consider evidence" regarding an alien's right to be present in the United States or the enforcement of the INA.

6.130 Issuing Subpoenas

INA § 235(d)(4)(A)[11] gives immigration officers the authority to subpoena witnesses and documents regarding an alien's right to be present or for the enforcement of the INA. INA § 235(d)(4)(B)[12] grants Federal district courts the authority to issue court orders compelling the production of witnesses and documents in the event that someone has failed to respond to an earlier subpoena, and explicitly provides that failure to obey such order may be punished as contempt of court. The authority to issue subpoenas is restricted by regulation to Supervisory Border Patrol Agents and above.[13]

concerning any matter which is material and relevant to the enforcement of this Act…."

[10] INA § 287(b)/8 U.S.C. § 1357(b): Designated immigration officers "shall have power and authority to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this Act and the administration of the Service; and any person to whom such oath has been administered (or who has executed an unsworn declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code), under the provisions of this Act, who shall knowingly or willfully give false evidence or swear (or subscribe under penalty of perjury as permitted under section 1746 of title 28, United States Code) to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by section 166, title 18, United States Code."

[11] INA § 235(d)(4)(A)/8 U.S.C. § 1225(d)(4)(A): "[A]ny immigration officer shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States."

[12] INA § 235(d)(4)(B)/8 U.S.C. § 1225(d)(4)(B): "Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer may, in the event of neglect or refusal to respond to a subpoena issued under this paragraph or refusal to testify before an immigration officer, issue an order requiring such persons to appear before an immigration officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof."

[13] 8 C.F.R. § 287.4 (subpoena authority restricted to Border Patrol agents in or above the grade of Supervisory Border Patrol Agent or Patrol Agent in Charge, depending upon circumstances).

6.140 Search Authority

Immigration officers are given the authority to search vehicles for aliens under two statutes: INA § 235(d)(1)[14] authorizes them to search vehicles "in which they believe aliens are being brought into the United States," and INA § 287(a)(3)[15] permits them to search vehicles "within a reasonable distance from any external boundary of the United States…." By regulation, the term "reasonable distance" generally "means within 100 air miles from any external boundary of the United States…."[16]

Immigration officers also have the statutory authority to search the person and personal effects of an alien applicant for admission if the officer reasonably suspects that the search will produce evidence that the alien is inadmissible.[17]

Several statutes authorize Customs officers, including Border Patrol agents, to conduct border searches. Customs officers may conduct searches at the

[14] INA § 235(d)(1)/8 U.S.C. § 1225(d)(1): "Immigration officers are authorized to board and search any vessel, aircraft, railway car, or other conveyance or vehicle in which they believe aliens are being brought into the United States."

[15] INA § 287(a)(3)/8 U.S.C. § 1357(a)(3): An immigration officer has the authority, without a warrant, "within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle…."

[16] 8 C.F.R. § 287.1(a)(2), and in particular "(b) *Reasonable distance; fixing by chief patrol agents and special agents in charge.* In fixing distances not exceeding 100 air miles pursuant to paragraph (a) of this section, chief patrol agents and special agents in charge shall take into consideration topography, confluence of arteries of transportation leading from external boundaries, density of population, possible inconvenience to the traveling public, types of conveyances used, and reliable information as to movements of persons effecting illegal entry into the United States: *Provided,* That whenever in the opinion of a chief patrol agent or special agent in charge a distance in his or her sector or district of more than 100 air miles from any external boundary of the United States would because of unusual circumstances be reasonable, such chief patrol agent or special agent in charge shall forward a complete report with respect to the matter to the Commissioner of CBP, or the Assistant Secretary for ICE, as appropriate, who may, if he determines that such action is justified, declare such distance to be reasonable."

[17] INA § 287(c)/8 U.S.C. § 1357(c): An immigration officer "shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for denial of admission to the United States under this Act which would be disclosed by such search." As a practical matter, this authority could only be exercised in a constitutionally reasonable manner during the course of a border search.

functional equivalent of the border (inbound and outbound) based on, among other statutes, 19 U.S.C. § 1581[18]. The authority to search for monetary instruments as part of a border search is found at 31 U.S.C § 5317[19]; this statute authorizes customs officers to search for monetary instruments at the functional equivalent of the border (inbound and outbound). The authority to conduct searches at the extended border is also found in the customs laws, including 19 U.S.C. § 482[20]. Other statutory sources of authority to conduct border searches include 19 U.S.C. §§ 1496[21] and 1583[22].

[18] 19 U.S.C. § 1581(a): "Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance."

[19] 31 U.S.C. § 5317(b): "[A] customs officer may stop and search, at the border and without a search warrant, any vehicle, vessel, aircraft, or other conveyance, any envelope or other container, and any person entering or departing from the United States."

[20] 19 U.S.C. § 482(a): "Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial."

[21] 19 U.S.C. § 1496: A customs officer "may cause an examination to be made of the baggage of any person arriving in the United States in order to ascertain what articles are contained therein and whether subject to duty, free of duty, or prohibited notwithstanding a declaration and entry therefor has been made."

[22] 19 U.S.C. § 1583(a)(1): A customs officer may "stop and search at the border, without a search warrant, mail of domestic origin transmitted for export by the United States Postal Service and foreign mail transiting the United States that is being imported or exported by the United States Postal Service."

6.150 Entering Private Lands

INA § 287(a)(3)[23] gives immigration officers the authority to enter upon private lands located within twenty-five miles of the border for the purpose of "patrolling the border."[24] The statute expressly provides that immigration officers may not enter dwellings to patrol the border; however, agents should remember that any time they intrude into an area or location where a reasonable expectation of privacy exists, they must have a warrant or an applicable exception to the warrant requirement.[25]

INA § 287(e)[26] prohibits an immigration officer from entering farms or other outdoor agricultural operations to interrogate people about whether they are lawfully present unless the immigration officer has (1) the consent of the owner (or the owner's agent) or (2) a properly executed warrant. An agent who wished to enter a farm or ranch located within twenty-five miles of the border for the purpose of patrolling the border under INA § 287(a)(3) would not be restricted by INA § 287(e).

Pursuant to 19 U.S.C § 1595(b)[27], customs officers may enter the private lands and buildings (other than dwelling houses) of others in the performance of their official duties.

[23] INA § 287(a)(3)/8 U.S.C. § 1357(a)(3): An immigration officer shall, "within a distance of twenty-five miles from [any external boundary of the United States,] have access to private lands, but not dwellings for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States…."

[24] 8 C.F.R. § 287.1(c) defines "patrolling the border to prevent the illegal entry of aliens into the United States" as "conducting such activities as are customary, or reasonable and necessary, to prevent the illegal entry of aliens into the United States."

[25] *See*, *e.g.*, *United States v. Romero-Bustamente*, 337 F.3d 1104 (9th Cir. 2003) (authority to patrol the border given by INA § 287(a)(3) did not justify entry onto curtilage of house by Border Patrol agents)*; see also, United States v. Troop,* 514 F.3d 405 (5th Cir. 2008) (warrantless entry into the home prohibited.)

[26] INA § 287(e)/8 U.S.C. § 1357(e): "Notwithstanding any other provision of this section other than paragraph (3) of subsection (a) [the provision granting authority to enter private property for the purpose of patrolling the border], an [immigration officer] may not enter without the consent of the owner (or agent thereof) or a properly executed warrant onto the premises of a farm or other outdoor agricultural operation for the purpose of interrogating a person believed to be an alien as to the person's right to be or to remain in the United States."

[27] 19 U.S.C. § 1595(b): "Any person authorized by this Act to make searches and seizures, or any person assisting him or acting under his directions, may, if deemed necessary by him or them, enter into or upon or pass through the lands, inclosures, and buildings, other than the dwelling house, of any person whomsoever, in the discharge of his official duties."

6.160 Detaining and Removing Aliens

Immigration officers, including Border Patrol agents, have several sources of authority to detain and remove aliens.

INA § 235(b)(1) authorizes an immigration officer to order an alien to be removed from the United States if the alien is inadmissible because the alien engaged in entry fraud[28] or does not have proper entry documents.[29] Immediate removal pursuant to this provision, known as "expedited removal," is not available if the alien indicates an intention to apply for asylum or expresses a credible fear of persecution. Expedited removal authority is also limited by policy to aliens that are encountered within 100 air miles of the border and have been present in the United States for less than 14 days.[30]

INA § 235(b)(2) requires an immigration officer to detain an alien seeking admission for a hearing before an immigration judge if the alien "is not clearly and beyond a doubt entitled to be admitted." An alien who is subject to expedited removal, is a crewman, or is a stowaway need not be detained for an immigration hearing.[31] Similarly, an alien that crossed the land border from Mexico or Canada may be returned there pending the immigration hearing.[32]

Finally, INA § 287(d) authorizes immigration officers to request a detainer for an alien arrested for a controlled substance violation.

6.170 Arrest Authority

The two main statutory sources of arrest authority for Border Patrol agents are INA § 287(a)(2)[33] and 19 U.S.C. § 1589a.[34]

[28] INA § 212(a)(6)(C)/8 U.S.C. § 1182(a)(6)(C).
[29] INA § 212(a)(7)/8 U.S.C. § 1182(a)(7).
[30] For these and other policy restrictions applicable to expedited removal, see 69 Fed. Reg. 48,872 (August 11, 2004), and guidance issued subsequent thereto.
[31] INA § 235(b)(2)(B)/8 U.S.C. § 1225(b)(2)(B).
[32] INA § 235(b)(2)(C)/8 U.S.C. § 1225(b)(2)(C).
[33] INA § 287(a)(2)/8 U.S.C. § 1357(a)(2): An immigration officer is authorized "to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest…."
[34] 19 U.S.C. § 1589a: A customs officer may "make an arrest without a warrant for any offense against the United States committed in the officer's presence or for a felony, cognizable under the laws of the United States committed outside the officer's presence if the officer has reasonable grounds to believe that the person to be arrested has committed or is committing a felony…."

INA § 287(a)(2) grants immigration officers the authority to arrest aliens who are unlawfully present in the United States. This "administrative" arrest authority exists regardless of whether the alien in question committed a crime. The two circumstances in which the arresting officer need not obtain a warrant are: (1) the arrestee entered or attempted to enter the United States in the officer's view or presence, or (2) the arrestee would be likely to escape before a warrant could be obtained.[35]

Pursuant to 19 U.S.C. § 1589a, a customs officer may make a warrantless arrest for any Federal crime committed in the officer's presence and for any Federal felony, regardless of whether the crime was committed in the officer's presence.[36]

6.180 Seizure for Forfeiture

The two primary statutes that give Border Patrol agents the authority to seize and retain objects for civil forfeiture are INA § 274(b)[37] and 19 U.S.C. § 1595a.

INA § 274(b) requires immigration officers to seize for forfeiture any vehicle used to smuggle aliens, the proceeds of smuggling aliens (i.e., money or goods obtained as payment for smuggling aliens), and any property traceable to such vehicle or proceeds. The scope of INA § 274(b) is thus rather limited; for example, it does not authorize the seizure for forfeiture of real property used to harbor aliens.

One of the primary civil forfeiture statutes applicable to customs violations is 19 U.S.C. § 1595a. In contrast to INA § 274(b), 19 U.S.C. § 1595a is a very broadly written statute. In part, and subject to limited exceptions, it authorizes the seizure and forfeiture of "every vessel, vehicle, animal, aircraft, or other thing used in, to aid in, or to facilitate, by obtaining information or in any other way, the importation, bringing in, unlading, landing, removal, concealing, harboring, or subsequent transportation of any article which is being or has been

[35] For a discussion of factors that suggest an alien would be "likely to escape," *see, United States v. Cantu*, 519 F.2d 494, 496-98 (7th Cir. 1975); *cert. denied*, 423 U.S. 1035 (1975). In order to arrest an alien who did not enter or attempt to enter illegally in the officer's presence, the immigration officer must have probable cause that the alien would escape if the officer attempted to obtain a warrant. *See, United States v. Cantu*, 519 F.2d at 496, and cases cited therein. Failure to obtain a warrant when required by the statute will not necessarily result in the application of the exclusionary rule. *United States v. Abdi*, 463 F.3d 547 (6th Cir. 2006).

[36] This arrest authority is broader than the criminal arrest authority granted by INA §§ 287(a)(4) and 287(a)(5)(A).

[37] INA § 274(b)(1)/8 U.S.C. § 1324(b)(1): "Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of subsection (a) [i.e., used to smuggle aliens], the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture."

introduced, or attempted to be introduced, into the United States contrary to law…."[38] It also authorizes the seizure and forfeiture of merchandise in various circumstances (including all merchandise that has been "smuggled, or clandestinely imported or introduced"),[39] as well as any merchandise anyone exports or attempts to export contrary to law, and any thing used to facilitate such action or attempt.[40]

6.190 Alien Crewmen and Vessels

Border Patrol agents, as immigration officers, have three main sources of statutory authority regarding alien crew members:[41] INA § 252(a), INA § 252(b), and INA § 235(d)(2). INA § 252(a) authorizes immigration officers to grant alien crew members conditional landing permits for up to, but not exceeding, 29 days in duration. INA § 252(b) authorizes immigration officers to revoke conditional landing permits. Finally, INA § 235(d)(2) authorizes an immigration officer to order the person in charge of a vessel or aircraft bringing an alien to the United States to (1) detain such alien on the vessel or at the airport, and (2) deliver such alien to an immigration officer for inspection or to a medical officer for examination.

6.200 Linewatch[42]

6.210 (b) (7)(E)
6.210a
6.210b
6.210c

Linewatch is the foundation of the Border Patrol's current strategy to gain operational control of the border between the ports of entry. Linewatch addresses the operational reality that the farther an illegal entrant, smuggler, or terrorist moves away from the border area toward the interior of the United States, the more difficult it becomes to intercept that individual. Although linewatch can occur at varying distances from the border depending on operational needs and topography, in most areas linewatch is generally conducted relatively close to the border.[43] Linewatch is the Border Patrol's first

[38] 19 U.S.C. § 1595a(a).
[39] 19 U.S.C. § 1595a(c).
[40] 19 U.C.S. § 1595a(d).
[41] Of course, as customs officers, Border Patrol agents are also authorized to exercise suspicionless boarding authority over vessels under 19 U.S.C. § 1581 and other applicable statutes. Customs officer authority regarding vessels is covered in Chapter 18 of this volume.
[42] The descriptions of linewatch activities given herein (including stillwatch, foot patrol, and motorized patrol) are based on § 11.4 of the *Border Patrol Handbook*, "Patrolling the Border."
[43] Linewatch activities are generally conducted within the 25-mile area adjacent to the border (specified in INA § 287(a)(3)) in which agents have the lawful

line of defense and has become the backbone of Border Patrol operations in many sectors, particularly in high-traffic areas where roving patrols have been found to be less effective. Linewatch operations are further subdivided into three types: stillwatch, foot patrol and motorized patrol.

6.210a (b) (7)(E)

(b) (7)(E)

6.210b (b) (7)(E)

(b) (7)(E)

6.210c (b) (7)(E)

(b) (7)(E)

authority to go onto the private property of others for the purpose of patrolling the border. *See* § 6.150, *supra*.

[44] (b) (7)(E)

(b) (7)(E)

[45] (b) (7)(E)

(b) (7)(E)

(b) (7)(E)

6.220 Constitutional Character of Linewatch Encounters

The constitutional character of a linewatch encounter will depend upon the circumstances surrounding the encounter. The lawful scope of an agent's actions will, in turn, depend upon the constitutional character of the encounter and the suspicion level of the agent.

For example, many encounters occurring while on low-visibility stillwatch start out as investigative detentions because agents will often surprise the suspected aliens and take steps to control their actions (e.g., by telling the persons encountered to stop and show the agents their hands).[46] For such seizures to be lawful, the agents must have reasonable suspicion, based on articulable facts, that the suspects are unlawfully present aliens or are engaged in criminal activity. Factors such as border proximity, time of day or night, prior activity in the area, sensor alerts, and the number, dress, activity, and direction of travel of the suspects are useful, articulable facts in developing reasonable suspicion.

Once the suspects are seized, agents should use due diligence and the least intrusive means reasonably available to confirm or dispel the suspicion providing the basis for the seizure. Agents may ask questions; request, examine and verify documents; and request consent to search persons and their belongings in order to confirm or dispel their reasonable suspicions.[47] Agents have no authority to compel a seized individual to answer questions or provide documents. However it is lawful to extend the duration of the seizure until an Agent can confirm or dispel his suspicion. Agents may also frisk any persons they reasonably suspect are armed and presently dangerous for weapons.[48]

Although high-visibility stillwatch encounters may start as investigative detentions (depending upon agents' actions), they may also begin as consensual encounters because persons approaching stationary, visible agents are arguably consenting to the interaction. Consensual encounters are not "seizures" within the meaning of the Fourth Amendment, and therefore require no suspicion.[49] During the course of a consensual encounter, an agent may ask questions,

[46] *See* § 2.62b for a discussion of investigative detentions requiring reasonable suspicion.
[47] *See* § 2.63.
[48] *See* § 2.630-31.
[49] *See* § 2.61.

request consent to search, and request and examine documents.[50] The essence of a consensual encounter is that the individual interacting with the agent is free to end the encounter at all times.

Agents conducting foot patrol or motorized patrol may face encounters starting as either consensual encounters or seizures, depending upon the circumstances. Agents who meet persons during foot patrol or motorized patrol should be aware of what actions (such as telling people where to stand, blocking their movement with vehicles, etc.) are likely to create seizures and should avoid taking those actions unless the agents have reasonable suspicion.

6.230 Resolving Linewatch Encounters

Regardless of how a linewatch encounter begins, it will be resolved according to what suspicion level agents have lawfully established during the course of the encounter. Consensual encounters that do not give rise to reasonable suspicion must end before they cease to be consensual. During investigative detentions, agents should use due diligence and the least intrusive means reasonably available to confirm or dispel their suspicions. If an agent is unable to develop probable cause during an investigative detention, that detention must be terminated or a judge could rule that it became an illegal arrest. Investigative detentions (or consensual encounters) that result in probable cause to believe that suspects are unlawfully present aliens or have violated Federal criminal laws will ripen into arrests.[51] Incident to either a criminal[52] or administrative[53] arrest, agents may search the arrested persons and objects carried by them for weapons, evidence, or means of escape, even with no suspicion that such items are actually present.[54] Items may also be seized and held for evidence or for forfeiture based upon probable cause.[55] Where agents on linewatch encounter a motor vehicle and have probable cause to believe it contains evidence or contraband[56] agents may search the vehicle as a readily mobile conveyance.[57]

6.240 Linewatch and Border Search

6.240a FEB Inbound
6.240b FEB Outbound
6.240c Extended Border

[50] *Id.*
[51] *See* § 2.62c.
[52] 19 U.S.C. § 1589a, *supra* at §6.170.
[53] INA § 287(a)(2), *supra* at §6.170.
[54] *See* §§ 2.610-613.
[55] *See* § 2.223.
[56] *E.g.*, *United States v. Ross*, 456 U.S. 798, 824 (1982).
[57] *See* § 2.540-543.

6.240a FEB Inbound

Border Patrol agents assigned to linewatch duties often encounter persons who have just entered the United States at places other than ports of entry. A Border Patrol agent who was reasonably certain that someone entered the United States would be reasonably certain of a border nexus. If the individual was apprehended immediately upon entry, or in a remote location the agent would likely also be reasonably certain of no material change.[58] A Border Patrol agent could therefore conduct an inbound border search at the first practical detention point.

The value of the authority to conduct an inbound border search generally depends on whether the scope of the border search would be greater than the scope of a search incident to arrest; this, in turn, depends upon the facts of the case. For example, a Border Patrol agent who encountered a pedestrian entering at a place other than a port of entry would likely have the authority to arrest that person.[59] Under these circumstances, the scope of a border search and a search incident to arrest would generally be the same (i.e., the person and whatever the person is carrying). On the other hand, if a person unlawfully entered the United States in a vehicle, border search authority would allow Border Patrol agents to search the entire vehicle with no additional suspicion. The scope of a search incident to arrest could be substantially narrower.[60] The ability to conduct an inbound border search could also be useful if a person who entered the United States at an improper location took refuge in a place where someone could reasonably expect privacy.[61]

[58] If someone enters the United States by hiking through a desert or forest, for example, that person would have little opportunity or incentive to acquire domestic merchandise after crossing the border but before reaching civilization.

[59] An alien entering the United States at an improper time or place is subject to arrest for violating 8 U.S.C. § 1325(a). A U.S. citizen (or national) entering the United States at other than a designated crossing point may be arrested for violating 19 U.S.C. §§ 1433(b) or 1459(a) if the violation is intentional. *See,* 19 U.S.C. §§ 1436(c) (vehicles), 1459(g) (pedestrians). In the rare circumstance that a U.S. citizen entered the United States at an improper place unintentionally (e.g., a lost hiker), border search authority would be useful.

[60] *Arizona v. Gant*, 179 S. Ct. 1710 (2009); limiting the suspicionless search of a vehicle incident to arrest to the following circumstance, 1) the arrestee is unrestrained and could return to the vehicle to secure a weapon, or 2) the agent/officer has a reason to believe there is evidence of the offense for which the suspect was arrest in the vehicle.

[61] For example: An agent follows foot sign from the border fence to a barn. The sign indicates that the person making it has entered, but has not left, the barn. Under these circumstances, the Border Patrol agent would be able to enter the barn without the owner's consent because it would be the functional equivalent of the border (inbound).

6.240b FEB Outbound

The border search doctrine gives Border Patrol agents tremendous authority over those who are leaving the United States. While simply leaving the United States at a place other than a port of entry is not unlawful, such action could suggest that someone is intentionally avoiding a port of entry in order to smuggle something out of the United States.[62] Persons attempting to smuggle money, weapons, or restricted technologies out of the United States often attempt to do so by leaving at places other than ports to avoid outbound border searches conducted by CBP Officers and to avoid inbound searches conducted by Mexican or Canadian authorities. The authority of Border Patrol agents to conduct outbound border searches can be a valuable enforcement tool to combat such crimes. At the last practicable point that a Border Patrol agent could stop someone or something that was just about to leave the United States, the agent would have the authority to stop and conduct a thorough border search.[63]

6.240c Extended Border

Border Patrol agents on linewatch often encounter circumstances justifying extended border searches. A Border Patrol agent who is reasonably certain that someone entered the United States at an improper place obviously has more than the reasonable suspicion of criminal activity required for an extended border search. As with the authority to conduct inbound searches at the FEB, whether the authority to conduct an extended border search is useful will depend on the facts of each case.

6.300 Roving Patrol[64]

6.310 Introduction

Roving patrol is the deployment of Border Patrol agents in motor vehicles patrolling fixed geographic areas. Operationally, roving patrol is a "backstop" to linewatch: roving patrol units can respond to sensor alerts and patrol traffic to look for individuals who might be violating Federal law but who have eluded agents on linewatch. Roving patrol is also frequently used in combination with checkpoint operations. For example, the presence of a checkpoint often causes

[62] For example, someone leaving the United States at a place other than a port of entry with defense articles, such as firearms, might be violating the *Arms Export Control Act*, 22 U.S.C. § 2278 (§ 3.1351 of this book). Someone transporting cash or other monetary instruments out of the United States might be violating the *Bulk Cash Smuggling Act*, 31 U.S.C. § 5332 (§ 7.620 of this book).

[63] Chapter Three of this book covers the legal requirements for outbound border searches.

[64] The description of roving patrol operations provided here is derived from the *Border Patrol Handbook*, Chapter 11. *See especially* § 11.4(e), "Observing Traffic (Roving Patrol)".

vehicles transporting illegal aliens to use seldom-traveled roads bypassing the checkpoint. The presence of an unfamiliar vehicle on a road that bypasses a checkpoint may serve as a valuable articulable fact that can be included in the facts and circumstances leading to a roving patrol stop.

6.320 Constitutional Character of Roving Patrol Encounters

6.320a Consensual Encounters on Roving Patrol
6.320b Roving Patrol Stops

Most roving patrol encounters involve vehicles stopped by Border Patrol agents using emergency equipment. Such encounters always begin as seizures, known as "roving patrol stops." If an agent "pulls-over" a vehicle all occupants of that vehicle are seized.[65] Roving patrol stops always require a minimum of reasonable suspicion.[66] On some occasions, however, agents on roving patrol might encounter and interact with individuals without stopping them. These encounters may be consensual, and consensual encounters do not require reasonable articulable suspicion.

6.320a Consensual Encounters on Roving Patrol

A Border Patrol agent performing roving patrol duties may engage in a consensual encounter in any of three circumstances: First, an agent on roving patrol may see a vehicle that is already parked. The agent would need no suspicion to stop and talk to the occupants of the parked vehicle. Second, if a vehicle stops of its own volition without the agent directing it to stop (e.g., by using the agent's emergency lights or siren), there is nothing to stop the agent from contacting and speaking with the vehicle's occupants.[67] Third, an agent on roving patrol could park and have a consensual encounter with a pedestrian. In any of these situations, as long as the agent did nothing that would cause the persons reasonably to believe they could not end the encounter, the encounter would be consensual and the agent could take actions consistent with a consensual encounter.[68] Of course, unless the agent had reasonable suspicion, the persons encountered would be free to leave at any time.[69]

[65] *Brendlin v. California*, 551 U.S. 249 (2007).
[66] *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).
[67] *See, e.g., United States v. Nasser*, 479 F.3d 1166 (9th Cir. 2007) (consensual encounter occurred where defendant saw parked Border Patrol vehicles with active light bars that had seized other vehicles and chose to stop); *United States v. Encarnacion-Galvez*, 964 F.2d 402, 410 (5th Cir. 1992); *cert. denied*, *Encarnacion-Galvez v. United States*, 506 U.S. 945 (1992).
[68] Note: if an agent is attempting to engage in a consensual encounter but utilizes the patrol vehicle's emergency lights, even as a traffic safety measure, a court would likely conclude that the ensuing encounter was a seizure because a reasonable innocent person would not feel free to leave under those circumstances.

Generally speaking, few encounters on roving patrol will be consensual. Where a roving patrol encounter is consensual, the agent may ask questions, ask for documents, request consent to search, and make open view observations. If any of these actions results in the development of reasonable suspicion, the encounter may be continued as a seizure. On the other hand, if the persons encountered want to depart and the agent has not developed reasonable suspicion, the encounter must end.

6.320b Roving Patrol Stops

Most roving patrol encounters will begin as seizures. An agent monitoring traffic will observe a vehicle, gain reasonable suspicion that the vehicle is engaged in criminal activity or contains one or more aliens that are unlawfully present, and will stop the vehicle using his vehicle's emergency equipment. At the point where the vehicle stops in response to the agent's actions, a seizure has occurred and the agent must use due diligence and the least intrusive means reasonably available to confirm or dispel the agent's reasonable suspicion. The authority of Border Patrol agents to conduct roving patrol stops based upon reasonable suspicion has been upheld by the Supreme Court in several cases.[70]

6.330 Articulable Facts for Roving Patrol Stops

In determining whether an agent had the reasonable suspicion required for a roving patrol stop, the reviewing court will examine the articulable facts the agent possessed at the time the stop occurred.[71] Following are examples of articulable facts that courts have considered when evaluating the existence of reasonable suspicion:

[69] All occupants of a seized vehicle have standing to contest the legality of the seizure in subsequent legal proceedings. *Brendlin v. California,* 551 U.S. 249 (2007).

[70] *See, e.g., United States v. Arvizu*, 534 U.S. 266 (2002) (lawful roving patrol stop based upon reasonable suspicion of criminal activity); *United States v. Cortez*, 449 U.S. 411 (1981) (accord); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (agents may stop vehicles based upon reasonable suspicion; however, apparent ancestry, taken alone, does not provide such suspicion).

[71] See §§ 2.122-23 for a discussion of articulable facts and their significance. Factors enumerated by the Supreme Court as possibly relevant to roving patrol stops include "(1) the characteristics of the area, (2) the proximity of the area to the border, (3) the usual traffic patterns on a particular road, (4) the agent's previous experience with criminal traffic, (5) information about recent illegal trafficking in aliens or narcotics in the area, (6) the behavior of the vehicle's driver, (7) the appearance of the vehicle, and (8) the number, appearance and behavior of the passengers." *United States v. Castaneda*, 951 F.2d 44, 47 (5th Cir. 1992), *citing United States v. Brignoni-Ponce*, 422 U.S. 873, 884-85 (1975).

(1) whether the vehicle is close to the border;[72]

(2) whether the vehicle is on a known smuggling route;[73]

(3) whether the vehicle's presence is inconsistent with the local traffic patterns;[74]

(4) whether the vehicle could have been trying to avoid a checkpoint;[75]

(5) whether the vehicle appears to be heavily laden;[76]

(6) whether the vehicle is from out of the area;[77]

[72] *See*, *e.g.*, *United States v. Diaz-Juarez*, 299 F.3d 1138 (9th Cir. 2002); *United States v. Guerrero-Barajas*, (5th Cir. 2001); *United States v. Doyle*, 129 F.3d 1372 (10th Cir. 1997); *United States v. Lopez-Martinez*, 25 F.3d 1481 (10th Cir. 1994); *United States v. Alvarado-Garcia*, 781 F.2d 422 (5th Cir. 1986). *But see, United States v. Pacheco-Espinosa*, 354 F. Supp. 2d 1219 (D.N.M. 2004) (vehicle stop 120 miles north of the Mexican border was still reasonable based on other factors presented), *aff'd*, 16 Fed. Appx. 352 (10th Cir. 2005). *Contra*, *United States v. Juarez-Torres,* 441 F. Supp. 2d 1108 (D.N.M. 2006) (extreme distance from the border of 250 miles undercut agent's reasonable suspicion that vehicle was involved in alien smuggling).

[73] *See*, *e.g.*, *United States v. Diaz-Juarez*, 299 F.3d 1138 (9th Cir. 2002); *United States v. Guerrero-Barajas*, 240 F.3d 428 (5th Cir. 2001); *United States v. Doyle*, 129 F.3d 1372 (10th Cir. 1997); *United States v. Lopez-Martinez*, 25 F.3d 1481 (10th Cir. 1994); *United States v. Alvarado-Garcia*, 781 F.2d 422 (5th Cir. 1986).

[74] *See*, *e.g.*, *United States v. Vasquez*, 298 F.3d 354 (5th Cir. 2002); *United States v. Jacquinot*, 258 F.3d 423 (5th Cir. 2001) (work truck leaving a national park on Sunday instead of Friday); *United States v. Doyle*, 129 F.3d 1372 (10th Cir. 1997) (unusual to have traffic in that area at that time).

[75] *See*, *e.g.*, *United States v. Vasquez*, 298 F.3d 354 (5th Cir. 2002) (vehicle used dirt road to circumvent a checkpoint); *United States v. Zapata-Ibarra*, 212 F.3d 877 (5th Cir. 2000) (vehicle on a route bypassing an open checkpoint); *United States v. Montero-Camargo*, 208 F.3d 1122, 1137-38 (9th Cir. 2000) (vehicle made illegal U-turn to avoid border patrol checkpoint); *United States v. Martinez-Cigarroa*, 44 F.3d 908 (10th Cir. 1996) (route bypassing a checkpoint); *United States v. Lopez-Martinez*, 25 F.3d 1481 (10th Cir. 1994) (route commonly used to bypass checkpoint); *United States v. Merryman*, 630 F.2d 780 (10th Cir. 1980) (driver made a U-turn before reaching the checkpoint).

[76] *See*, *e.g.*, *United States v. Vasquez*, 298 F.3d 354 (5th Cir. 2002) (vehicle heavily laden); *United States v. Guerrero-Barajas*, 240 F.3d 428 (5th Cir. 2001); *United States v. Ceniceros*, 204 F.3d 581 (5th Cir. 2000) (shocks of the vehicle recovering slowly as if the vehicle is heavily laden); *United States v. Olafson*, 213 F.3d 435 (9th Cir. 2000) (minivan appeared to be heavily laden); *United States v. Gutierrez-Orozco*, 191 F.3d 578 (5th Cir. 1999) (riding low in back); *United States v. Morales*, 191 F.3d 602 (5th Cir. 1999).

[77] *See*, *e.g.*, *United States v. Diaz-Juarez*, 299 F.3d 1138 (9th Cir. 2002) (vehicle not registered in the area); *United States v. Jacquinot*, 258 F.3d 423 (5th Cir.

(7) whether the vehicle or its load looks unusual in some way;[78]

(8) whether the vehicle is of a sort often favored by smugglers;[79]

(9) whether the vehicle appears to have been altered or modified;[80]

(10) whether the cargo area in the vehicle is covered;[81]

(11) the time of day or night at which the vehicle is spotted, and whether it corresponds to a shift change;[82]

(12) whether the vehicle is being driven in an erratic or unsafe manner;[83]

(13) whether the vehicle appears to be traveling in tandem with another vehicle;[84]

2001) (work truck with Kansas plates leaving a national park in Texas); *United States v. Diaz-Juarez* 299 F,3d 1138(9th Cir. 2002), vehicle bouncing erratically*; United States v. Zapata-Ibarra*, 212 F.3d 877 (5th Cir. 2000) (vehicle not registered in the area).

[78] *See*, *e.g.*, *United States v. Guerrero-Barajas*, 240 F.3d 428 (5th Cir. 2001) (vehicle with heavily tinted windows); *United States v. Gandara-Salinas*, 327 F.3d 1127 (10th Cir. 2003) (vehicle with a Mexican license plate and spare tire that appeared to be larger and cleaner than the rest of the truck); *United States v. Gutierrez-Orozco*, 191 F.3d 578 (5th Cir. 1999) (spare tire in the cab of a pick-up covered by a jacket); *United States v. Morales*, 191 F.3d 602 (5th Cir. 1999) (tires of the vehicle underinflated).

[79] *See*, *e.g.*, *United States v. Arvizu*, 534 U.S. 266 (2002) (minivans favored by smugglers); *United States v. Singh*, 415 F.3d 288 (2d Cir. 2005) (Lincoln Town Cars favored by smugglers); *United States v. Doyle*, 129 F.3d 1372 (10th Cir. 1997) (large sedan favored by alien smugglers).

[80] *See*, *e.g.*, *United States v. Diaz-Juarez*, 299 F.3d 1138 (9th Cir. 2002) (suspension appeared to have been modified); *United States v. Chavez-Chavez*, 205 F.3d 145 (5th Cir. 2000) (shock absorbers appeared rigid).

[81] *See*, *e.g.*, *United States v. Morales*, 191 F.3d 602 (5th Cir. 1999) (pick-up bed covered with a fiberglass lid); *United States v. Merryman*, 630 F.2d 780 (10th Cir. 1980) (lumpy object in back of the vehicle covered by a tarp).

[82] *See*, *e.g.*, *United States v. Arvizu*, 534 U.S. 266 (2002); *United States v. Chavez-Chavez*, 205 F.3d 145 (5th Cir. 2000); (common for drug smugglers to pass area this time of day); *United States v. Morales*, 191 F.3d 602 (5th Cir. 1999); *United States v. Alvarado-Garcia*, 781 F.2d 422 (5th Cir. 1986); (2:00 a.m.).

[83] *See*, *e.g.*, *United States v. Guerrero-Barajas*, 240 F.3d 428 (5th Cir. 2001) (vehicle weaving within its lane); *United States v. Gutierrez-Orozco*, 191 F.3d 578 (5th Cir. 1999) (vehicle weaving across the road); *United States v. Morales*, 191 F.3d 602 (5th Cir. 1999) (driver paying more attention to the agent than the road).

(14) whether the vehicle looks as if it has recently been driven off road;[85]

(15) whether the persons inside the vehicle avoid looking at the agent;[86]

(16) whether the persons inside the vehicle are paying undue attention to the agent's presence;[87]

(17) whether the persons in the vehicle tried to avoid being seen or exhibited other unusual behavior;[88]

(18) whether the driver slowed down after seeing the agent;[89]

(19) whether the passengers appeared dirty;[90]

(20) whether there is intelligence available that suggests that smuggling will occur in the area or by a specific vehicle;[91] and

[84] *See*, *e.g.*, *United States v. Martinez-Cigarroa*, 44 F.3d 908 (10th Cir. 1996) (vehicles appeared to be traveling in tandem and aliens were found in the first vehicle); *United States v. Lopez-Martinez*, 25 F.3d 1481 (10th Cir. 1994).

[85] *See*, *e.g.*, *United States v. Valenzuela*, 365 F.3d 892, 894 (10th Cir. 2004) (Cadillac covered in a layer of fine dust, suggesting recent off-road activity); *United States v. Doyle*, 129 F.3d 1372 (10th Cir. 1997) (branch caught in window of car).

[86] *See*, *e.g.*, *United States v. Chavez*-Chavez, 205 F.3d 145 (5th Cir. 2000) (passengers eyes fixed straight ahead); *United States v. Gutierrez-Orozco*, 191 F.3d 578 (5th Cir. 1999) (driver avoids looking at agent); *United States v. Martinez-Cigarroa*, 44 F.3d 908 (10th Cir. 1996).

[87] *See*, *e.g.*, *United States v. Chavez-Chavez*, 205 F.3d 145 (5th Cir. 2000); (driver kept looking at the agent); *United States v. Ceniceros*, 204 F.3d 581 (5th Cir. 2000) (driver repeatedly looking at agent); *United States v. Morales*, 191 F.3d 602 (5th Cir. 1999) (driver did a double-take when he saw the agent); *United States v. Martinez-Cigarroa*, 44 F.3d 908 (10th Cir. 1996) (driver staring at the patrol vehicle after it passed); *United States v. Lopez-Martinez*, 25 F.3d 1481 (10th Cir. 1994) (passenger stared at the agent for 20 seconds and then sank out of sight).

[88] *See*, *e.g.*, *United States v. Arvizu*, 534 U.S. 266 (2002) (children waving to agent following their vehicle without turning around); *United States v. Zapata-Ibarra*, 212 F.3d 877 (5th Cir. 2000); (passengers slouching down to avoid being seen); *United States v. Gutierrez-Orozco*, 191 F.3d 578 (5th Cir. 1999) (passenger slumped over in seat to avoid being seen).

[89] *See*, *e.g.*, *United States v. Diaz-Juarez*, 299 F.3d 1138 (9th Cir. 2002) (vehicle slowing and speeding as if unfamiliar with the area); *United States v. Jacquinot*, 258 F.3d 423 (5th Cir. 2001); *United States v. Lopez-Martinez*, 25 F.3d 1481 (10th Cir. 1994) (vehicle going 25 miles per hour below the speed limit).

[90] *See*, *e.g.*, *United States v. Chavez-Chavez*, 205 F.3d 145 (5th Cir. 2000) (passenger's clothing appeared dirty and unkempt).

[91] *See*, *e.g.*, *United States v. Diaz-Juarez*, 299 F.3d 1138 (9th Cir. 2002); *United States v. Jacquinot*, 258 F.3d 423 (5th Cir. 2001) (intelligence that a group from

(21) whether the vehicle is coming from an area of a sensor alert.[92]

6.340 Resolving Roving Patrol Encounters

A roving patrol stop is lawful so long as the Border Patrol agent possessed reasonable suspicion prior to stopping the suspect vehicle and once stopped, the agent uses due diligence and the least intrusive means reasonably available to confirm or dispel the agent's reasonable suspicion.[93] For example, the agent may order persons in the vehicle to exit or remain in the vehicle;[94] question the vehicle's occupants; make observations from outside of the vehicle (using a flashlight if necessary);[95] take other actions that do not constitute a search;[96] request, examine and call in identification; call in information regarding the vehicle; request consent to search; and have a detector dog sniff the vehicle's exterior. The agent may also use force when reasonably necessary and as authorized by DHS/CBP Use of Force policy. If the agent reasonably suspects that someone in the vehicle is armed and presently dangerous, the agent may frisk that person and unlocked containers in the passenger compartment of the vehicle.[97]

The agent has only that amount of time reasonably necessary to confirm or dispel his suspicion. If the agent is unable to confirm his reasonable suspicion, the vehicle must be released. If the agent is able to confirm his suspicion and develop probable cause, the agent may act on it in the appropriate manner. Probable cause to believe that there are unlawfully present aliens or contraband in the vehicle will allow the agent to conduct a search of the vehicle.[98] Probable cause to believe that one or more of the occupants are unlawfully present or have committed a Federal crime will allow the agent to arrest and search the person(s) in question.[99] Probable cause to believe that the vehicle is subject to forfeiture will allow the agent to seize the vehicle under the appropriate statute;

Kansas was smuggling in the area and truck had Kansas plates); *United States v. Ceniceros*; 204 F.3d581 (5th Cir. 2000) (agent responding a "BOLO," or "be on the lookout" alert).

92 *See*, *e.g.*, *United States v. Arvizu*, 534 U.S. 266 (2002); *United States v. Jacquinot*, 258 F.3d 423 (5th Cir. 2001); *United States v. Olafson*, 213 F.3d 435 (9th Cir. 2000); *United States v. Doyle*, 129 F.3d 1372 (10th Cir. 1997) (only vehicle in the area of the sensor alert).

93 For a detailed discussion of temporary seizures based on reasonable suspicion, see §§ 2.62b and 2.63 of this book.

94 *See Wilson v. Maryland*, 519 U.S. 408 (1997); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

95 *Texas v. Brown*, 460 U.S. 730, 739-40 (1983).

96 *See*, *e.g.*, *United States v. Rascon-Ortiz*, 994 F.2d 749 (10th Cir. 1993); *United States v. Muniz-Melchor*, 894 F.2d 1430 (5th Cir. 1990), *cert. denied*, 495 U.S. 923 (1990).

97 *See Michigan v. Long*, 463 U.S. 1032 (1983). *See also* §§ 2.630-2.632, *supra*.

98 *See* §§ 2.540-2.543, *supra*.

99 *See* §§ 2.610-2.612c, *supra*.

the seized vehicle will then become the object of an inventory search.[100] Remember the limitations applicable to search incident to arrest of a vehicle.[101]

6.400 Immigration Checkpoints[102]

6.410 Introduction

The primary purpose of an immigration checkpoint operation is to apprehend illegal aliens and smugglers who have evaded apprehension at the border and are attempting to travel to interior locations. Although the inspection of vehicular traffic for illegal aliens is the primary focus of agents manning the checkpoint, agents at checkpoints are not required to ignore other violations of Federal laws. The purpose of this section is to examine the law as it applies to Border Patrol operations at immigration checkpoints.

6.420 Constitutional Character of Immigration Checkpoint Encounters

6.420a (b) (7)(E)

6.420b Secondary Inspection Area

In *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), the Supreme Court interpreted INA § 235(a)(1) and (3) as authorizing the Border Patrol to operate immigration checkpoints to determine the immigration status of all individuals passing through a checkpoint during its hours of operation, subject to legal and regulatory limitations. These seizures were deemed reasonable even without suspicion based on the important public interest advanced by the inspections, and the limited interference with an individual's personal liberty.

When reviewing immigration checkpoint operations, courts look to see if the operation was carried out pursuant to a plan with explicit, neutral limitations on the conduct of individual agents. The courts will focus on the lack of discretion afforded individual agents, the standardized procedures employed, and the minimal intrusion imposed on travelers. The duration of the checkpoint seizure is strictly limited to the time reasonably necessary to accomplish the purpose of the checkpoint.[103] The reasonableness of a particular checkpoint seizure is determined by a test that balances the "gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and

[100] *See* §§ 2.640-2.641a, *supra*.

[101] See §2.612 (c), supra; see also, *Arizona v. Gant*, 179 S. Ct. 1710 (2009); limiting the suspicionless search of a vehicle incident to arrest to the following circumstance, 1) the arrestee is unrestrained and could return to the vehicle to secure a weapon, or 2) the agent/officer has a reason to believe there is evidence of the offense for which the suspect was arrest in the vehicle.

[102] The description of immigration checkpoints comes from *Border Patrol Handbook* Chapter 13, "Traffic Check Operations".

[103] *United States v. Portillo-Aguirre*, 311 F.3d 647 (5th Cir. 2002).

the severity of the interference with individual liberty."[104] In ascertaining the severity of the interference with individual liberty, the court must consider both the objective intrusion of the seizure (its duration and the intensity of any brief questioning and visual inspection that might attend it) and its subjective intrusion (its potential for generating fear and surprise to law-abiding citizens). Weighing all of the aforementioned considerations, the Supreme Court determined that "stops for brief questioning conducted at permanent checkpoints are consistent with the Fourth Amendment…."[105] By contrast, the Supreme Court invalidated a motor vehicle checkpoint program in which motorists were briefly seized without any suspicion for the purpose of discovering narcotics.[106] The Court noted that the government's interest in discovering narcotics was "ultimately indistinguishable from the general interest in crime control," and that such seizures must be supported by reasonable suspicion.[107]

Even though the Supreme Court has decided that the suspicionless seizure of a vehicle at a properly-sited immigration checkpoint is constitutionally reasonable, the interaction between an agent and a traveler at a checkpoint must also be constitutionally reasonable. The reasonableness of the interaction will depend on the nature of the agent's conduct and the level of suspicion the agent has regarding criminal activity or immigration violations. For example, in order to search a vehicle at an immigration checkpoint, an agent would need probable cause to search the vehicle under the readily mobile conveyance doctrine, reasonable suspicion that an occupant is armed and dangerous to conduct a limited frisk of the interior of the vehicle to a locate weapon, or an occupant's consent to search.[108] Facts to support a border search will not exist at a checkpoint.

6.420a (b) (7)(E)

(b) (7)(E)

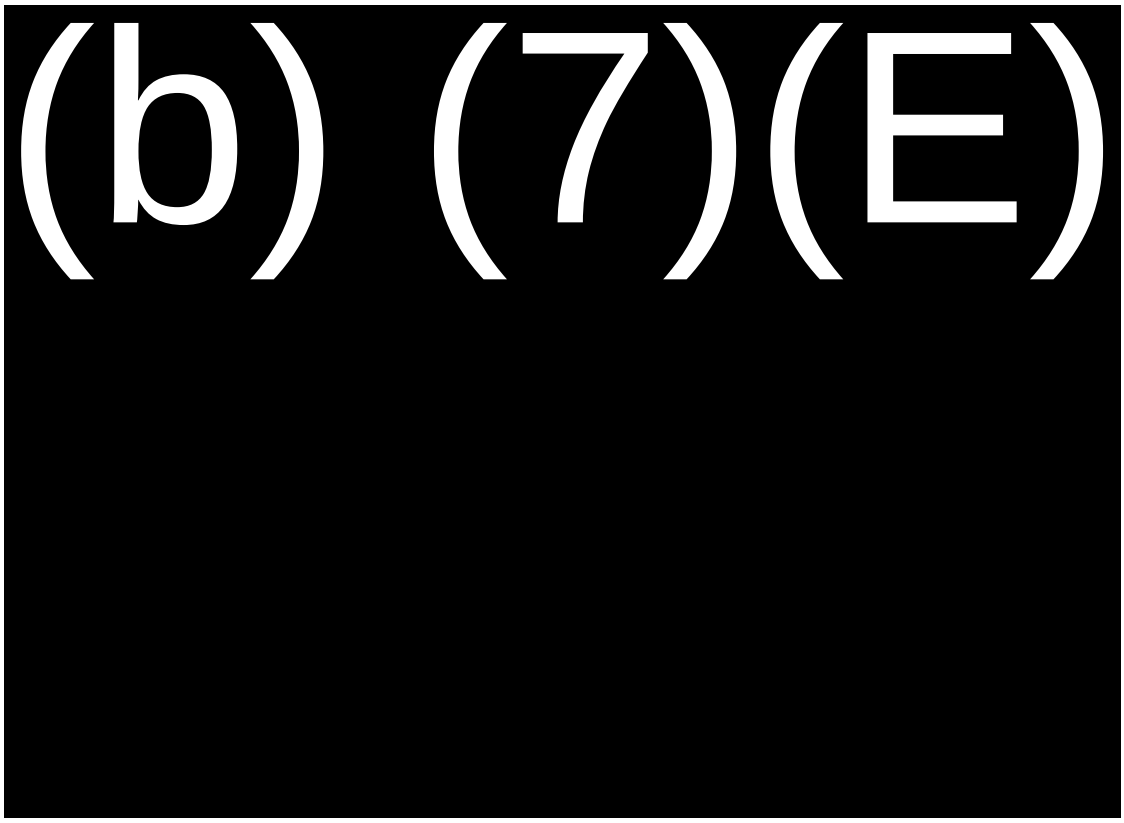
[104] *See, Brown v. Texas*, 443 U.S. 47, 51 (1979). *See also Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (holding that the use of sobriety checkpoints was consistent with the Fourth Amendment); *Illinois v. Lidster*, 540 U.S. 419 (2004) (holding that a highway checkpoint setup to obtain information about a recent hit and run accident was also consistent with the Fourth Amendment); *Delaware v. Prouse*, 440 U.S. 648 (1979) (suggesting in dicta that driver's license and vehicle registration checkpoints were lawful under the Fourth Amendment when made with no suspicion); *U.S. v. Gabriel*, 405 F. Supp. 2d 50 (D. Me 2005) checkpoint to look for possible terrorists is constitutional.

[105] *United States v. Martinez-Fuerte*, 428 U.S. 543, 566 (1976).

[106] *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

[107] *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000).

[108] *See United States v. Martinez-Fuerte*, 428 U.S. 543, 567 (1976), *citing United States v. Ortiz*, 422 U.S. 891 (1975).

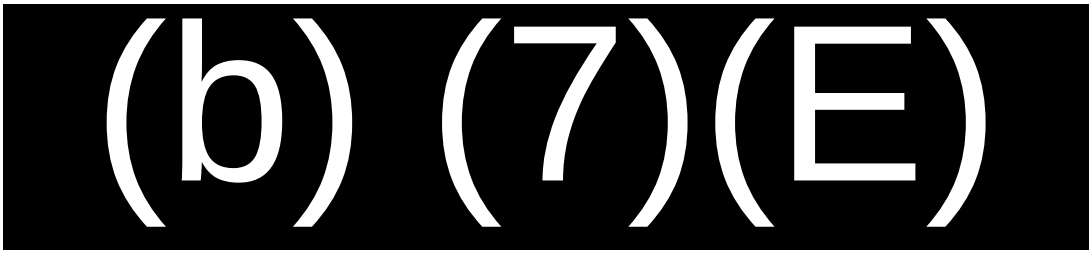


109 (b) (7)(E)

110 (b) (7)(E)



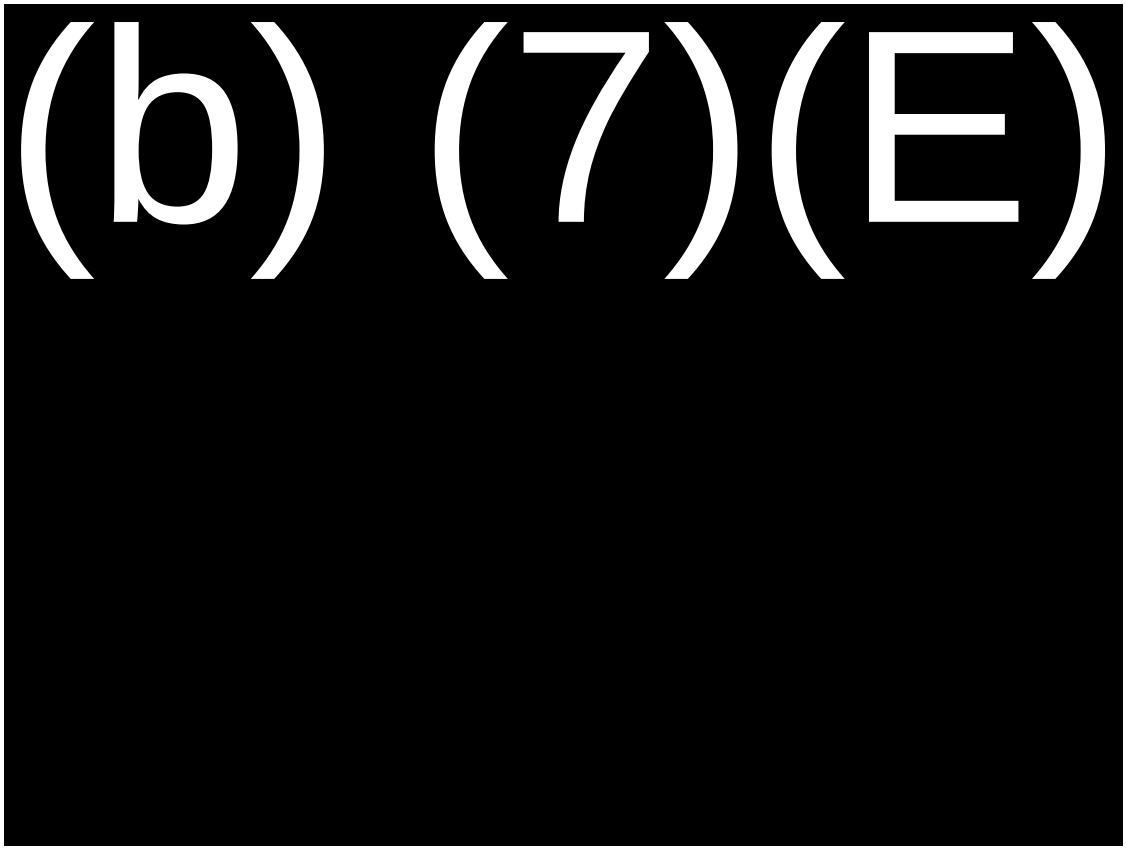
112 (b) (7)(E)



113 (b) (7)(E)

(b) (7)(E)

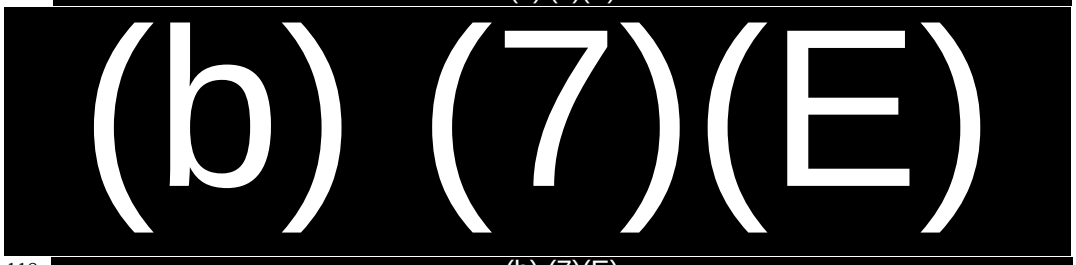
114 (b) (7)(E)



6.420b Secondary Inspection Area

The purpose of the secondary inspection area is to move the suspect vehicle and its occupants to a location more appropriate for further investigation. Moreover sending a vehicle to secondary prevents the suspect vehicle from obstructing traffic in the primary area and unduly extending the seizure of other motorists. The primary legal distinction between primary and secondary is the duration of

115 (b) (7)(E)
(b) (7)(E)
116 (b) (7)(E)
117 (b) (7)(E)



118 (b) (7)(E)
(b) (7)(E)

the seizure and the singling out of a vehicle as opposed to whether an agent asks questions in the traffic lane or the parking lot. It is important to remember that checkpoint operations are only an administrative seizure exception to the Fourth Amendment's warrant clause. There is no inherent authority to search a vehicle during either a primary or secondary inspection absent consent, or probable cause to support a readily mobile conveyance search.[119]

The Supreme Court has recognized that an agent must have "wide discretion" in deciding what vehicles to release and what vehicles to refer to the secondary inspection area.[120] An agent at the primary inspection area may refer a vehicle to the secondary inspection area to investigate a potential immigration violation with nothing more than some or mere suspicion of such a violation.[121] If the vehicle is referred to the secondary inspection area solely to investigate a potential Federal crime that is unrelated to an immigration violation, the agent making the referral must have reasonable suspicion of criminal activity. Regardless of the reason for the secondary referral, because the referral continues the seizure initially made at primary, an agent must use due diligence to resolve the suspicion that led him to refer the vehicle to secondary. If, during the course of an immigration inspection, an agent establishes reasonable suspicion regarding a separate, unrelated violation, he may investigate the new violation as long as he exercises due diligence to confirm or dispel the new suspicion.[122]

Regardless of the reason for sending the vehicle and person(s) to secondary, a Border Patrol agent may take all of the enforcement actions he could have taken at the primary inspection area.[123]

6.430 Bus Checks at Immigration Checkpoints

By policy, buses are sent directly to secondary for inspection due to safety and traffic considerations.[124] Because the programmatic purpose of an immigration checkpoint is to check the immigration status of travelers, the inspection of the bus and its passengers can only last as long as it would reasonably take to check the immigration status of the bus passengers. Once the immigration check has been completed, an agent may not continue to detain the bus or its

[119] *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).
[120] *United States v. Martinez-Fuerte*, 428 U.S. 543, 563-64 (1976).
[121] Such referrals "are made for the sole purpose of conducting a routine and limited inquiry into residence status that cannot feasibly be made of every motorist where the traffic is heavy." *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976).
[122] *United States v. Machuca-Barrera,* 261 F.3d 425, 434 (5th Cir. 2001).
[123] *See* § 6.410a, above, for specific enforcement actions that the agent could take.
[124] *Border Patrol Handbook*, § 13.7(f).

passengers absent decisionable suspicion of illegal activity within the agent's enforcement jurisdiction.[125]

6.440 Resolving Immigration Checkpoint Encounters

If an agent is unable to develop probable cause using due diligence and the least intrusive means reasonably available, the vehicle and its occupants must be released. On the other hand, if an agent does establish probable cause during the course of the lawful immigration checkpoint seizure, the agent can act on that suspicion.[126]

If an agent develops probable cause to believe a vehicle occupant has committed an immigration violation or a criminal offense within his enforcement jurisdiction, the agent may arrest that occupant. If an arrest is made, the agent can conduct a search incident to arrest.[127]

If an agent develops probable cause that there is evidence or seizable property in a vehicle at the checkpoint, he can conduct a search pursuant to the readily mobile conveyance doctrine.[128] During the readily mobile conveyance search,[129] the agent can search anywhere he has probable cause to believe that the object for which he is searching may be found.[130] When the agent locates the object sought it may be seized under the plain view seizure exception to the Fourth Amendment's warrant clause.

The facts necessary to establish the elements of the FEB inbound simply will not exist at an immigration checkpoint due to the requirement that such searches be conducted at the first practical detention point after the nexus event. Similarly, the facts necessary to establish the FEB outbound will never exist at an immigration checkpoint because it will not be the last practical detention point before someone or something leaves the United States. In an extremely rare case, it could be possible that the facts would support conducting an extended border search at an immigration checkpoint because such a search does not need to be conducted at the first practical detention point.

[125] *See generally, United States v. Ventura,* 447 F.3d 375 (5th Cir. 2006); *United States v. Portillo-Aguirre,* 311 F.3d 647 (5th Cir. 2002); *United States v. Machuca-Barrera,* 261 F.3d 425 (5th Cir. 2001); *United States v. Ellis*, 330 F.3d 677 (5th Cir. 2003).

[126] *See generally* § 6.340, *supra*.

[127] *See* § 2.610 for more detail on searches incident to arrest; *See also*, *Arizona v. Gant*, 179 S. Ct. 1710 (2009) (limitations on search incident to arrest of a motor vehicle).

[128] *See* § 2.540.

[129] *See* § 2.541.

[130] *See* §§ 2.542-2.543.

6.500 Transportation Checks[131]

6.510 Introduction

Transportation checks occur when Border Patrol agents have consensual encounters with travelers located in or near bus terminals, train stations and airports, or when they board stationary buses and trains at such locations to engage in consensual encounters with passengers. The purpose of transportation checks is to find and arrest smugglers and illegal aliens attempting to use public transportation to move from the border area to the interior of the United States. Transportation checks conducted at key hubs complement linewatch, roving patrol and immigration checkpoint operations by closing off another means of escape from the border area.

6.520 Constitutional Character of Transportation Checks

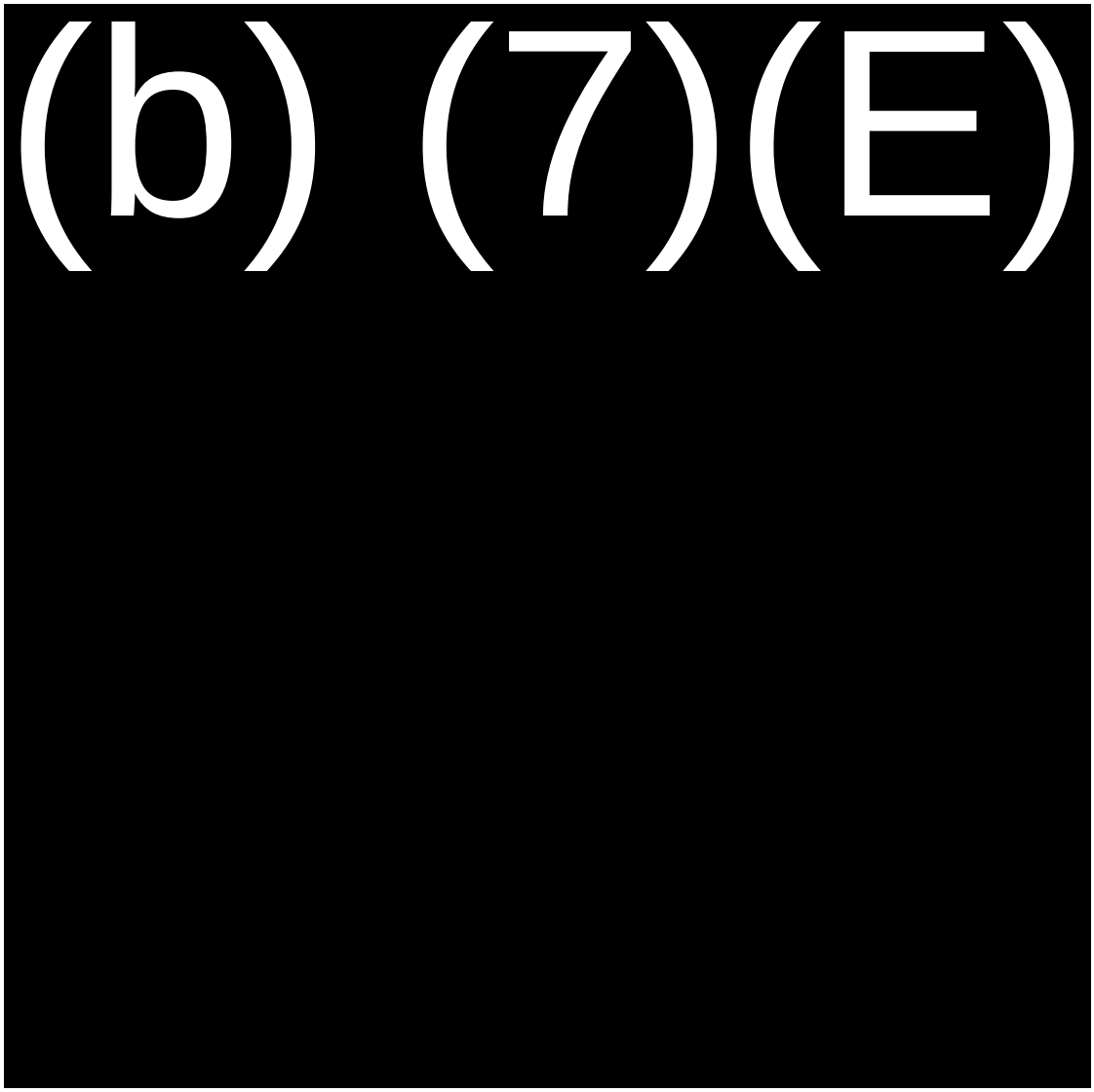
A transportation check must begin as a consensual encounter unless an agent has at least reasonable suspicion that a specific person is unlawfully present in the United States or has committed a federal crime. An agent conducting a transportation check will rarely have the articulable facts to support reasonable suspicion without first talking to someone; hence, the initial contact must generally be consensual to be lawful.

A consensual encounter is not a seizure of a person and requires no suspicion of criminal activity or immigration violations.[132] Nothing in the Constitution prevents an agent from questioning any person in a location where the agent is lawfully present, such as a bus station, train depot, or airport.[133] Of course, the agent must interact with the person in such a manner that a reasonable innocent person would feel free to leave or terminate the encounter with the agent.[134] When the transportation check occurs on a bus or train, the agent will have to demonstrate that he gained access to the bus or train with the consent of its owner or employee. Agents have no inherent authority to simply board a common carrier without at least reasonable suspicion or consent. In addition, the agent must ensure that his conduct while onboard the conveyance would not cause a reasonable person to believe that he could not terminate the encounter with the agent.[135]

[131] The description of transportation checks provided herein is based on *Border Patrol Handbook* Chapter 14, "Transportation Check".
[132] *See* § 2.61.
[133] *See*, *e.g.*, *Florida v. Bostick*, 501 U.S. 429 (1991); *United States v. Mendenhall*, 446 U.S. 544 (1980).
[134] The Supreme Court has noted that "the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 436 (1991). *Bostick* has an extensive treatment of the legal parameters of consensual encounters.
[135] *Id.*

An agent's questions about a person's identity (or a request for identification) do not, by themselves, constitute a Fourth Amendment seizure.[136] However, the person need not answer an agent's questions and may not be detained, even momentarily, without reasonable suspicion. His refusal to listen to or answer questions, does not, without more, furnish reasonable suspicion.

6.530 (b) (7)(E)



[136] *Id.*, *citing I.N.S. v. Delgado*, 466 U.S. 210 (1984); *Florida v. Royer*, 460 U.S. 491 (1983).

(b) (7)(E)

6.540 Resolving Transportation Check Encounters

There are three possible conclusions to any consensual encounter: If the agent does not develop any articulable facts to give rise to a reasonable suspicion, the agent should thank the individual for his cooperation, return any property the agent has received from the person, and continue on with the agent's duties. If the agent does develop reasonable suspicion, the agent may detain the individual to resolve the agent's suspicion that the individual is unlawfully present or involved in criminal activity, and may conduct a frisk if the agent has reasonable suspicion that the individual is armed and dangerous. If the agent develops probable cause that an immigration offense or crime within his or her enforcement jurisdiction has occurred, the agent may arrest the individual and conduct a search incident to arrest of the person, items carried, and immediate vicinity.

6.600 City Patrol[139]

[137] (b) (7)(E)
(b) (7)(E)
[138] (b) (7)(E)
(b) (7)(E)

[139] The description of city patrol operations is based largely on *Border Patrol Handbook* § 11.10, "Interior Patrol".

6.610 Introduction

City patrol serves as a "back-up" to other Border Patrol enforcement operations. Its purpose is to locate illegal aliens within cities close to the international border. It can be carried out by agents patrolling on foot or by patrolling the city in official Border Patrol vehicles as in roving patrol operations. The objective of agents assigned to city patrol is to locate aliens who are subject to removal from the United States.

6.620 Constitutional Character of City Patrol Encounters

The constitutional character of a city patrol encounter will depend upon the actions of the agent and the circumstances surrounding the encounter.[140] An agent who has reasonable suspicion that someone is unlawfully present or has committed a Federal crime may briefly detain that person to confirm or dispel his suspicion. However, agents on city patrol generally will not have the articulable facts necessary to seize someone unless they have first talked to that person. Hence, most city patrol encounters must start as consensual encounters.[141] An agent who develops reasonable suspicion during the course of a consensual encounter can then conduct a brief investigative inquiry by using due diligence and the least intrusive means reasonably available to confirm or dispel his suspicion.[142] Of course, any stop of a vehicle must be supported by reasonable suspicion.[143]

6.630 Limitations on Enforcement Authority

6.630a Administrative Arrest Warrants
6.630b Outdoor Agricultural Operations
6.630c Schools and Places of Worship
6.630d (b) (7)(E)
6.630e Worksite Enforcement

There are various statutory and policy limitations on the exercise of an agent's enforcement authority while conducting city patrol operations. These restrictions must always be kept in mind in order to avoid taking unauthorized action that may otherwise be permissible outside of city patrol operations.

6.630a Administrative Arrest Warrants

The authority for making warrantless arrests of unlawfully present aliens is found in INA § 287(a)(2). Under INA § 287(a)(2), an agent can only make a warrantless administrative arrest if the alien (1) enters or attempts to enter the United States illegally in the agent's "presence or view," or (2) the agent has

[140] U*nited States v. Manzo-Jurado*, 457 F.3d 928 (9th Cir. 2006).
[141] See § 2.61 for a discussion of the nature, and permissible actions during, a consensual encounter.
[142] *See* § 2.62b and § 2.63.
[143] *See* §§ 6.300-6.340, *supra*.

"reason to believe" that the alien would be "likely to escape" before the agent could obtain a warrant for the alien's arrest.[144] When an agent assigned to linewatch, roving patrol, immigration checkpoint or transportation check operations encounters an unlawfully present alien, the nature of the surrounding circumstances are such that the alien (who is already in transit from one place to another) would be likely to escape; this fact obviates the need for an administrative arrest warrant. An agent conducting city patrol duties would not necessarily encounter an alien in transit; thus, the alien may not be "likely to escape," which would make a warrantless administrative arrest unlawful. Agents intending to conduct administrative arrests on city patrol should be aware of the following factors that might be used to show likelihood of escape before a warrant could be obtained: (1) the existence of altered papers, (2) evidence of previous arrests, (3) lack of ties to the community such as family, home, or a job, and (4) attempts to flee.[145]

Of course, the broad arrest authority of 19 U.S.C. § 1589a allows an agent to make a warrantless arrest based on probable cause to believe that a person has committed any Federal crime in his presence or any Federal felony without regard to whether the arrestee would be likely to escape. However, the arrest authority under 19 U.S.C. § 1589a does not empower an agent to make a warrantless arrest of someone who committed a misdemeanor outside of his presence, and entry at an improper time or place is typically a misdemeanor.[146]

6.630b Outdoor Agricultural Operations

INA § 287(e) limits a Border Patrol agent's entry onto a farm or other outdoor agricultural operation if the purpose of entering is to question persons regarding their right to be or remain in the United States. An agent performing linewatch duties may lawfully enter a farm or other agricultural operation within 25 miles of the border to patrol the border under INA § 287(a)(3). However, an agent assigned to city patrol operations who intends to enter a farm or outdoor agricultural operation should carefully consider his reason for going onto the farm and whether INA § 287(e) limits his ability to do so. If the agent's purpose for entering the outdoor agricultural operation is to question any person about that person's immigration status, the agent is prohibited from entering the area unless the agent has obtained a warrant or the consent of the owner or manager.

Regardless of where a farm or ranch is located, an agent may lawfully enter to interview a witness, pursue a fleeing felon, respond to a bona fide emergency, or for any other lawful purpose other than interrogating any person about his or her immigration status.

[144] *See* § 6.170 and accompanying notes for a detailed discussion on arrest authority.
[145] *See, Pearl Meadows Mushroom Farm, Inc. v. Nelson*, 723 F. Supp. 432, 449 (N.D. Cal. 1989).
[146] *See,* 8 U.S.C. § 1325(a).

6.630c Schools and Places of Worship

The First Amendment of the Constitution protects the free exercise of religion and prohibits an establishment of religion. In addition, the Supreme Court has ruled that all children in the United States, even children who may be here illegally, are entitled to receive a public education free from unnecessary interference by the Government.[147] In order to protect these constitutional interests and avoid negative publicity, policy[148] prohibits conducting enforcement activities at schools, places of worship, and outdoor religious ceremonies without the prior written approval of the sector's chief patrol agent, subject to a few limited exceptions. The exceptions to the general policy of avoiding enforcement activities at schools and places of worship involve cases in which the safety of agents or the public is at risk, such as hot pursuit of a fleeing felon. In such a situation, the Border Patrol agent is to notify his immediate supervisor, as soon after the incident as possible, that an enforcement activity has occurred at a school or religious place.

The restrictions discussed in this section apply only to enforcement activities. Agents can, in the course of their official duties, enter schools or places of worship for the purpose of public relations, canine demonstrations, career fairs, and other community functions.

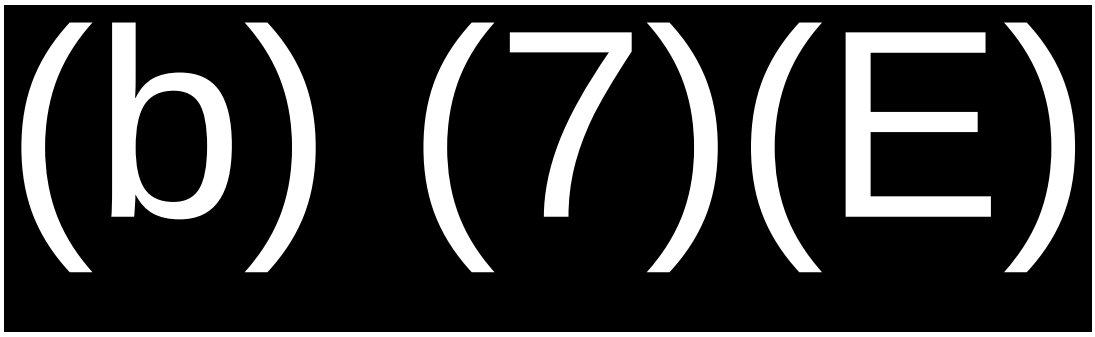
6.630d (b) (7)(E)

(b) (7)(E)

[147] *Plyler v. Doe*, 457 U.S. 202 (1982).

[148] Border Patrol Memorandum, "*Enforcement Activities at Schools, Places of Worship, or at funerals or other religious ceremonies*" (May 17, 1993). The memorandum was issued by the INS Office of Operations.

[149] (b) (7)(E)
(b) (7)(E)



6.630e Worksite Enforcement

In some sectors, the Border Patrol has found that worksite enforcement is necessary to help deter illegal immigration. The Worksite Enforcement Program came into existence with the enactment of the Immigration Reform and Control Act of 1986 (IRCA). At that time, Congress passed laws making it illegal for employers to knowingly hire aliens who do not have legal authorization to work in the United States. It also required employers to review and record the evidence presented by prospective employees to show they were authorized to be present, and to work, in the United States. These laws have since been modified, but the underlying purpose of the law is still to eliminate the magnet of employment that encourages aliens to enter the United States illegally.

Under the provisions of a memorandum of understanding entered into between CBP and Immigration and Customs Enforcement (ICE) on November 16, 2004, ICE is primarily responsible for investigating claims that employers are hiring illegal aliens in violation of U.S. law. However, this does not prevent Border Patrol agents involved in city patrol operations from being involved in worksite enforcement activities as well. Border Patrol agents should be aware that ICE maintains oversight of worksite enforcement even when it is conducted by Border Patrol agents. Agents should be familiar with the laws, regulations and policies governing worksite enforcement before commencing such activities.

6.640 Resolving City Patrol Encounters

The resolution of a city patrol encounter will depend upon the nature of the underlying interaction with the person. If it is a consensual encounter, the agent must follow the rules governing consensual encounters. If it is a seizure based on reasonable suspicion, the agent must conduct an investigative detention for the purpose of confirming or dispelling his suspicion. If the agent's suspicions are dispelled, the person must be released. On the other hand, if the agent develops probable cause, the agent can arrest the individual and conduct a search incident to the arrest.

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Chapter Seven

Bank Secrecy Act

(CMIR, Bulk Cash Smuggling, etc.)

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7.000 Introduction

During the late 1960s, the United States government became increasingly concerned about the use of secret bank accounts by Americans engaged in illegal activities.

On October 26, 1970, the President signed the *Bank Records and Foreign Transaction Act* into law. Title I and II of that act constituted what is commonly known as the *Bank Secrecy Act* (hereinafter, the BSA). Title I requires banks and other financial institutions to retain certain financial records for periods of up to five years.[1] By requiring the maintenance of these records, Congress believed that criminal, tax, and regulatory investigations and proceedings would be facilitated. This was based upon Congress' finding that "an effective fight on crime depends in large measure on the maintenance of adequate and appropriate records by financial institutions."

Title II is entitled the *Currency and Foreign Transactions Reporting Act.*[2]

Failure to comply with the reporting requirements of the BSA may lead to civil penalties, civil forfeiture and criminal sanctions.

The primary purpose of the reporting requirement of the *Bank Secrecy Act* is to identify the source, volume and movement of currency and monetary instruments being transported into or out of the United States, or being deposited in financial institutions, and to aid law enforcement officials in the detection and investigation of criminal, tax, and regulatory violations.

7.100 Title I - Recordkeeping Requirements

This part of the *Bank Secrecy Act* imposes recordkeeping requirements on banks and other financial institutions to keep certain records. The types of records required to be kept include copies of checks, bank statements, records of each extension of credit in an amount exceeding $10,000 (except for real property loans), each advice, request or instruction given regarding any transfer of currency or monetary instruments, funds, checks, investment securities or credit of more than $10,000 and records of transactions.[3]

7.210 Currency and Monetary Instruments Report

7.211 Currency
7.212 Travelers' Checks
7.213 Certain Other Negotiable Instruments
7.214 Incomplete Instruments
7.215 Securities or Stock in Bearer Form

1 12 U.S.C. §§ 1828b, 1951-1959.
2 31 U.S.C. §§ 321, 5311-5326, 5328-5332.
3 12 U.S.C. § 1829b; 31 C.F.R. § 1010.410 (2011).

A report must be filed by anyone who transports, is about to transport, or causes the transport of monetary instruments in excess of $10,000 into or out of the United States at one time.

Determining whether a particular negotiable instrument is a "monetary instrument" is the primary consideration in determining whether a report is required for the export or import of such an instrument. Title 31 of the Code of Federal Regulations defines the term "monetary instruments" in the following way:

(1) Monetary instruments include:

(i) Currency;

(ii) Traveler's checks in any form;

(iii) All negotiable instruments (including personal checks, business checks, official bank checks, cashier's checks, third-party checks, promissory notes (as that term is defined in the Uniform Commercial Code), and money orders) that are either in bearer form, endorsed without restriction, made out to a fictitious payee (for the purposes of 31 C.F.R. § 1010.340), or otherwise in such form that title thereto passes upon delivery;

(iv) Incomplete instruments (including personal checks, business checks, official bank checks, cashier's checks, third-party checks, promissory notes (as that term is defined in the Uniform Commercial Code), and money orders) signed but with the payee's name omitted; and

(v) Securities or stock in bearer form or otherwise in such form that title thereto passes upon delivery.

(2) Monetary instruments do not include warehouse receipts or bills of lading.[4]

7.211 Currency

The coin and currency of the United States, or of any other country, which circulate in and are customarily used and accepted as money in the country of issuance are monetary instruments. Included are U.S. silver certificates, U.S. notes and Federal Reserve notes, but not other negotiable instruments not regarded as legal tender.

[4] 31 C.F.R. § 1010.11(dd) (2011). Warehouse receipts are receipts given by a warehouseman for goods received by him for storage in his warehouse. A bill of lading is evidence of a contract for carriage of goods sent by sea for a certain freight.

Under a Treasury ruling gold coins are not monetary instruments. This is so even if the coins are minted "circulation" coin of a particular country. The reason is that such coins are not used as "coin of the realm" because their gold value far exceeds their face value. However, gold coins are merchandise and must be declared upon importation under the Customs laws.

7.212 Travelers' Checks

Travelers' checks are issued in predetermined amounts ($10, $20, $50, $100, $500, and $1000) by certain companies, several large United States banks, and foreign banks. Travelers' checks are not drawn on any specified bank, but are payable at practically all banks throughout the world and are guaranteed by a well-known institution.

Travelers' checks that have been issued and are negotiable, irrespective of form, are monetary instruments.[5]

Bulk lots of travelers' checks prior to their delivery to and issuance by a bank or selling agent are not negotiable instruments and therefore not "monetary instruments." Similarly, travelers' checks that have been negotiated by the payee and are being transported (normally by a financial institution) in the collection and reconciliation process are no longer negotiable and therefore are not "monetary instruments."

A list of companies issuing travelers' checks in this country is located at § 7.1400.

7.213 Certain Other Negotiable Instruments

7.213a In Bearer Form
7.213b Endorsed Without Restriction
7.213c Made Out to a Fictitious Payee

Personal checks, business checks, bank checks, cashier's checks, third-party checks, promissory notes, postal and other money orders that are:

- ✓In bearer form, or
- ✓ Endorsed without restriction, or
- ✓ Made out to a fictitious payee, or
- ✓ Otherwise in such form that title thereto passes upon delivery are monetary instruments, regardless of whether they are undated, antedated, or postdated.

[5] 31 C.F.R. § 1010.11(dd)(1)(ii) (2011). See *United States v. Larson*, 110 F.3d 620 (8th Cir. 1997).

Thus, a negotiable instrument, such as a regular bank check, made payable to a named payee and either unendorsed or restrictively endorsed on the reverse side is not a monetary instrument and therefore not subject to the reporting requirements, even if the named payee is transporting the instrument. See § 7.220 for other examples of negotiable instruments that are not monetary instruments.

7.213a In Bearer Form

Title to valuable papers (checks, bonds, coupons, etc.) can be transferred either by delivery or by endorsement. As a general rule, if title to an instrument is transferable simply by delivery, it is a bearer instrument.

Investment securities (e.g., stocks and bonds) in bearer form and other negotiable instruments in bearer form are similar to cash; i.e., anyone in possession (the bearer) of the instrument can negotiate it. Put another way, an instrument is in bearer form if the way it is made or endorsed is such that there is no limitation or restriction on who can do what with it.

The illustration in Figure 1 is an example of a check drawn in bearer form.

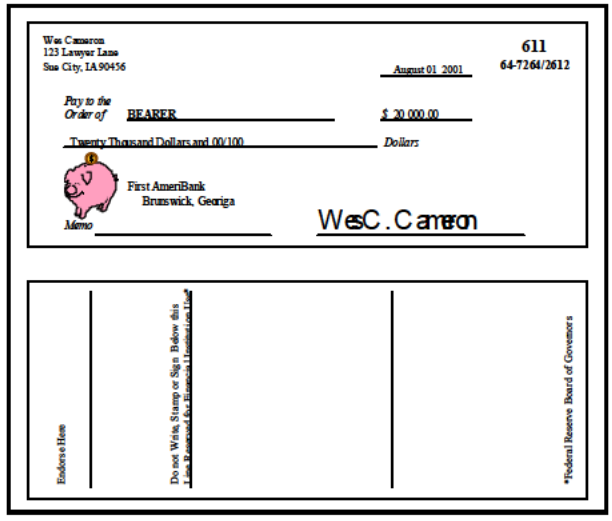


Figure 1: Monetary Instrument (bearer form - paid to "Bearer")

7.213b Endorsed Without Restriction

Instruments made payable to a named payee and endorsed without restriction by that payee are bearer instruments and thus monetary instruments.

Similarly, an instrument drawn in bearer form, i.e., made payable to "cash" or "bearer" or the foreign language equivalent, such as, "portador," Spanish for

bearer, which is endorsed without restriction remains a bearer instrument and therefore a monetary instrument.

Figures 2 and 3 illustrate examples of checks endorsed "in blank," i.e., without restriction.

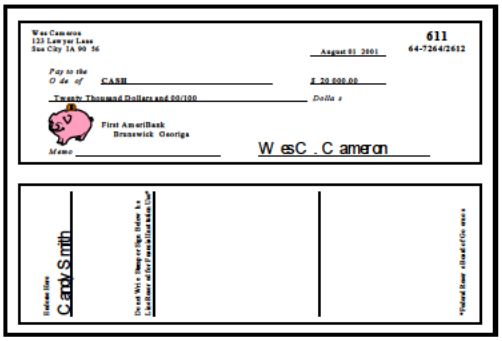


Figure 2 Monetary Instrument (bearer form - unrestricted endorsement)

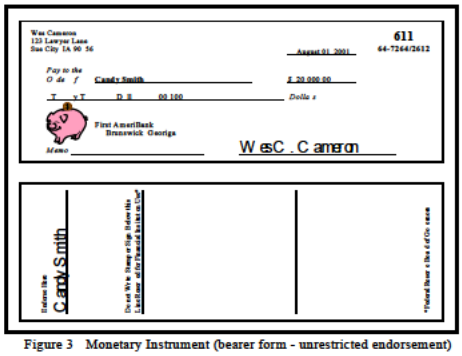


Figure 3 Monetary Instrument (bearer form - unrestricted endorsement)

Note that figure 3 is an example of a check, drawn to the order of a named payee, which is not considered a monetary instrument until the payee endorses the check without restriction.

7.213c Made Out to a Fictitious Payee

Checks made out to a fictitious payee (as often happens when cashier's checks are purchased by a money launderer) are monetary instruments. Figure 4 is an example of a check made payable to a fictitious payee. As a practical matter, awareness of the fictitious nature of a payee's name would usually come through an undercover operation or a cooperating individual.

At least one court has held that the payee to whom a check is written cannot actually exist for the "fictitious payee" provision of the CMIR statute and implementing regulations to govern the instrument.[6] According to the Court, for the purpose of 31 U.S.C. § 5316, it is not sufficient that the check was made out to a living person who was not intended to have an interest in the instrument.[7]

6 *See United States v. Ali,* 561 F.Supp.2d 269, 276 (E.D. N.Y. June 28, 2008)
7 *Id.* at 280.

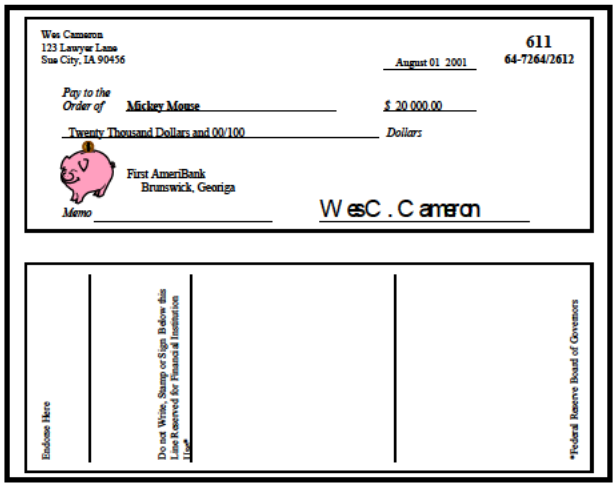


Figure 4: Monetary Instrument (fictitious payee)

7.214 Incomplete Instruments

Incomplete instruments—such as checks, promissory notes and money orders that are signed but with the payee's name omitted—are treated as bearer instruments and are, therefore, monetary instruments. See Figure 5 for an example.

Checks signed (made) and otherwise in bearer form but with the amount omitted were not considered monetary instruments for CMIR purposes by one court. "However, [the defendant] astutely notes a conundrum: factoring the regulator's reach to include incomplete checks with unascribed value must be reconciled with 31 USC 5316's requirement that a report will be filed where "monetary instruments of more than $10,000 at one time" are transported. The Court agrees that checks drawn in blank amount cannot contribute to the amount triggering a reporting obligation as such covered instruments leave the country. Although technically covered "monetary instruments", they are monetary instruments with no value at the critical point of valuation -- upon their exportation from the United States."[8] The Court, however, went on to hold that these same incomplete instruments did support the defendant's conviction for structuring in violation of 31 U.S.C. § 5324(c)(3).[9] Given the limited precedential value of a single U.S. District Court decision, you should consult your supporting Associate/Assistant Chief Counsel for advice if you encounter incomplete monetary instruments like those described above.

8 See *United States v. Ali*, 2008 U.S. Dist. Lexis 86463 at pg. 15 (E.D. N.Y. Oct. 27, 2008)

9 *Ali*, 2008 U.S. Dist. Lexis 86463 at pg. 22.

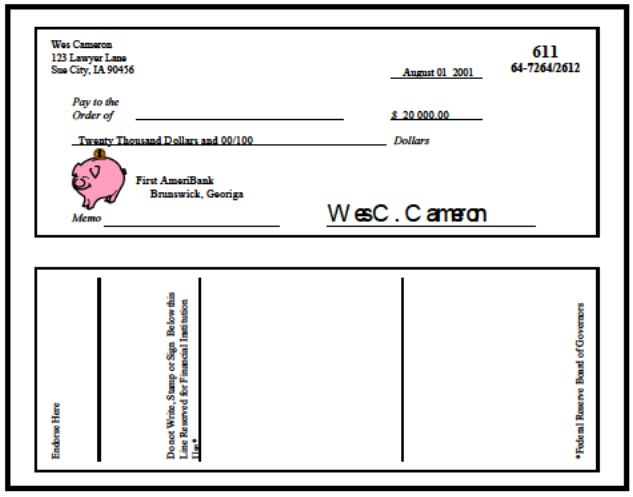


Figure 5: Monetary Instrument (incomplete)

7.215 Securities or Stock in Bearer Form

7.215a Bearer Bond
7.215b Registered Bond
7.215c Stock Certificate

The term "investment securities" applies to all classes of bonds and stocks. Investment securities in bearer form or otherwise in such form that title thereto passes upon delivery are monetary instruments. Examples of investment securities are bond and stock certificates.

7.215a Bearer Bond

A bond is either an instrument under which a person or corporation guarantees to pay a stated sum of money on or before a specified date, or a certificate of ownership of a specified portion of a debt due by the government or corporation to individual holders usually bearing a fixed rate of interest. A bearer bond is presumed to be owned by the person who holds it; the owner's name is not on record with the issuer. Such bonds usually carry detachable interest coupons. Interest is collected by presentation of a coupon to the issuer's agent or the bondholder's bank. The detachable certificate of interest due is also a bearer instrument.

7.215b Registered Bond

A bond may be registered in the name of the owner as to principal or interest or both. A bond registered as to principal can be transferred only with the endorsement of the registered owner, but interest is paid by presentation of the appropriate coupon. Registered bonds are not in "bearer" form unless endorsed in blank.

Endorsement, or assignment, in blank is a formal transfer of title in which the space for the insertion of the new owner is left blank, so that the name may be written in at any subsequent time. An assignment form is found on the reverse side of registered bonds. Registered bonds endorsed or assigned in blank become "bearer" instruments in that title passes by mere delivery.

7.215c Stock Certificate

A stock certificate is a certificate evidencing ownership of one or more shares of a corporation's stock. These certificates are usually registered to a principal and as such are not bearer instruments. A share of stock differs from a bond in that a bond is a contract to pay a certain sum of money with definite stipulations as to amount and maturity of interest payments, whereas a share of stock contains no promise to repay the purchase price or any amount whatsoever. The shareholder is an owner; a bondholder is a creditor. Just as with a bond, however, a stock certificate may be assigned in blank. The following is a typical form of assignment on the reverse side of a stock certificate.

> For value received.....hereby sell, assign and transfer into..... shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint..... attorney to transfer the said stock on the books of the within named company with full power of substitution in the premises.
>
> Dated In the presence of:
> (Signature).....

The signature of this assignment must correspond with the name as written on the face of this certificate in every particular without alteration or enlargement or any change whatever.

7.220 Instruments That Are Not Monetary Instruments

7.221 Payable to a Named Person and Not Endorsed
7.222 Payable to Named Payees and Not Endorsed by All Those Named
7.223 Restrictively Endorsed Instruments
7.224 Stored Value Cards
7.225 Investigative Detention of Instruments

7.221 Payable to a Named Person and Not Endorsed

Instruments which are made payable to a named, nonfictitious person and are not endorsed are not monetary instruments.

Figure 6 depicts a check made payable to a named payee and not endorsed.

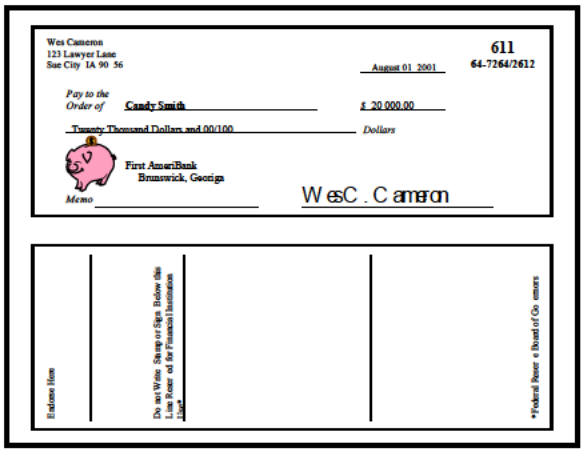


Figure 6: Not a Monetary Instrument (restricted payee)

7.222 Payable to Named Payees and Not Endorsed by All Those Named

Instruments made payable to more than one payee, such as seen in Figure 7, and which do not have the unrestricted endorsement of all payees, are not monetary instruments. "Made payable to more than one payee" is to be distinguished from the case of alternative payees. An instrument made payable to "John OR Mary" is made payable to alternative payees. Negotiation by either one satisfies the condition. An instrument made payable to "John AND Mary" is made payable to more than one payee and must be negotiated (endorsed) by both. In the following illustration, since the endorsement is incomplete it does not change the multiple-payee instrument to a bearer instrument, and therefore the check is not a monetary instrument.

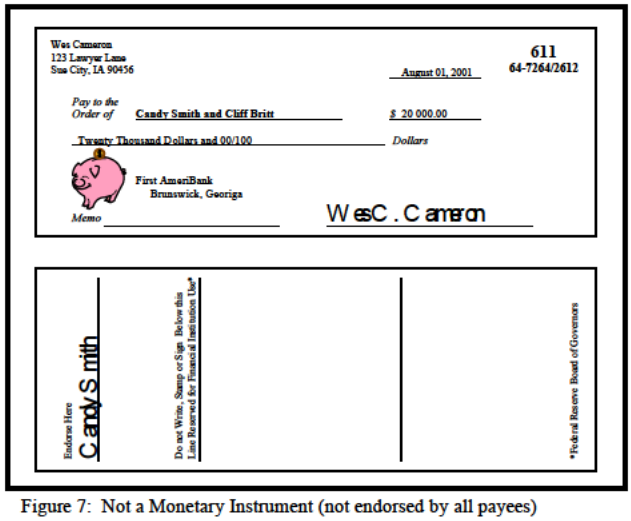


Figure 7: Not a Monetary Instrument (not endorsed by all payees)

7.223 Restrictively Endorsed Instruments

Instruments that are restrictively endorsed are not monetary instruments, irrespective of whether they were originally drawn as bearer instruments or made payable to a named payee. The following illustrations contain examples of both. Although the check in Figure 8 that was made payable to "Bearer" was drawn as a bearer instrument, the restrictive endorsement transforms it from bearer to nonbearer, and thus it is no longer a monetary instrument. The fact that the endorser may have possession of the check is immaterial to the question of whether or not the check is in bearer form.

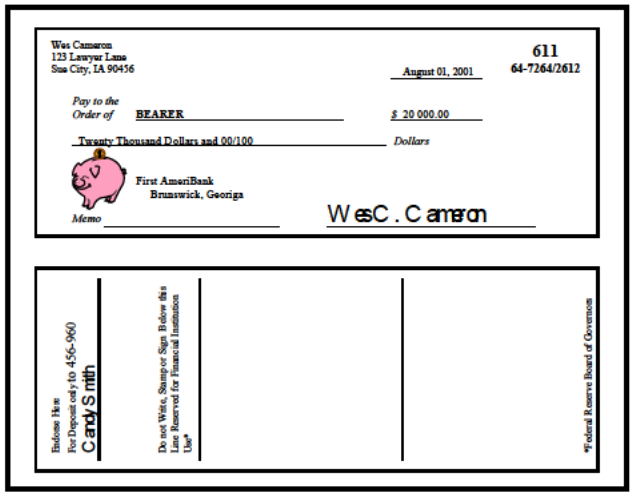


Figure 8: Not a Monetary Instrument (restricted endorsement)

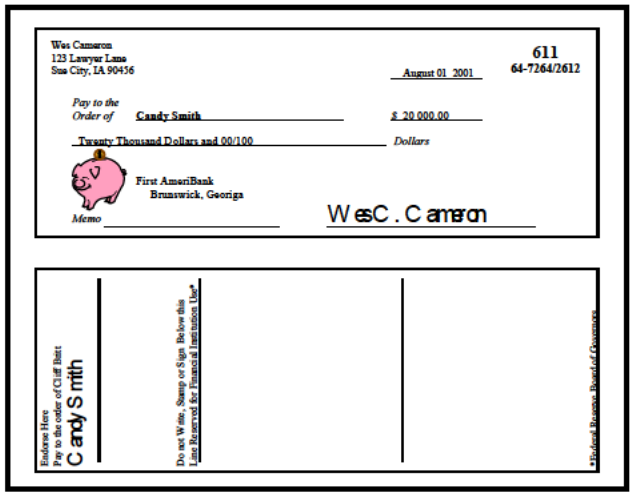


Figure 9: Not a Monetary Instrument (restricted endorsement)

In Figure 9, the original payee, Candy Smith, endorsed the check and added a new payee -- "Pay to the order of Cliff Britt." As a result, due to the new

restrictive endorsement, the check is no longer considered a monetary instrument for CMIR purposes.

7.224 Stored Value Cards[10]

The United States Department of Justice has taken the position that "open-loop" stored value cards are not monetary instruments for the purposes of 31 U.S.C. § 5332 ("Bulk Cash Smuggling"). [See United States Attorneys' Bulletin, September 2007, Vol. 55, No. 5, *Bulk Cash Smuggling*, p. 41]. "According to the Federal Reserve Bank of New York:

> There are two main categories of stored value cards in the marketplace. The first prepaid cards made available to the marketplace were single-purpose or "closed loop" cards. Gift cards, which can be used to purchase goods at particular retailers, and prepaid telephone cards, which can only be used to make telephone calls, are examples of single-purchase cards. The second type of card to emerge was a multi-purpose or "open-loop" card, which can be used to make debit transactions at a wide variety of retail locations, as well as other purposes, such as receiving direct deposits and withdrawing cash from ATMs. Some multi-purpose cards are branded by Visa and MasterCard and can be used wherever those brands are accepted. [Federal Reserve Bank of New York, *Stored Value Cards: An Alternative for the Unbanked?* (July 2004), *Id.* at p. 43].

This second type of Stored Value Card does not fit within the definition of monetary instruments according to the above mentioned sources. It is unclear whether these sources consider "closed-loop" cards would be considered monetary instruments. However, it seems that the definition of monetary instruments would not include "closed-loop" cards, either.

7.225 Investigative Detention of Instruments

During a border search, if an agent or officer reasonably suspects that certain instruments may be monetary instruments, the instruments may be detained for a reasonable period of time to determine their status. In such instances, the appropriate Associate/Assistant Chief Counsel should be contacted as soon as possible.

7.230 United States

For CMIR purposes, the Unites States include the fifty states, the District of Columbia, the Indian lands (as that term is defined in the Indian Gaming

10 Changes to the regulations regarding stored value cards as "monetary instruments" are being considered. See "Definition of Monetary Instrument;" 76 Fed. Reg. 64049 (2011) (to be codified at 31 C.F.R. pt. 1010) (proposed Oct. 17, 2011)

Regulatory Act). It also includes territories and possessions that the Secretary prescribes by regulation, i.e., the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and all other territories and possessions of the United States other than the Indian lands and the District of Columbia.[11]

Consequently, a CMIR is not required for travel between the U.S. Virgin Islands and Puerto Rico or between Florida and Puerto Rico or the U.S. Virgin Islands. However, a CMIR would be required for travel from Puerto Rico to the Dominican Republic, or from the Dominican Republic to Puerto Rico. Note that in some territories and possessions, CBP does not have facilities to collect CMIRs.

CMIRs are required in the case of "cruise-to-nowhere" gambling ships.[12]

7.240 Transports or About to Transport

Section 5316(a)(1) requires a report upon the *transportation* of monetary instruments. Consequently, transfers of funds through normal banking procedures not involving the physical transportation of funds, such as wire transfers, are not required to be reported to CBP. Wire transfers are covered by the money laundering law.[13]

7.250 At One Time

Section 5316(a)(1) requires a report for monetary instruments in excess of $10,000 that are transported "*at one time*." "*At one time*" is defined as the transportation of more than $10,000 "(i) on one calendar day or (ii) if for the purpose of evading the reporting requirements . . . on one or more days."[14]

For example, Morales was stopped at the Port of Entry as he was about to depart the United States and was asked if he had munitions or currency or other instruments valued in excess of $10,000. Morales stated he was fully aware of the reporting requirements and denied having anything to report. Following the discovery of some ammunition, Morales and the other occupants of the vehicle were searched and over $20,000 was found, $5,000 secreted in the underwear of each. Morales admitted that the cash was his and that he had instructed the others to hide the money in their underwear to avoid detection and the reporting requirement. Morales was found guilty of transporting "at one time" more than $10,000 without filing the required report.[15]

Another example of "at one time" is demonstrated by Maria who enters the United States at Hidalgo, Texas at 8:00 a.m. on August 29th with $3000, and

11 31 U.S.C. § 5312(a)(6); 31 C.F.R. §§ 1010.100(zz),(hhh) (2011).
12 Chief Counsel opinion EN-88-1121, dated June 22, 1989.
13 18 U.S.C. § 1956(a)(2).
14 31 C.F.R. § 1010.100(b) (2011).
15 *United States v. Morales-Vasquez*, 919 F.2d 258 (5th Cir. 1990).

goes back to Mexico. She reenters the United States at noon on the 29th with $4000 and reenters again at 4:00 p.m. that same day with $7000. At the time of the last transportation, Maria will have transported "at one time" more than $10,000 and a report is required covering all these transportations.

A third example would be Joe who is stopped at the POE en route to Canada and is asked if he has currency or monetary instruments. Stating that he has $13,000, Joe then asks the inspector whether the inquiry was "for the government form that has to be filed for over $10,000." When told that it was, Joe decides not to leave the United States and is allowed to turn around. Sometime later Joe is seen approaching the POE again and is stopped, claims no reportable monetary instruments and is searched, revealing only $9,500. Joe is allowed to proceed. Two days later Joe is seen again approaching the POE and is again stopped, claiming he only has $3,500, which is confirmed. Joe has violated the law by attempting to transport more than $10,000 "at one time" without filing the required report.[16]

7.260 Who Must File

7.261 A Person
7.262 Knowingly Transports
7.263 Has Transported
7.264 (b) (7)(E)
7.265 Receipt of Monetary Instruments

7.261 A Person

Reports are required to be filed by a person or agent or bailee of a person.[17] The term "person" is defined as including an individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, an Indian Tribe (as that term is defined in the Indian Gaming Regulatory Act), and all entities cognizable as legal personalities.[18] In group situations a report has to be filed if any one person is transporting over $10,000; it does not matter that the person is carrying it for another member or members of the group. Similarly, as discussed below, anyone who *causes* another to transport more than $10,000 must file.

16 *See, e.g.*, *United States v. Scanio*, 900 F.2d 485 (2d Cir. 1990), *overruled by Ratzlaff v. United States*, 510 U.S. 135 (1994). "Congress subsequently amended the anti-structuring law to conform to the *Scanio* interpretation, *see* Riegle Community Development and Regulatory Improvement Act of 1994, § 411 Pub. L. No. 103-325, 108 Stat. 2160, 2253 (1994) (codified at 31 U.S.C. §§ 5322(a), (b), 5324(c))" *United States v. Simon*, 85 F.3d 906, 909 n.3 (2d Cir. 1996).

16 31 U.S.C. § 5316.

18 31 C.F.R. § 1010.100(mm) (2011).

Thus, three persons traveling together each have $15,000. Two give their money to the third. All three have an individual responsibility to see that a report is filed, two for "causing" and the third for transporting. Although only one report is required with respect to a particular transportation, no person who is required to file a report is excused from liability for failure to do so if, in fact, a complete and truthful report has not been filed by someone with respect to that transportation.[19]

7.262 Knowingly Transports

The filing requirements only apply to those individuals who have knowledge of the fact that they are transporting monetary instruments which exceeds $10,000. As discussed below, the courts are split on the issue of the knowledge requirements for seizure and forfeiture purposes. Contract carriers, such as UPS, FedEx, DHL, etc., are required to file if they have knowledge, i.e., the shipper has declared the contents as being monetary instruments. As a practical matter, these carriers refuse to accept such instruments for shipping.

7.263 Has Transported

The phrase "has transported" does not refer to the past tense, but rather reflects an intent to require reports from individuals who have monetary instruments transported on their behalf, such as by mail, shipping companies, or private carriers.

In the case of monetary instruments which are being exported and which do not accompany a person, the Treasury Regulations provide:

> Each person who physically transports, mails or ships, or causes to be physically transported, mailed, or shipped, . . . monetary instruments . . . exceeding $10,000 at one time from the United States . . . shall make a report thereof.[20]

With the exception of noncitizens shipping from abroad to banks or brokers, and bank-to-bank shipments, the report obligation is absolute upon a shipper, admitting of no exception or contingency.[21] A transporter's obligation is independent of, and not contingent upon, the shipper's unequivocal responsibility. If a transporter has knowledge of the nature of his cartage, a report is required of him independently of any required by the shipper.[22] In

[19] 31 C.F.R. § 1010.340(a) (2011). *See also*, *United States v. $23,090.00 in U.S. Currency*, 377 F.Supp.2d 1223 (S.D. Fla. 2005) (an individual who sends money out of the United States using another person to transport the funds on his behalf is responsible for filing a CMIR.)

[20] 31 C.F.R. §1010.340(a) (2011).

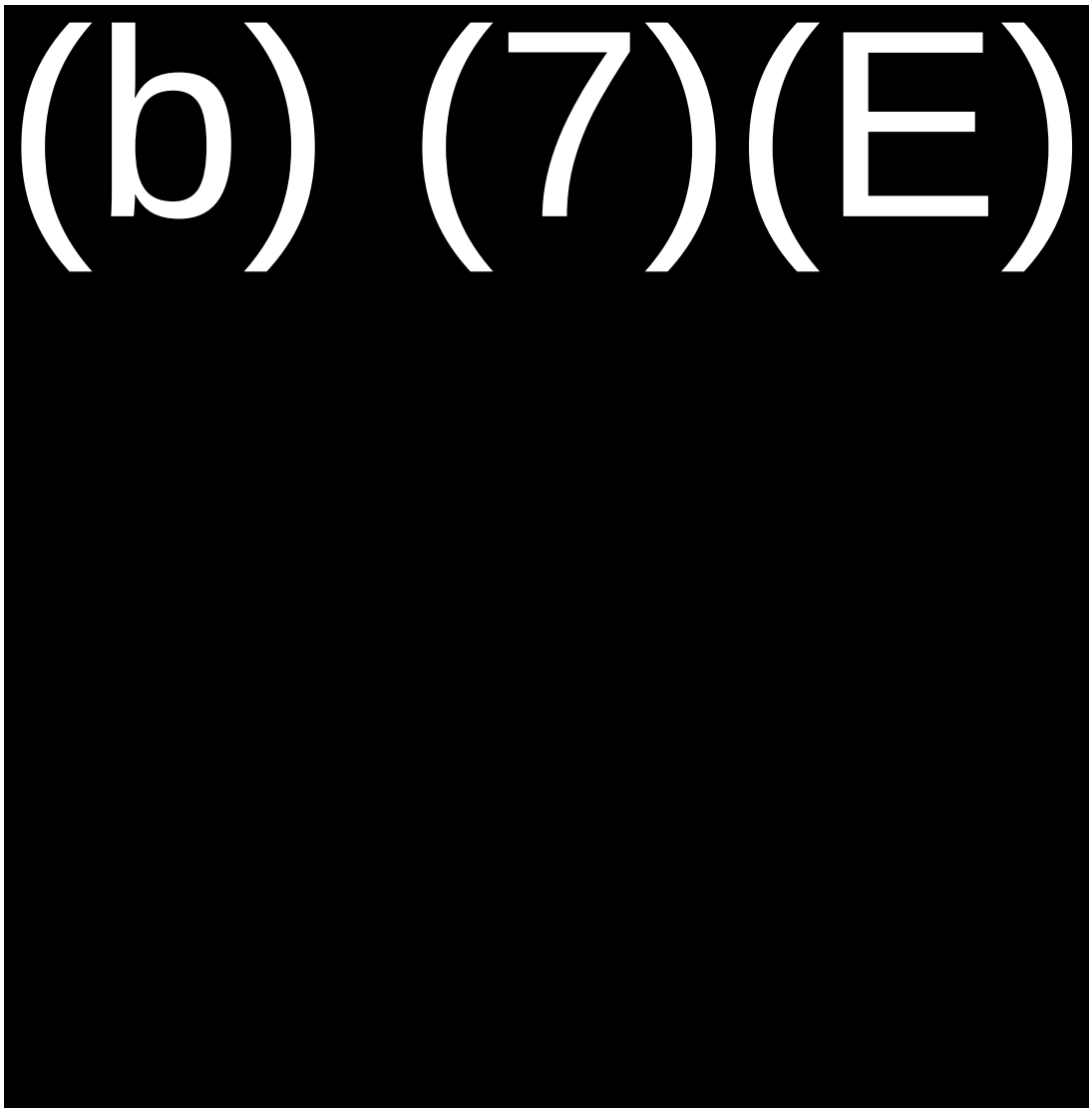
[21] 31 C.F.R. §§ 1010.340(a),(c) (2011).

[22] 31 C.F.R. §§ 1010.340 (2011).

either or both events, the required reports shall be filed at or before the time of entry or departure.[23]

A shipper has the option of filing the report by mail on or before the date of entry or departure.[24] Treasury General Counsel's office advises that filing by mail on or before the date of entry or departure is satisfied by being post marked on or before the date of entry or departure.

7.264 (b) (7)(E)



[23] 31 U.S.C. § 5324(b); 31 C.F.R. § 1010.306(b)(1) (2011).
[24] 31 C.F.R. § 1010.306(b)(3) (2011).


(b) (7)(E)

7.265 Receipt of Monetary Instruments

A report must be filed by anyone who *receives* monetary instruments exceeding $10,000 where the transporter, shipper or mailer has not filed a report.[25]

The CMIR must be filed within 15 days after receiving the monetary instruments.[26] The report can be filed at any port of entry or departure or by mail to the Commissioner of Customs and Border Protection, Attention: Currency Transportation Reports, Washington, DC, 20229. If filed by mail, the report must be filed on or before the date of entry, mailing, or shipping.[27]

7.270 Who Is Not Required to File

As noted previously in § 7.263, 31 C.F.R. § 1010.340 specifically excludes from the reporting requirements certain situations, including overland shipments between commercial banks, common carriers with respect to monetary instruments carried by passengers or with respect to shipments of monetary instruments not declared as such by the shipper, etc.

7.280 When to File - "Time of Departure"

The report is required to be filed at the time of entry into the United States or "at the time of departure," mailing, or shipping.

When the "time of departure" actually occurs in a given case may be an issue. For example, in *United States v. Bareno-Burgos* the currency reporting law was not violated by a passenger who did not report prior to boarding a flight from JFK to Colombia via Miami since the "time of departure" out of the United States would not occur until he boarded the flight in Miami en route to Colombia.[28] Also, in *United States v. Jenkins,* the court concluded no violation had occurred even though Jenkins was about to transport the currency outside of the U.S., since he was arrested by the FBI in his hotel room a number of hours before the scheduled flight and had not yet reached the point of departure.[29]

The cases, however, have uniformly upheld enforcement efforts taken with respect to persons who (1) are at the last geographical point in the United States before departure; (2) have been presented with the opportunity to file the report; and (3) manifest a definite commitment to leave without filing the report.[30] As

25 31 C.F.R. § 1010.340(b) (2011).
26 31 C.F.R. § 1010.306(b)(2) (2011).
27 31 C.F.R. § 1010.306(b)(3) (2011).
28 *United States v. Bareno-Burgos*, 739 F. Supp. 772 (E.D. N.Y. 1990); *but see United States v. Bibian*, No. 94-50078, Unpublished (9th Cir. 1995).
29 *United States v. Jenkins*, 689 F. Supp. 342 (S.D.N.Y. 1988), *rev'd. on other grounds*, 876 F.2d 1085 (2d Cir. 1989), *cert. denied*, 502 U.S. 1014(1991).
30 *United States* v. *$831,160*, 607 F. Supp. 1407 (N.D. Cal. 1984), *aff'd.*, 785 F.2d 317 (9th Cir. 1986); *United States v. Rojas*, 671 F.2d 159 (5th Cir. 1982);

one court stated, "[t]he general rule . . . is that the 'time of departure' from the country is reached when one is reasonably close, both spatially and temporally, to the physical point of departure and manifests a definite commitment to leave."[31] Having reached the "time of departure," one who fails to file when given the opportunity violates the law.

Unique circumstances may be presented which might create a "functional equivalent" to the time of departure out of the United States. For example, El Al, the Israeli airline, maintaining such tight security that passengers in Los Angeles who will board an El Al flight from JFK to Tel Aviv go through Customs procedures in LAX, are then isolated from other passengers, escorted to the chartered LAX to JFK flight, met in JFK and escorted in isolation directly to the El Al plane which then departs for Tel Aviv. In such a circumstance, the Ninth Circuit has held that LAX is the "functional equivalent" to the time of departure for Tel Aviv sufficient for requiring the submission of a report at LAX.[32]

7.300 Searches at the Border

By statute and court decisions, "customs officers," e.g., Air & Marine Interdiction Agents, Aviation Enforcement Officers, Border Patrol Agents and Customs and Border Protection Officers, may stop and search at the border, without a search warrant, any vehicle, vessel, aircraft, or other conveyance, any envelope or other container, and any person entering or departing from the United States.[33] Searches of objects for monetary instruments can be done both inbound and outbound without any suspicion.[34] The rules for border search of a person issued by a particular enforcement arm of CBP (A&M, OBP or OFO) govern how an enforcement officer from that arm is to conduct a search of a person for monetary instruments.

Agents and officers should be aware that the ability to conduct an outbound border search may be proper even when a violation of the currency law has not occurred in the outbound setting, i.e., "prior to the time of departure." Even if monetary instruments are found during a border search, the officer should not make a seizure or arrest unless the conditions discussed at § 7.280 are present.

7.400 Seizure and Forfeiture

See Chapter 15.

United States v. $122,043, 792 F.2d 1470 (9th Cir. 1986); and *United States v. Ozim*, 779 F.2d 1017 (4th Cir. 1985).

31 *United States v. $831,160*, 607 F. Supp. at 1413.

32 *United States v. Bibian*, No. 94-50078, Unpublished (9th Cir. 1995).

33 *See*, 31 U.S.C. § 5317(b). *See also, United States v. Seljan*, 547 F.3d 993, 1004 (9th Cir. 2008, *cert. denied*, 129 S.Ct. 1368 (2009) and Chapter Three, Border Authority.

34 *United States v. Cardona*, 769 F.2d 625 (9th Cir. 1985); *United States v. Ezeiruaku*, 936 F.2d 136 (3rd Cir. 1991).

7.500 Civil Penalties

7.510 Material Omission or Misstatements

A civil penalty may be imposed on anyone not filing a report or filing a report with a material omission or misstatement. The amount of the penalty can be the amount of the instruments for which the report was required. The amount of the penalty must be reduced by the amount of any instruments forfeited.

The Secretary of the Department of Homeland Security has delegated to the Commissioner of Customs and Border Protection the authority to impose fines and penalties in accordance with the provisions of 31 U.S.C. § 5321(a)(2) and (4).[35] The penalty provisions should be considered whenever unreported monetary instruments or their proceeds are not available for seizure. If quick action is necessary to prevent the removal or destruction of assets to secure payment of a penalty, a prejudgment remedy may be available under FED. R. CIV. P. 64, and state law.

Section 5321(c) specifically provides that the Secretary may remit a penalty and § 5321(d) provides that a civil penalty can be imposed in addition to any criminal penalty.

Although regulations permit a declaration regarding merchandise to be amended under certain circumstances after the commencement of an inspection, there is no authority to permit such for the CMIR (FinCEN Form 105). A person does not have a second chance to correct a currency report.

7.510 Material Omission or Misstatements

The statutory language does not require an examination of whether a person knew of the omission or misstatement, only that it be material. A $1000 omission on a report of $20,000 has been held to be material.[36]

7.600 Criminal Penalties

7.610 (b) (7)(E)

7.620 Bulk Cash Smuggling – 31 U.S.C. § 5332

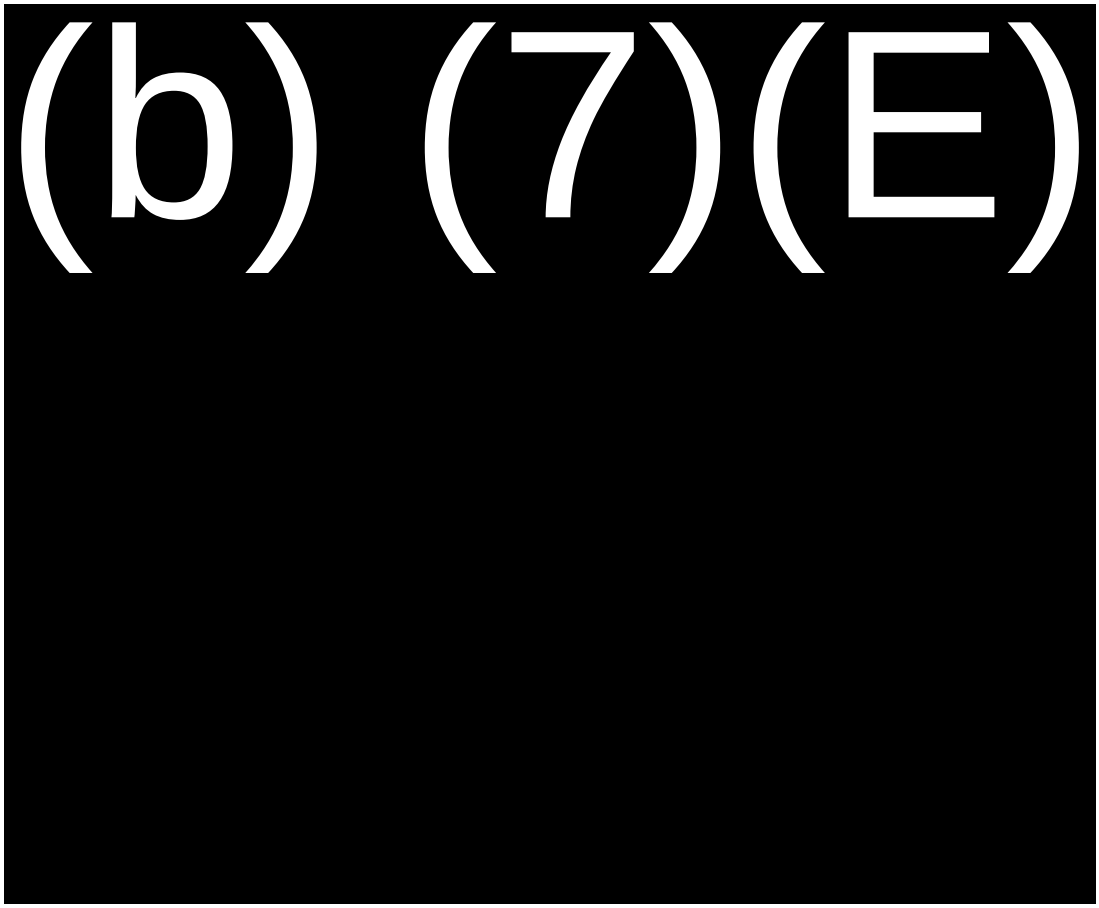
7.610 (b) (7)(E)

7.611 Procedures for Ports Using the Written Declaration (CBP Form 6059B)

7.612 (b) (7)(E)

[35] DHS Delegation Number 7010.3, dated 5/11/06, Subject: Delegation of Authority to the Commissioner of U.S. Customs and Border Protection, paragraphs II.A.5.u.

[36] *United States v. $173,081.04 in U. S. Currency and One personal Check Drawn by Jaime Buendia in the Amount of $21,128.00*, 835 F.2d 1141-1143 (5th Cir. 1988).



7.611 Procedures for Ports Using the Written Declaration (CBP Form 6059B)

Question 13 on the written declaration asks, "I am (We are) are carrying currency or monetary instruments over $10,000 U.S. or foreign equivalent." If the "yes" box is checked, then the report may have to be completed (FinCEN Form 105). If a false FinCEN 105 is filed or if the "no" box is checked and more than $10,000 in monetary instruments are discovered, then all monetary instruments are subject to seizure.

37 (b) (7)(E)

(b) (7)(E)

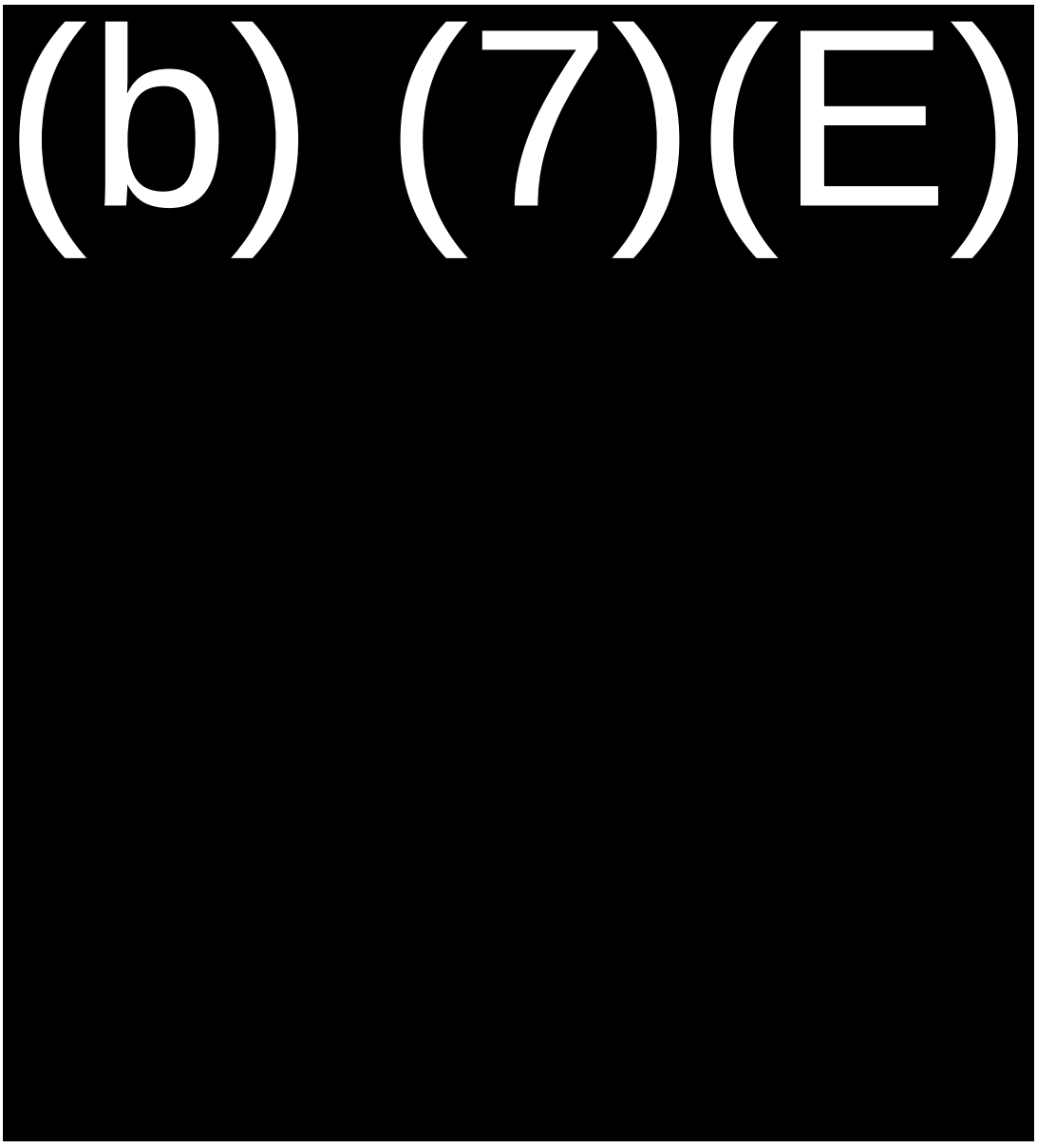
38 (b) (7)(E)

(b) (7)(E)

39 (b) (7)(E)

(b) (7)(E)

7.612 (b) (7)(E)



7.620 Bulk Cash Smuggling – 31 U.S.C. § 5332

In *United States v. Bajakajian*,[41] the Supreme Court held that forfeiture of 100 percent of the unreported monetary instruments[42] in a CMIR case would result

[40] (b) (7)(E)

[41] *United States v. Bajakajian*, 524 U.S. 321 (1998).

in a violation of the Eighth Amendment's excessive fines clause unless the currency was involved in some other criminal activity.[43] In response, Congress enacted 31 U.S.C. § 5332, making the practice of bulk cash smuggling a crime. In the new statute, Congress issued findings emphasizing the seriousness of this crime and linking the practice of smuggling bulk cash to the growing globalization of crime including drug trafficking, terrorism, money laundering, racketeering, tax evasion and other serious crimes. Consistent with the long recognized sanction of seizing and forfeiting smuggled merchandise, the sanctions for violating § 5332 include the forfeiture of 100 percent of the smuggled cash as representing the body, or *corpus delecti*, of the smuggling offense, regardless of whether the government can establish that the smuggled cash is involved in some other criminal activity.

Section 5332 makes it an offense for anyone to or attempt[44] to:

1. Knowingly conceal more than $10,000 of monetary instruments
2. On a person, or in a conveyance, luggage, or container
3. With the intent to evade the CMIR requirement

Section 5332 defines concealment on the person to include "concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual."[45] Amounts of monetary instruments, even large amounts, which are merely carried in pockets, wallets, handbags, or luggage, may not be sufficient to demonstrate "knowingly concealed" without some evidence of intent to evade through an effort to conceal the monetary instruments in a lining, compartment or hidden pocket. Each case should be analyzed on its own merits and evidence to determine if this element has been satisfied.

The transportation element of § 5332 is the same as for CMIR, 31 U.S.C. § 5316 purposes, *i.e.* the physical transportation or physical transportation of over $10,000 in monetary instruments into or out of the United States.

The "intent to evade" element requires that the Government must show that the concealment was for the purpose of evading the CMIR reporting requirements.[46]

42 Defined as: Currency, traveler's checks in any form, all negotiable instruments, incomplete instruments, securities or stock in bearer form. See 31 C.F.R. § 103.11(u)(1)(i)-(v).

43 Please refer to § 7.400 in this chapter.

44 *See*, *e.g., United States v. Jimenez*, 421 F.Supp. 2d 1008 (W.D.Tex. 2006), (defendant was found 200 miles from southern border headed towards Mexico with over $200,000 concealed in bundles behind the glove compartment; this constituted probable cause of an attempt to violate 31 U.S.C. § 5332).

45 31 U.S.C. § 5332(a)(2).

46 *See, United States v. Jose*, 499 F.3d 105, 110 (1st Cir. 2007) ("Although the elements of the offense [of bulk cash smuggling] … largely track those of the offense [of a CMIR violation, bulk cash smuggling] … places its emphasis on the

In the passenger environment, if a person carrying over $10,000 in monetary instruments is informed of the CMIR reporting requirement and fails to make a report, the "intent to evade" the reporting requirement should generally be established, and forfeiture may proceed under 31 U.S.C. §§ 5317 and 5332. The "intent to evade" may be more difficult to prove outside of the passenger environment, where persons will have, or claim to have, no knowledge of the CMIR reporting requirement. Some relevant inquiries to the "intent" question may be[47]:

- Was the defendant made aware of the CMIR requirement?
- Was the defendant a frequent international traveler?
- Had the defendant completed CMIRs on previous trips?
- Was the defendant offered a change to amend or complete his CMIR?
- Could the defendant understand, speak or read English?
- Was the CMIR offered in a language the defendant did understand, speak and/or read?

As a practical matter, CBP should proceed under a dual forfeiture theory under both §§ 5316 and 5332 in connection with most CMIR cases. The "excessive fines" defense will virtually always be available for forfeitures based solely on § 5316 CMIR violations since, absent an involvement of the currency in other criminal activity, forfeiture of the entire amount for a CMIR violation will likely be regarded as excessive in violation of the Eighth Amendment and the court will likely authorize only forfeiture of a portion of the seized funds.

For § 5332 bulk cash smuggling forfeitures, however, if the government can demonstrate, based on admission or other evidence, that currency involved in a CMIR reporting violation was also concealed with the intent to evade the reporting requirement, the entire amount seized should be forfeitable because bulk cash smuggling violations generally are not believed to be subject to an "excessive fines" defense.[48] However, some courts continue to conduct an Eighth Amendment excessive fines analysis under 31 U.S.C. § 5332.[49]

knowing concealment of "more than $ 10,000 in currency or other monetary instruments," rather than the *requirement to file a report.")*

47 Rita Foley, "Bulk Cash Smuggling," *United States Attorneys' USA Bulletin*, (U.S. Dept. of Justice, Vol. 55, No. 5, Sept. 2007).

48 *See* Stefan D. Cassella, "Bulk Cash Smuggling and the Globalization of Crime: Overcoming Constitutional Challenges," *Berkeley Journal of International Law* 22.1 (2004): 98-122.

49 *See, e.g., United States v. Ely,* 468 F.3d 399 (6th Cir. 2006) (after conviction for bulk cash smuggling, 100% forfeiture not excessive fines because forfeiture less than statutory fine or fine under Sentencing Guidelines); *United States v. Jose*, 499 F.3d 105 (1st Cir. 2007) (similar ruling as above); United *States v. $293,316 in United States Currency*, 349 F.Supp. 2d 638 (S.D.N.Y. 2004), *aff'd* 497 F.3d 204 (2d Cir. 2007) (after a conviction for bulk cash smuggling, but no connection between the currency and another crime, 100% forfeiture would violate 8th Amendment); *United States v. $120,856*, 349 F.Supp. 2d 687 (D.V.I.

A person convicted of bulk cash smuggling, or a conspiracy to commit the same, faces a maximum punishment of five years imprisonment.[50] In addition, the court shall order that the defendant forfeit to the United States any property, real or personal, involved in the offense, and any property traceable to such property. The statute defines "property involved in the offense" as "any currency or other monetary instrument that is concealed or intended to be concealed in violation [of 31 U.S.C. § 5332, as well as] any article, container, or conveyance used, or intended to be used, to conceal or transport the currency or other monetary instrument, and any other property used, or intended to be used, to facilitate the offense." Criminal forfeiture orders may take several forms: money judgment, directly forfeitable property, and substitute assets.

In addition, to the criminal penalty and forfeiture provisions, the statute also provides for the civil forfeiture of any monetary instruments involved in or traceable to a violation, or a conspiracy to violate the statute (31 U.S.C. § 5332(c)). Civil forfeitures under this statute are made in accordance with the forfeiture procedures enacted as part of CAFRA (see Chapter 15).

7.700 Awards

Title 31 U.S.C. § 5323 authorizes the payment of rewards to informants where there is a recovery, either through forfeiture, civil penalty or criminal fine, in excess of $50,000. The amount of the reward is up to the Secretary, with a maximum of the lesser of 25% of the recovery or $150,000. Informants and cooperating individuals, in general, can also be paid for their assistance through purchase of evidence or purchase of information.

7.800 CBP Jurisdiction

CBP is delegated authority over criminal investigations only as to the CMIR reporting requirements; otherwise, authority is delegated to the Director, Financial Crimes Enforcement Network (FinCEN).[51]

7.900 Currency Transaction Reports (CTRs)

Under 31 U.S.C. § 5313 and 31 C.F.R. § 1010.311, financial institutions are required to file a Currency Transaction Report (FinCEN Form 104) for cash transactions exceeding $10,000.

Although CBP's jurisdiction for criminal investigations is limited to CMIR violations, there may be certain circumstances where CTR violations arise.

2005) (defendant acquitted of bulk cash smuggling, 100% forfeiture would be excessive fine).

50 31 U.S.C. § 5322; *United States v. Tatoyan*, 474 F.3d 1174 (9th Cir. 2007) (jury needs to find a "willful" violation of § 5332 in order for penalties to be authorized).

51 31 C.F.R. § 1010.810 (2011).

The term "financial institution" includes both bank and nonbank institutions such as the U.S. Postal Service, businesses engaged in vehicle sales, and persons involved in certain real estate transactions.[52] There have been a number of court cases construing this term and concluding that it applies to individuals who act like a financial institution.[53]

The term "transaction" for purposes of the CTR rules includes deposits, withdrawals, currency exchanges, payments or transfers. The financial institution must file the FinCEN Form 104 (CTR) with the IRS within 15 days of the transaction, and the financial institution is required to keep copies of the report for five years.[54]

31 U.S.C. § 5324 specifically prohibits the structuring of transactions in such a way as to evade the reporting requirements.

This section authorizes the imposition of civil and criminal penalties on a person who, "for the purpose of evading the reporting requirements," commits any of the three following alternative acts:

- causes or attempts to cause a domestic financial institution to fail to file a currency transaction report;
- causes or attempts to cause a domestic financial institution to file a CTR that contains a material omission or misstatement of fact; or
- "structures" or assists in structuring or attempts to structure or attempt to assist in structuring, any transaction with one or more domestic financial institutions.

As a threshold matter, the government must establish that an individual conducted or attempted to conduct any of the types of transactions alternatively set forth "for the purpose of evading the reporting requirements of 31 U.S.C. § 5313(a)." This element of proof is essentially the same as that which now exists for traditional § 5313 prosecutions. That is, the evidence must establish that an individual knew of the reporting requirements and set out thereafter to evade such requirements.

Factors typically evidencing intent to evade are:

- use of false payee or remitter names on checks or money orders;

52 31 U.S.C. § 5312 and 31 C.F.R. § 1010.100 (t) (2011).
53 *See*, for example, *United States v. Mouzin*, 785 F.2d 682 (9th Cir. 1986). But see *United States v. Bucey*, 876 F.2d 1297 (7th Cir. 1989). The Regulations also contain specific provisions for casinos.
54 31 C.F.R. § 1010.306 (2011).

- false information on account opening documents; artificially structuring single deposits;

- numerous artificial withdrawals or exchanges of currency in order to create a false appearance that multiple unrelated transactions were made;

- employment of runners to surreptitiously make deposits, withdrawals, or exchanges;

- maintenance of multiple accounts for moving money among several banks or within one bank.

Once it has been proven that the transaction was conducted for the purpose of evading the reporting requirements, one of the three alternative provisions of 31 U.S.C. § 5324 must be met.

Section 5324 also makes it illegal to cause or attempt to cause a financial institution to not file a report or to file a false report.[55]

The CTR seizure and forfeiture provision includes not only the involved currency, but also any property traceable thereto, as well as any other property used in any way to facilitate the illegal transactions.[56]

Civil penalties are covered under 31 U.S.C. § 5321, which again authorizes the Secretary to assess a penalty with an adjustment for any amount forfeited as is the case with CMIRs; criminal penalties are covered by 31 U.S.C. § 5322.

7.1000 Foreign Bank Account Reports (FBAs)

An FBA Report (TD Form 90-22.1) must be filed with the IRS by any person who has a foreign bank account or securities over $10,000.[57] The reports must be filed before June 30th of each calendar year.

7.1100 Reports Relating to Coins and Currency Received in Nonfinancial Trade or Business – 31 U.S.C. § 5331

This law, which supersedes 26 U.S.C. § 6050I – Returns Relating to Cash Received in Trade or Business (FinCEN Form 8300), requires that any person

55 *United States v. Scanio*, 900 F.2d 485 (2d Cir. 1990), *overruled by Ratzlaff v. United States*, 510 U.S. 135 (1994). "Congress subsequently amended the anti-structuring law to conform to the *Scanio* interpretation, *see* Riegle Community Development and Regulatory Improvement Act of 1994, § 411 Pub. L. No. 103-325, 108 Stat. 2160, 2253 (1994) (codified at 31 U.S.C. §§ 5322(a), (b), 5324(c))" *United States v. Simon*, 85 F.3d 906, 909 n.3 (2d Cir. 1996).

56 18 U.S.C. § 981(a)(1)(A).

57 See 31 U.S.C. § 5314 and 31 C.F.R. §§ 1010.350 (2011).

engaged in a trade or business file a report with the Financial Crimes Enforcement Network (FinCEN) when a cash transaction exceeds $10,000.[58] The data elements in the report include the name and address of the person from whom the cash, i.e., coins or currency, was received, the sum received, the date and nature of the transaction, and the identification of the individual filing the report. Congress also amended 31 U.S.C. § 5324 making it an offense to cause a trade or business to fail to file the required report, file a false report, or to structure a transaction with the intent to evade the reporting requirement.[59] Finally, 31 U.S.C. § 5317 was amended to authorize criminal and civil forfeiture for violations of 31 U.S.C. § 5324(b).[60]

7.1200 Relationship with Other Laws

7.1210 Money Laundering
7.1220 RICO and Title III
7.1230 *Travel Act*

7.1210 Money Laundering

Violations of the reporting requirements under Title 31 are excluded from the list of specified unlawful activities under 18 U.S.C. § 1956.[61] However, § 1956(a)(2) applies to the transportation of monetary instruments or funds into or out of the U.S. for certain purposes. Thus, compliance with the CMIR reporting requirement does not preclude the possibility that there nonetheless may be a violation of § 1956. On the other hand, in a recent case the Supreme Court held that failing to file a CMIR did not by itself transform the undisclosed international transportation of monetary instruments into a violation of 18 U.S.C. § 1956(a)(2).[62]

There are further differences between the CMIR requirements and the provisions of § 1956(a)(2). First, § 1956 is not limited to monetary instruments as defined in Title 31; rather, its provisions apply as well to the transportation or transfer of "funds" which includes wire transfers and any type of negotiable instrument or currency. Second, there is no minimum amount for § 1956.

58 Section 365, Pub. L. 107-56, 115 Stat. 272 (eff. October 26, 2001), Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism of 2001, hereafter, *USA PATRIOT Act*.

59 *Supra*. Note, as enacted, 31 U.S.C. § 5324(b) makes it an offense to fail to file a report required by 31 U.S.C. § 5333. This is apparently a typographical error in that the reporting requirement referenced in § 5324(b) is found at 31 U.S.C. § 5331, not 31 U.S.C. § 5333, which does not exist. Congress will have to amend § 5324(b) to cite the proper statute before a violation of 31 U.S.C. § 5324(b) may be charged.

60 Section 372, *USA PATRIOT Act*.

61 *See* 18 U.S.C. § 1956(c)(7)(A).

62 *See Cuellar v. United States*, 128 S.Ct. 1994 (2008).

Finally, all property involved in a violation of § 1956 or § 1957, including any property traceable thereto, is subject to seizure and forfeiture under 18 U.S.C. § 981(a)(1)(A). In fact, it can be demonstrated that § 981 applies in any case at the border where probable cause exists to believe that money is drug proceeds.

7.1220 RICO and Title III

Criminal violations of the *Currency and Financial Transactions Reporting Act* (CFTRA) are included in the definition of "racketeering activity" under 18 U.S.C. § 1961; moreover, violations of 31 U.S.C. § 5322 are specifically included as predicate offenses under Title III, 18 U.S.C. § 2516(g).

7.1230 Travel Act - 18 U.S.C. § 1952

Section 1952(a)(3) makes it illegal to travel in interstate or foreign commerce with intent to promote or facilitate any "unlawful activity," which includes the CFTRA as well as money laundering.

The Travel Act is violated when:

- a person uses a facility of interstate or foreign commerce, such as the telephone,
- with intent to "facilitate the promotion, management, establishment, or carrying on, of any unlawful activity," and
- thereafter performs an additional act in furtherance of the specified unlawful activity.

In a case involving a New York State Senator, the government satisfied the elements of the *Travel Act* by proving that he (1) intended to engage in an unlawful activity, namely transporting $150,000 outside the United States without filing a CMIR; (2) caused his secretary to use the telephone to make travel arrangements to Zaire, thus facilitating the unlawful activity; and thereafter (3) performed an additional facilitating act by accepting $150,000 in cash from an FBI agent.[63]

7.1300 Access And Disclosure Of Information

7.1310 Access to Information
7.1320 Grand Juries
7.1330 Summons
7.1340 Disclosure of Information

63 *United States v. Jenkins*, 943 F.2d 167 (2d Cir. 1991), *cert. denied*, 502 U.S. 1014 (1991).

7.1310 Access to Information

In seeking information from financial institutions, the requirements of the *Right to Financial Privacy Act* (RFPA) must be met. See Chapter 13, Right to Financial Privacy. For example, Section 3402 specifies that records concerning an individual's account can be obtained from a financial institution only with the individual's consent, or with an administrative subpoena, a search warrant, a judicial subpoena or pursuant to a formal written request (the RFPA does not preclude the use of a grand jury subpoena). The RFPA does not apply to account information concerning corporations nor to information provided to a "supervisory agency," which could include CBP in certain circumstances.[64]

Section 3413(i) also authorizes a court to order a financial institution not to notify its customer of the subpoena. In some situations the U.S. attorneys have prepared cover letters that are served on the financial institution with the subpoena, and the financial institutions have agreed not to notify the customer of the ongoing investigation.

7.1320 Grand Juries

Information can also be obtained by means of a grand jury subpoena, although the secrecy provisions of FED. R. CRIM. P. 6 would apply. See Chapter 8, Customs Fraud.

7.1330 Summons

31 U.S.C. § 5318 authorizes access to financial information by use of administrative subpoena or summons. The regulations include procedures for use of a summons, and the Customs Service and its successor, Customs and Border Protection, was given specific authority to do so with respect to the CMIR provisions of 31 C.F.R. § 1010.340(a)-(d).[65] The Title 31 summons can be used to require any person having possession of records that must be kept under the CFTRA to produce them. Note, however, that the summons can be used *only* for purposes of *civil* enforcement of the CFTRA. The summons is limited to financial institutions, their employees or persons having possession of the reports.

As an alternative to 31 U.S.C. § 5318, consideration might be given to using the CF 3115 Customs summons authorized by 19 U.S.C. § 1509. This section authorizes the use of the summons to demand records "regarding which there is probable cause to believe that they pertain to merchandise the importation of which into the United States is prohibited." Consequently, financial records might be subject to the Customs summons in appropriate circumstances. The use of the Customs summons, however, must comply with the requirements of the *Right to Financial Privacy Act*, such as notice to the customer, certification of compliance, etc., and cannot be used in drug investigations. See Customs

64 *See* 12 U.S.C. §§ 3401(6) and 3413(b).
65 31 C.F.R. § 1010.912(c) (2011).

Directive 4210-012 of November 22, 1991. Moreover, if the records to be summoned are not suspected to be evidence of prohibited importations, compliance with the summons cannot be enforced.

7.1340 Disclosure of Information

All completed CMIR, CTR, and FBA forms are subject to the provisions of the *Privacy Act*, and 31 C.F.R. § 103.43 contains specific provisions regarding the authority of the Secretary to make information available. Further, § 103.44 specifically exempts these reports from the FOIA.

7.1400 Travelers' Checks Issuing Companies

Central offices for companies issuing travelers' checks:

American Express
Travel Related Services
4315 S 2700 W
Salt Lake City, UT 84184
*800-221-7282

Bank of America
1 Powell Street
San Francisco, CA 94137
415-436-1764
* 800-279-3264

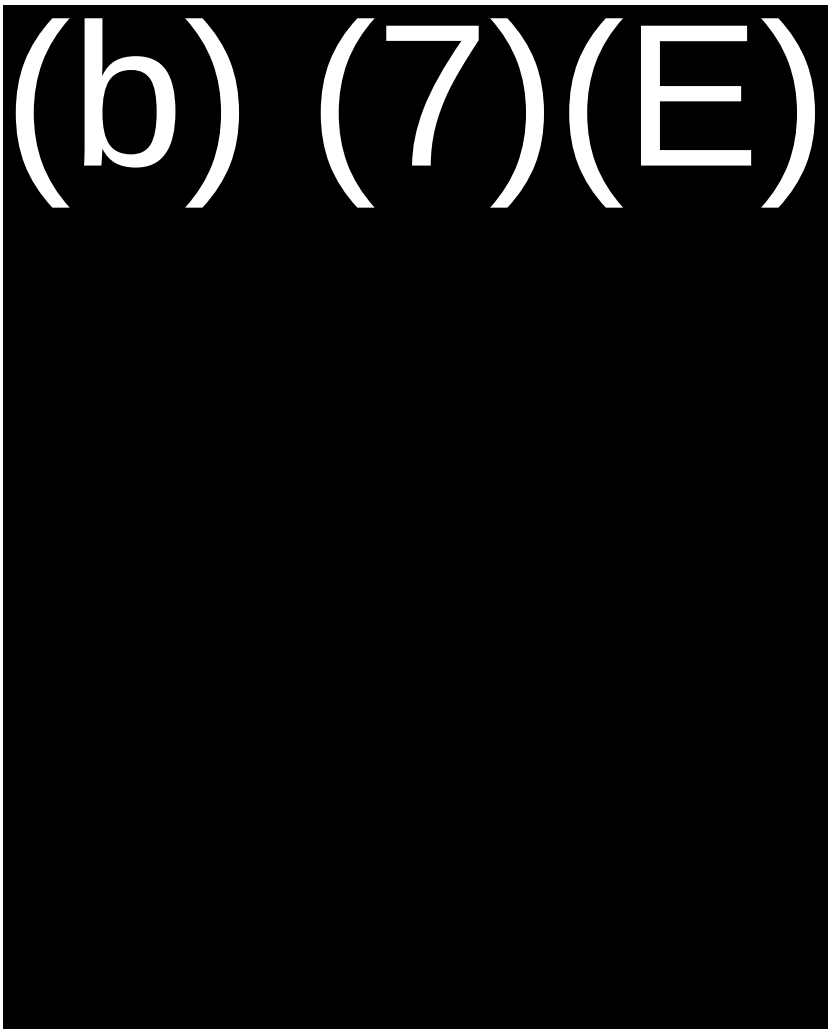
Barclay's Bank International, Ltd.
120 Broadway
New York, N.Y. 10006
*800-235-7366

Thomas Cook Bankers
380 Madison Ave.
New York, N.Y.
609-987-7300
* 800-223-7373

MasterCard International
* 800-223-9920

Visa International
* 800-227-6811

* 24 Hour Central Office Telephone Number


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Chapter Eight

Trade Enforcement

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8.000 Introduction – Trade Concepts and Definitions

The United States government has regulated international trade and relied on the revenue generated thereby for more than two hundred years. The Fifth Act of the First Congress, signed by President George Washington on July 31, 1789, created the first agency of the federal government, the U.S. Customs Service. The revenue generated from the collection of duties on imported items was critical not only in getting the country out of debt, but also in providing funds for growth and infrastructure. By 1835, Customs revenues alone had reduced the national debt to zero and would, in later years, fund the purchase of new territories and the construction of critical national infrastructures.

In 2003, though the Customs Service was reorganized and renamed U.S. Customs and Border Protection, CBP remained responsible for the critical function of trade enforcement. Trade still plays a vital role in the mission of CBP. CBP protects the nation not only from terrorist attacks and instruments of terror, but also from threats to the economy. Immigration and Customs Enforcement ("ICE") special agents also play an important role in trade enforcement as they are responsible for investigating violations of the trade laws.

8.001 The Customs Modernization Act

In 1993, to deal more efficiently with the ever-growing tide of paperwork involved with importing of merchandise into the United States, legislation was drafted to update archaic customs laws and modernize the importation process by incorporating the electronic processing of entries. The Customs Modernization Act was ultimately attached to another bill, NAFTA, and became officially known as the "North American Free Trade Agreement, Title VI – Customs Modernization"[1] (informally referred to as the "Mod Act").

In addition to updating customs laws, the Mod Act streamlined and automated the importation process. It introduced two important new concepts to the trade community: "informed compliance" and "reasonable care." These concepts created a shared responsibility between the government and the trading community to expedite the movement of goods. On the one hand, the government is obligated to communicate to the public what the customs laws require through training seminars for the public and various publications (such as on CBP's public web-page, the Federal Register, and the Customs Bulletin and Decisions). On the other hand, the trading community is required to exercise reasonable care in complying with those laws, *i.e.* importers must act reasonably in all facets of the importing process, with knowledge of the facts and all relevant legal obligations.

1 The entire text of the Mod Act is available at Public Law 103-182, Dec. 8, 1993 (107 Stat. 2057)

8.002 The Entry Process

When a shipment of merchandise arrives in the United States, the importer of record (i.e., the owner, purchaser, broker or consignee) must "enter" the goods with CBP by filing entry documents with the port director at the port of entry. From the time the merchandise is imported to the time the merchandise is released, it is deemed to be in CBP's custody. Only a very limited number of items are exempt from entry requirements, such as corpses, together with their coffins and accompanying flowers; business records; telecommunications transmissions; certain vessels, railway locomotives and cars; and instruments of international traffic[2].

Imported goods are not legally entered until after the shipment has arrived within the port of entry, delivery of the merchandise has been authorized by CBP, and estimated duties have been paid. It is the responsibility of the importer of record to arrange for examination and release of goods and to use reasonable care throughout the entry process.[3]

There are many types of entries that can be made, depending on the circumstances of the importation: goods may be entered formally, informally, for consumption (i.e. use in the U.S.), for warehousing at the port of arrival, or they may be transported in-bond to another port of entry and entered there under the same conditions as at the port of arrival.

A consumption entry is the most common type of entry and may be either formal or informal. An informal entry is quite simple and is generally used when the value of a shipment is $2,000 or less (except for textiles and quota merchandise)[4]. The importer usually brings all relevant paperwork, such as invoices, packing lists and shipping documents, and presents them to CBP, who then determines whether or not to examine the goods. Once CBP is satisfied that the goods are admissible and that all required duties have been paid, CBP stamps the paperwork with a "release" stamp and the importer takes possession of the goods.

Formal entry is required if the value of merchandise exceeds the $2,000 limit; however, the Port Director can request formal entry for any shipment.[5] For a formal entry, the importer must have a current and sufficient bond in force. The amount of the bond must be enough to cover any future duty that might be owed. Bonds may be single use or continuing. Formal entry of goods for consumption is then a two-step process that may be done either with paper or electronically. First, the documents necessary to determine whether the merchandise may be released from CBP custody must be filed within five

[2] General Note (GN)3(e), Harmonized Tariff Schedule of the United States; 19 C.F.R. 141.4.
[3] 19 U.S.C. 1484; 19 C.F.R. 141, 142
[4] 19 C.F.R. 142.4(c), 19 C.F.R. 143.21
[5] 19 C.F.R. 143.22

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working days of the shipment's arrival at a U.S. port. These documents include: Entry Manifest (CF 7533) or Application for Special Permit for Immediate Delivery (CF3461); evidence of a right to make entry; a commercial invoice; packing list; and any other documents necessary to determine merchandise admissibility. This is usually referred to as the entry package. CBP reviews the paperwork and decides whether or not to examine the goods before releasing them. If the goods are released, an entry summary for consumption CF 7501 must be filed (along with all the documents in the entry package and any documents not available when the cargo was released) and estimated duties must be deposited within 10 working days of the time the goods were entered.

Merchandise arriving into the U.S. by commercial carrier must be entered by the owner, purchaser, an authorized employee, a licensed customs broker on behalf of the owner, or a consignee. Customs brokers are the only people authorized by the tariff laws of the U.S. to act as agents for importers. Brokers are private individuals or firms who are licensed by CBP to prepare and file the necessary paperwork, arrange for the payment of duties and otherwise represent their clients in customs matters. Every entry must be supported by some form of evidence of the right to make entry. When entry is made by a customs broker, the broker must have a power of attorney.

Examination of goods and entry documents by CBP is necessary to determine things such as: the value of the goods for customs purposes and their dutiable status; how the goods should be classified, whether the goods must be marked with their country of origin or require special marking or labeling and, if so, whether they have been so marked; whether the shipment contains prohibited or restricted articles; whether the goods are correctly invoiced; whether there is an excess or shortage of the invoiced goods; and whether the shipment contains narcotics or other contraband. In this way, CBP has the information it needs to assess the correct duty, seize the goods, if necessary, or issue a penalty to the importer.

Prohibited goods may never be entered into the U.S. and are inadmissible. Restricted merchandise is merchandise whose release into commerce is not strictly prohibited, but is contingent upon compliance with the laws of other agencies, such as the Food and Drug Administration, Environmental Protection Agency, etc., or other requirements, such as textile visas. If the merchandise appears to be admissible, but the entry information is inaccurate, CBP may reject the entry and return it to the filer for correction. If the merchandise appears to be inadmissible, CBP can detain the shipment for further inquiry, seize or exclude the merchandise.[6] If the entry information is accurate and the merchandise is admissible, it may be conditionally released from CBP's custody. Conditional release means that CBP can order redelivery of the merchandise if it later determines that the merchandise is not admissible. However, the order for redelivery must be made within the conditional release period, which varies

[6] 19 U.S. C. 1499; 19 C.F.R. 151.16

depending on the issue.[7] Failure to redeliver the merchandise upon demand results in the assessment of liquidated damages under the terms of the import bond.

8.003 Duty Payment

All goods imported into the United States are subject to duty or duty-free entry in accordance with their classification under the Harmonized Tariff Schedule of the United States (HTSUS), discussed below. When goods are dutiable, *ad valorem*, specific, or compound rates may be assessed. An *ad valorem* rate is a percentage of the value of the merchandise, such as 2.5% *ad valorem*. A specific rate is a specified amount per unit of weight or other quantity, such as $1.45 per dozen. A compound rate is a combination of both an *ad valorem* rate and a specific rate, such as 0.15 cents per kilo plus 3% *ad valorem*. Rates of duty are determined by the U.S. Congress.

Rates of duty may also depend on the country of origin. Most merchandise is dutiable under the most-favored-nation rates – now referred to as "normal trade relations" – under General column 1 of the HTSUS. Merchandise from nations to which these rates have not been extended (currently only North Korea and Cuba) is dutiable at the full or "statutory" rates found in column 2 of the HTSUS.

Apart from the payment of duty, importers may also make claims for "drawback." The term drawback refers to a refund of 99% of the duties or taxes collected on imported merchandise because certain legal or regulatory requirements have been met. To qualify for drawback, an importation of merchandise and subsequent exportation or destruction of the merchandise must occur. The purpose of the drawback program is to assist U.S. importers, manufacturers, and exporters in competing in international markets by allowing them to obtain refunds of duties paid on imported merchandise when that merchandise does not remain in the U.S. for consumption. There are three primary types of drawback:

- Manufacturing drawback: refund of duties paid on imported merchandise used in the manufacture of articles that are either exported or destroyed. The imported merchandise must be used in manufacture and exported within five years from the date of the importation of the merchandise.

- Unused/Same-condition merchandise: refund of duties paid on imported merchandise that is exported or destroyed in the same condition in which it was imported, without undergoing manufacture, and is never used in the United States. The imported merchandise must be exported within three years from the date of the importation of the merchandise.

[7] *See*, for example, 19 C.F.R. 141.113

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- Rejected/Non-conforming merchandise: refund of duties paid on imported merchandise that is exported because it did not conform to sample or specifications, or was shipped without the consent of the consignee. Merchandise must be returned to CBP custody within three years of the date of its importation in order to qualify for this type of drawback. Rejected merchandise must be exported and cannot be destroyed in lieu of exportation.

8.004 Classification

Duties are assessed upon goods imported into the U.S. based upon their classification under the Harmonized Tariff Schedule of the United States (HTSUS). The HTSUS is a comprehensive list of categories of commodities organized and broken down into sections and chapters. The chapters are further broken down into 10-digit codes which are referred to as "tariff item numbers," "classification numbers" or "HTSUS numbers." The first four digits are the heading numbers, the next four are the subheading numbers. The final two digits are unique to the U.S. and provide statistical information that is used by other agencies and trade groups for a number of purposes. The Tariff Schedule is "Harmonized" in that a great majority of U.S. trading partners use the same basic classification system for merchandise importation. That is to say, an item imported into the United States will have the same classification number (up to the sixth digit) as it would in Japan or South Africa. In addition to the rate of duty, classification can also provide information such as quota and visa requirements, especially for textile products. Section 637 of the Mod Act makes it the responsibility of the importer to use reasonable care when choosing a classification for the merchandise (CBP is responsible for classifying and appraising the merchandise).

Products are classifiable (1) under items or descriptions that name them specifically, also referred to as *eo nomine* provisions; (2) under provisions of general description; (3) under provisions that identify them by component or material; or (4) under provisions that provide for merchandise in accordance with its actual or principal use. When two or more provisions appear to apply for the same merchandise, the prevailing provision is determined in accordance with the legal notes and the General Rules of Interpretation for the tariff schedule. Importers may also find guidance as to tariff classification principles in rulings issued by CBP's Office of International Trade, Regulations and Rulings and in case law of the Court of International Trade or U.S. Court of Appeals for the Federal Circuit.

8.005 Value

The value of the imported merchandise multiplied by the duty rate as prescribed by the HTSUS tells the importer the amount of duty owed. It is thus critical to know the true value of the imported merchandise. The Customs Modernization Act makes it the responsibility of the entry filer to use reasonable care to declare

the price of the imported merchandise and provide any other information necessary to enable CBP to properly assess duty.[8] There are five statutory methods of appraisement, given in their order of preference:

- Transaction value: the preferred and most common method. Transaction value is the price actually paid or payable for merchandise when sold for exportation to the United States, plus five specified additions if they are not included in the price.[9] These five specified additions are:
 - Packing costs incurred by the buyer
 - Selling commissions incurred by the buyer
 - Royalty or license fee that the buyer is required to pay as a condition of the sale
 - The proceeds, accruing to the seller, of any subsequent resale, disposal or the use of the imported merchandise
 - The value of any assist

- Transaction value of identical or similar merchandise

- Deductive value: the resale price in the U.S. after importation with deductions for certain items

- Computed value: the sum of the following items:
 - Materials, fabrication, and other processing
 - Profit and general expense
 - Any assist, if not included above
 - Packing costs

- Value if other values cannot be determined: If none of the above methods can be used to appraise the imported merchandise, then customs value must be based on a value derived from one of the above methods, reasonably adjusted as necessary.

8.006 Liquidation

CBP officers acting on behalf of the port director have the responsibility to review declared classifications and values as well as other required information for correctness. An entry summary and documentation may be accepted without any changes. At this point, the entry is liquidated. Liquidation is the point at which CBP's ascertainment of the rate and amount of duty becomes final for most purposes. Liquidation is accomplished by posting a notice on a public bulletin board at a customs house. Entries must be liquidated within one year of the date of entry, unless the period needs to be extended for another one-year period, not to exceed a total of four years from the date of entry or suspended.

[8] Public Law 103-182, Dec. 8, 1993 (107 Stat. 2057)
[9] 19 U.S.C. 1401a(b)(1); 19 C.F.R. 152.103(a)

Sometimes CBP determines that an entry cannot be liquidated as entered. For example, the importer may not have the correct classification, or may have classified the goods in a way that is not consistent with established and uniform classification practice. If the change required by this determination results in a rate of duty more favorable to the importer, CBP will liquidate the goods at the more favorable rate and refund the difference for the applicable amount of the deposited estimated duties. If the change imposes a higher rate of duty, the importer will be given advance notice of the proposed duty rate increase and an opportunity to make a claim for a lower rate of duty. If the importer does not respond or does not substantiate a claim for lower duty, the entry is liquidated at the higher rate and the importer is billed for the difference between the new rate of duty and the deposited estimated duties.

After an entry is liquidated, the importer may still pursue a claim for an adjustment of duty. This is done through a protest and must be filed within 120 days after liquidation[10]. If a protest is denied by the port, it may be reviewed by the Office of International Trade, Regulations and Rulings, in Washington, DC. The importer may further protest an adverse decision to the Court of International Trade within 180 days of denial of the protest.

8.007 Marking

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Congressional intent in enacting 19 U.S.C. 1304 was "that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the good is the product. The evident purpose is to mark the good so that, at the time of purchase, the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will."[11]

Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements contained in 19 U.S.C. 1304. 19 CFR 134.41(b) mandates that the ultimate purchaser in the U.S. must be able to find the marking easily and read it without strain.

It is not always a simple matter to determine who the "ultimate purchaser" will be. In a broad sense, an "ultimate purchaser" may be defined as the last person in the United States who will receive the article in the form in which it was imported.

If an article or container is not properly marked at the time of importation, a

10 19 C.F.R. Part 174

11 *United States v. Friedlaender & Co.*, 27 C.C.P.A. 297 at 302 (1940)

marking duty of 10% of the final appraised value of the article will be assessed unless the article is exported, destroyed, or properly marked under CBP supervision before liquidation.[12]

Section 42 of the Lanham Trademark Act of 1946[13] (also known as the Lanham Act) provides that, among other things, no imported article of foreign origin which bears a name or mark designed to make the public believe that it was manufactured in the United States, or any foreign place other than the place in which it was actually manufactured, shall be admitted entry into the United States. In many cases, the words "United States" or the letters "U.S.A," or even the name of a U.S. city appearing on an imported article are considered to be designed to make the public believe that the article was produced in the U.S., unless the name of the country of origin appears in close proximity and in letters of at least an equal size.

Additionally, imported goods may not bear a name or mark prohibited by Section 42 of the Lanham Act. Those goods may be seized and forfeited by CBP. However, the importer of those goods may petition CBP prior to final disposition in order to release the goods upon the condition that the prohibited marking be removed or obliterated or that the article and containers be properly marked; or the port director may permit the article to be exported or destroyed under CBP supervision and without expense to the government.

8.008 Other Special Requirements

The importation of certain types of merchandise may be prohibited or restricted in order to protect the economy and security of the United States, to safeguard consumer health and well-being, or to preserve domestic plant and animal life. Some commodities are subject to an import quota or restraint under the terms of a trade agreement.

Many of these restrictions and prohibitions are subject to not only CBP laws and regulations, but the laws and regulations of other U.S. government agencies, which CBP helps to enforce. These agencies, to name a few, include the Food and Drug Administration, U.S. Department of Agriculture, the Bureau of Alcohol, Tobacco, Firearms and Explosives, the Nuclear Regulatory Commission, the Department of Energy, the U.S. Consumer Products Safety Commission, the U.S. Fish and Wildlife Service, and the Office of Foreign Assets Control. These rules apply to all types of importations, including those made by mail or placed into a foreign trade zone.

An import quota is a quantity control on imported merchandise for a certain period of time. Quotas are established by legislation, directives, and proclamations issued under the authority contained in specific legislation. These quotas are administered by CBP, however, CBP has no authority to

[12] 19 C.F.R. 134.2
[13] 15 U.S.C. 1124

change or modify a quota.

There are two types of quotas: absolute and tariff-rate. Tariff-rate quotas allow the entry of a specified quantity of the quota product at a reduced rate of duty during a given time period. There is no limitation on the amount of the product that may be entered during the quota period. Goods entered outside of the quota period, however, are subject to higher duty rates. Absolute quotas are quantitative, that is, no more than the amount specified may by permitted entry during a quota period. Some absolute quotas are global, while others apply to a specific foreign country or region. Imports that arrive after a quota has been filled may be held for the opening of the next quota period by placing it in a foreign trade zone, bonded warehouse, or it may be exported or destroyed under CBP supervision.

8.009 Foreign Trade Zones

A Foreign Trade Zone (FTZ) is a secured area in the United States that is legally outside of the U.S. customs territory.[14] The purpose of these zones is to attract and promote international trade and commerce. The creation of these areas is authorized by the Foreign Trade Zone Board. For practical reasons, zones are usually located at or near CBP ports of entry, industrial parks, or terminal warehouse facilities. Zones must be within 60 miles or 90 minutes' driving time from the port of entry limits. Although zones are treated as being outside of the customs territory of the U.S. for tariff and customs entry proposes, all other federal laws are applicable to products and activities within such zones.

Merchandise lawfully brought into a FTZ may be stored, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchandise or otherwise manipulated or manufactured. Foreign goods also may be placed into an FTZ after being entered and duties paid. In that case, the goods are treated as domestic merchandise when they leave the zone. Otherwise, when foreign goods, either in their original condition or after processing, are transferred from the FTZ to the customs territory of the United States, the goods must be entered according to the laws of the U.S. If they are entered for consumption, duties and taxes will be assessed on the entered articles according to the condition of the foreign merchandise at the time of entry from the zone. There is no time limit on how long foreign merchandise may be stored in a zone, or when it must be entered into customs territory, re-exported or destroyed.

Following is a discussion of the various criminal and civil enforcement tools available to CBP as it seeks to ensure compliance with the procedures outlined above.

8.100 Criminal Trade Enforcement

[14] 19 U.S.C. 81b

8.110 Principal Customs Criminal Fraud Statutes

The Customs statutes and regulations require importers to give CBP complete and accurate information concerning articles being imported. This includes information such as the description, value, classification, rate of duty, quantity and the buyer and seller of the imported merchandise.[15] They also require that importers comply with "binding rulings" issued by CBP.[16]

8.111 Entry of Goods Falsely Classified - 18 U.S.C. § 541

The entry, introduction, or attempted entry or introduction of merchandise upon a false classification of weight, measure, quality or value or by payment of less than the amount of duty legally due is prohibited by this statute.

Entering merchandise "by payment of less than the amount of duty legally due" is illustrated by Godinez, an importer of lumber, who instructed his supplier to describe certain lumber as duty-free "softwood," when he knew that the *Tariff Act* defined "softwood" as only that from coniferous trees, and that his product to be imported was deciduous tree wood and was, therefore, dutiable hardwood. Godinez was indicted and convicted of entering twelve such shipments of wood product "by payment of less than the amount of duty legally due."[17]

8.112 Entry of Goods by Means of False Statement - 18 U.S.C. § 542

This is the primary criminal trade fraud statute enforced by CBP and ICE. Section 542 prohibits entry of merchandise (which includes prohibited articles) by means of false statements or willful acts or omission. The statute consists of two paragraphs, the first dealing with false statements or practices and the second with willful acts or omissions. There are at least three distinct prohibitions found in these paragraphs. This statute is also designated as a Specified Unlawful Activity (SUA) under the *Money Laundering Control Act*. Moreover, property that constitutes or is derived from proceeds traceable to violations of this provision is subject to civil or criminal forfeiture under 18 U.S.C. §§ 981, 982. The civil penalty counterpart to § 542 is 19 U.S.C. § 1592.

The first prohibition in § 542 involves the following elements:

- ✓ Entry/Introduction, Attempted Entry/Introduction;
- ✓ Of Merchandise;
- ✓ Into the Commerce of the United States;

15 19 U.S.C. §§ 1481, 1484 - 1485, 19 C.F.R. §§ 141.1 – 141.5 (2001).
16 19 C.F.R. §§ 177.08 and 177.10 (2001).
17 *United States v. Godinez*, 922 F.2d 752 (11th Cir. 1991).

- ✓ By Means of Any Fraudulent or False Statement (Written or Verbal) Practice or Appliance (Whether or Not U.S. May Be Deprived of Duties);

An entry begins when such information necessary to secure the release of merchandise from CBP custody is submitted to CBP by documentation or pursuant to an electronic data interchange system.[18] An "introduction," on the other hand, commences when the goods are unloaded at a CBP port whether or not an entry has been made.[19] The statute forbids doing or attempting either event "by means of" a false or fraudulent statement or practice.
Under 19 U.S.C. § 1401(c) "merchandise" is defined to include "goods, wares and chattels of every description …" and includes prohibited articles as well as monetary instruments.

Merchandise is "entered" into the commerce of the United States when CBP releases imported merchandise without restriction to the importer or other person for consumption within the Customs territory of the United States.

A fraudulent statement is an assertion which is known to be untrue that is made or used with the intent to deceive. A false statement is an assertion that is untrue when made or when used and which is known by the person making it or using it to be untrue. If an individual secures or attempts to secure the entry or introduction of merchandise into the United States by either a false or fraudulent statement or act, he violates this section.

The First, Second, Third, Fifth and Ninth Circuits vary in their construction of the "by means of" materiality requirement in § 542.[20] The First, Second and Third Circuits view the requirement broadly, holding that if a false statement has the potential to affect the integrity or operation of the CBP importation process, i.e., could affect the manner in which CBP handles the assessment of duties and passage of goods into the United States, then the statement is material. The Fifth and Ninth Circuits, however, hold that the merchandise would be barred from entry (seized) but for the false statement, in order for the entry to be "by means of" the false statement.

In one Ninth Circuit case (*Teraoka*), for example, an importer submitted fraudulent invoice documents to defeat the "trigger price mechanism," a mechanism that "triggered" an investigation to determine whether the imported goods were being sold at less than foreign market value. The mechanism was created pursuant to the antidumping statute and was designed to insure that

18 19 U.S.C. § 1484.
19 *United States v. Steinfels*, 753 F.2d 373 (5th Cir. 1985).
20 *United States v. Holmquist*, 36 F.3d 154 (1st Cir. 1994); *United States v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999), *cert. denied*, 528 U.S. 1136 (2000); *United States v. Bagnall*, 907 F.2d 432 (3rd Cir. 1990); *United States v. Corcuera-Valor*, 910 F.2d 198 (5th Cir. 1990); *United States v. Teraoka*, 669 F.2d 577 (9th Cir. 1982).

foreign merchandise was not sold in the United States at less than its fair market value. In *Teraoka*, had the importer stated the true value in the invoice documents, the imported merchandise would not have been denied entry. The court held, therefore, that the goods were not "entered" "by means of" a false statement. A fraud had been committed but not under this particular provision of § 542.

A further illustration is found in a case where one Ackerman submitted documents undervaluing jewelry being imported from Mexico. He declared the value of the jewelry to be $242.00 when in fact it was worth $11,341.88. He did so only because entry of a commercial shipment of jewelry having a value of more than $250 required certificates of origin. Since Ackerman did not have the certificates, a true declaration would have prevented the entry until certificates were secured from the Mexican merchants to establish that the jewelry was Mexican and therefore duty-free. Ackerman's false statements were "material" because they were capable of influencing Customs and had a natural tendency to do so (i.e., had the Customs officer believed Ackerman's false statements, the jewelry would have been allowed entry).[21]

In another case, a "fraudulent practice" was successfully charged where rubber hose was imported in a manner that allowed easy removal of country of origin markings that were, in fact, subsequently removed.[22]

Finally, in a case involving the importation of duty-free surgical instruments from Pakistan, a court held that an importer's use of inflated invoice prices on Customs forms, so the prices did not accurately reflect the price paid, or the "transaction value" of the imported goods as that term is defined in 19 U.S.C. § 1401a, violated 18 U.S.C. § 542.[23]

This "but for" test for materiality (used in the Ninth Circuit) can be avoided in its entirety simply by using the "enter merchandise by means of" language only in those indictments where the false statement was, in fact, the means or mechanism for the release of the merchandise into the commerce of the United States. In any other case, use the "did make a material false statement in a declaration, to wit . . . without reasonable cause to believe . . ." as discussed in the next section.

A violation of § 542 is also committed by any person who:

- ✓ Makes any material false statement;
- ✓ In any declaration;

21 *United States v. Ackerman*, 704 F.2d 1344 (5th Cir. 1983).
22 *United States v. Shields Rubber Corp.*, 732 F. Supp. 569 (W.D. Pa. 1989).
23 *United States v. Ismail*, 97 F.3d 50 (4th Cir. 1996), *cert. denied*, 531 U.S. 1014 (2000).

- ✓ Without reasonable cause to believe the truth of it.

This is true whether or not the U. S. may be deprived of duties.

A false statement is "material" if the false statement carries the *potential* of inducing agency reliance or of affecting or influencing a legitimate function of the agency, regardless of its actual impact.[24]

The requirements, form and contents of declarations that must be made, filed or transmitted electronically under oath. Any material false statement in any such declaration or any other false material statement to CBP would satisfy the element of a "declaration."

This section does not impose strict liability for a material false statement, but neither does it require that the defendant act willfully and knowingly. The government need only show that the person acted "without reasonable cause to believe the truth" of the statement,[25] which language has been equated with the "knowing" element of 18 U.S.C. § 1001.[26] Plainly, Teraoka's scheme to avoid antidumping duties, as discussed earlier, involved the making of a false, material statement "without reasonable cause to believe the truth of such statement" and for which Teraoka properly could have been charged and convicted under this provision of section 542.

When the lack of knowledge of the falsity is raised as a defense, and there is evidence of a conscious action by the defendant to escape confirmation of conditions or events he strongly suspected to exist, a deliberate ignorance charge to the jury may be appropriate. The jury must be satisfied that but for his conscious contrivances the defendant would have had the requisite knowledge.[27]

The third provision of 18 U.S.C. § 542 makes willful acts or omissions that may deprive the United States of duties a criminal offense. These acts or omissions do not necessarily have to be attempts to smuggle specific merchandise through CBP but nevertheless may result in a deprivation of lawful duties. In other words, willful acts or omissions occurring at any time during the importation process which may affect adversely the ability of the United States to collect its lawful duties is a crime.[28]

This provision prohibits any:

- ✓ Willful act or omission;

24 *United States v. Pereira*, 463 F. Supp. 481 (E.D.N.Y. 1978).
25 *United States v. Felsen*, 648 F.2d 681 (10th Cir. 1981).
26 *United States v. Avelino*, 967 F.2d 815 (2d Cir. 1992).
27 *Spurr v. United States*, 174 U.S. 728 (1899); *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976); *Baker v. United States*, 115 F.2d 533 (8th Cir. 1940).
28 *United States v. Yip*, 930 F.2d 142 (2d Cir. 1991).

- ✓ Whereby the United States is or may be deprived of duties;

- ✓ On merchandise which is the subject of a false invoice, paper or statement;

or

- ✓ On merchandise affected by such act or omission.

The offense may be committed by omitting information that, although not otherwise required to be disclosed, has the effect of deceiving CBP as to a material fact, as well as by an affirmative act. Willfulness involves an evil intent and is best understood as knowledge of a legal duty and a deliberate purpose to avoid that duty.[29]

Here, like the "by means of" language in the first violation, the word "whereby" logically refers back to the willful act or omission. Thus, not every willful act or omission will result in liability, but only such as are material, i.e., *whereby* the United States shall or may be deprived of duties.[30]

This prong refers to the false statement provision of the offenses in the first paragraph of the statute when it states: "Whoever is guilty of any willful act whereby the United States . . . may be deprived of any lawful duties accruing upon merchandise embraced or referred to in such invoice, declaration . . ." Hence, this first prong makes criminal those acts and omissions which might deprive the United States of duties on the merchandise specifically related to the false statements.

Examples of this sort of conduct might include someone helping to package and ship the merchandise referred to in the false invoice, or carting away the goods covered in the false invoice, or knowing that the invoice relied upon by CBP contains falsehoods but failing to alert the agency to those falsehoods, thereby depriving the government, or attempting to deprive it, of duties.[31]

This prong addresses the failure to file required forms respecting goods brought into the United States or otherwise provide required information on such goods. For example, an importer might pay a design engineer to design a particular piece of machinery and then contract with an overseas manufacturer to build it from those plans. Upon importation, the importer fails to include the value of the design engineering, declaring only the cost of the value of the actual manufacturing. This omission, i.e., failure to declare the "assist," is one whereby the United States may be deprived of duties. Although this scenario still may be found to be a violation of the third provision in § 542, because these

29 *United States v. Eighty-five Head of Cattle*, 205 F.679 (9th Cir. 1913); *United States v. Szwaczka*, 769 F.Supp. 293 (E.D.Wis. 1991).
30 *United States v. Yip*, 930 F.2d 142 (2d Cir. 1991).
31 *Id.* at 148.

acts and omissions do not involve false statements on the entry documents, nor are they acts or omissions through which an individual seeks to benefit from the false statements of another, they are not covered by the first paragraph of § 542.

8.113 Smuggling Goods into the United States - 18 U.S.C. § 545

This statute is often referred to as the customs "smuggling" statute, but as will be explained below it actually prohibits many other forms of conduct involving moving or attempting to move items across our borders. This statute is also designated as a Specified Unlawful Activity (SUA) under the *Money Laundering Control Act*. Moreover, property which constitutes or is derived from proceeds traceable to violations of this provision are subject to civil or criminal forfeiture under 18 U.S.C. §§ 981, 982. Further, this statute provides for civil forfeiture of any merchandise (or "substitute property") involved in a violation.[32]

The first of four activities prohibited by this statute involves the smuggling or clandestine introduction of imported merchandise which should have been invoiced.

The elements of a smuggling violation of § 545 are:

- ✓ Knowingly and willfully;
- ✓ With intent to defraud the U.S.;
- ✓ Smuggles or clandestinely introduces (or attempts to) into the U.S.;
- ✓ Imported merchandise that should have been invoiced.

Each of these terms has a particular meaning as applied to criminal statutes and defines a particular state of mind that must accompany the proscribed conduct in order for a criminal offense to occur. The word "knowingly" generally means that the prohibited conduct was accomplished intentionally and voluntarily and not because of mistake, accident or other innocent reason.[33]

The term "willfully," however, as the Supreme Court has observed, has many meanings and its construction is often influenced by its context.[34] The term generally means the doing of an unlawful act with knowledge that the act is unlawful and with the specific intent to do the act.[35] An act, or failure to act, is

32 *United States v. Ahmad*, 213 F.3d 805 (4th Cir. 2000); *United States v. Brigance*, 472 F. Supp. 1177 (S.D. Tex. 1979).
33 *United States v. Borello*, 766 F.2d 46 (2d Cir. 1985); *United States v. Davis*, 597 F.2d 1237 (9th Cir. 1979); *Babb v. United States*, 252 F.2d 702 (5th Cir. 1958); *United States v. Schneiderman*, 102 F. Supp. 87 (S.D. Cal. 1951).
34 *Ratzlaf v. United States*, 510 U.S. 135 (1994).
35 *United States v. Connery*, 867 F.2d 929 (1989); *Babb v. United States*, 252 F.2d 702 (5th Cir. 1958).

"willfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids or fail to do what the law requires; i.e., to act with a bad purpose either to disobey or to disregard the law.[36] Although the terms are different and stated in the conjunctive in this part of the statute, it can be seen that the word "willfully" fully encompasses "knowingly." Put another way, since willful conduct is necessarily knowing conduct,[37] proof of willfulness is both necessary and sufficient for conviction, whereas proof of knowing conduct alone, although necessary, is not sufficient. This *does not* mean that a defendant must know that his conduct is illegal, *per se*. It *does* mean that he must know that the law imposes upon him certain requirements (as in "knowingly," above) and that he purposely seeks to disobey or disregard that known legal duty.[38] Knowledge that there may be criminal consequences for such disobedience is not required. A violation would be established, for example, on proof that a defendant knew that he had imported merchandise, that duties thereupon were not fully paid, and that he intended to bring such goods into the United States without payment of the required duties.[39]

An intent to defraud is established by evidence of an intent to defeat the Customs laws.[40] The Second, Seventh and Ninth Circuits have held that the government need not show that the items were subject to duty, but must show at least some interest or right to be avoided.[41] The Third Circuit, on the other hand, recognizes that "defraud the United States" generally extends beyond defrauding the government of revenue and includes means used to interfere with or obstruct a lawful governmental function such as deceit or dishonesty, but goes on to say that its meaning must be determined by the context of the statute in which it appears. Upon review of the legislative history of § 545, the Third Circuit concluded that "defraud the United States" means to defraud the revenue of the United States.[42] Although the Third Circuit interpretation of this language was in the context of the second crime in § 545 (Passing a False Document Through Customhouse), since "defraud the United States" is also part of the smuggling elements, the case has the curious result of potentially requiring a loss of revenue in a contraband smuggling case as well.

36 *United States v. Ackerman*, 704 F.2d 1344 (5th Cir. 1983).
37 *Dunbar v. United States*, 156 U.S. 185 (1894).
38 *United States v. Ackerman*, 704 F.2d 1344 (5th Cir. 1983). (See also, *United States v. Dominguez-Mestas*, 929 F.2d 1379, 1382 (9th Cir. 1991) (first paragraph of § 545 requires proof of mens rea or "evil purpose")).
39 *Dunbar v. United States*, 156 U.S. 185 (1894).
40 *United States v. Mehrmanesh*, 689 F.2d 822, 833 (9th Cir. 1982); *United States v. Boggus*, 411 F.2d 110 (9th Cir. 1969).
41 *United States v. Borello*, 766 F.2d 46 (2d Cir. 1985); *United States v. Kurfess*, 426 F.2d 1017 (7th Cir. 1970); *United States v. Robinson*, 167 F.3d 851 (9th Cir. 1998, *cert. denied*, 526 U.S. 1016 (1999).
42 *United States v. Menon*, 24 F. 3d 550 (3rd Cir. 1994). *Contra*, *United States v. Ahmad*, 213 F.3d 805 (4th Cir. 2000), *cert. denied*, 531 U.S. 1014 (2000).

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As originally enacted, 18 U.S.C. § 545 required that the merchandise *actually be landed* on shore to complete the offense. Simply bringing merchandise into the territory of the United States, (e.g., arrival of a vessel within the limits or a port, but not yet unladen), would not satisfy "smuggles or clandestinely introduces."[43] For example, Lespier loaded a large volume of liquor onto his vessel in St. Thomas, in the United States Virgin Islands. Intent on smuggling the untaxed alcohol into Puerto Rico, Lespier set sail under cover of darkness and without navigation lights. Observed by Customs, Lespier sailed towards Puerto Rico. When he arrived at a point about one mile off the coast of the island of Culebra, in Puerto Rican (U.S.) waters, Custom officers stopped the vessel and took Lespier and his cargo into custody. Prosecuted under this provision, the conviction was reversed because the cargo had not actually landed.[44]

This problem was remedied in 1994 when 18 U.S.C. § 545 was amended to add an "attempts" provision. Now, where property has not actually been landed, it is possible to charge an attempt if the crime of attempt is complete.[45] See Chapter One, Introduction, for discussion of the law of attempts. However, due to proof issues associated with the law of attempts, where the facts permit, it might be preferable to charge the third crime in this section, "Importation Contrary to Law." See § 8.113c below.

The word "smuggle" and the phrase "clandestinely introduce" mean substantially the same thing.[46] The term "clandestinely introduce" refers to any method of introducing goods into the United States surreptitiously whether by concealment or fraud.[47] The statute covers all smuggling, without regard to whether the merchandise involved is intended for commercial or private use.[48]

"Merchandise that should have been invoiced" means that the landed merchandise should have been lawfully entered or declared.[49] Bringing goods into the U.S. without declaring the goods constitutes a violation of § 545 even if the goods could otherwise have been legally imported.[50]

A violation of § 545 also occurs whenever one:

- ✓ Knowingly and willfully;
- ✓ With intent to defraud the United States;

43 *Keck v. United States*, 172 U.S. 434 (1899); *United States v. Lespier*, 601 F.2d 22 (1st Cir. 1979).
44 *United States v. Lespier*, 601 F.2d 22 (1st Cir. 1979).
45 *United States v. Plummer*, 221 F.2d 1298 (11th Cir. 2000).
46 *United States v. Clabourn*, 180 F. Supp. 448 (S.D. Cal. 1960).
47 *United States v. Kurfess*, 426 F.2d 1017 (7th Cir. 1970).
48 *United States v. Hall*, 559 F.2d 1160 (9th Cir. 1977).
49 *United States v. Boggus*, 411 F.2d 110 (9th Cir. 1969).
50 *United States v. Richardson*, 588 F.2d 1235 (9th Cir. 1978).

- ✓ Passes (attempts to pass) through Customhouse;
- ✓ Any false, forged or fraudulent invoice or other document.

The false, forged or fraudulent offering must be causally related (i.e., material) to the importation. This portion of § 545 is a true "fraud" provision, like § 542.[51]

Third, a § 545 violation occurs whenever one:

- ✓ Fraudulently or knowingly;
- ✓ Imports or brings into the United States;
- ✓ Any merchandise contrary to law.

As with the phrase "knowingly and willfully," the phrase "fraudulently or knowingly" has specific meaning and each word is separately defined. Here, contrary to "knowingly *and* willfully," the words appear disjunctively, which means that a violation occurs if the conduct is done *either* knowingly *or* fraudulently.[52] The word "fraudulently" describes conduct performed with an evil purpose to evade the law and done with the specific intent to deceive or evade for the purpose of bringing about some gain or loss.[53] The term necessarily includes the idea of "knowing," which carries the same meaning as discussed in § 8.113a(1), and, as noted, describes a state of mind whereby conduct is intentionally and voluntarily accomplished, as opposed to conduct resulting from mistake, accident, or other innocent reason.[54] In this case, although a specific intent to defraud is sufficient for conviction, such is not necessary. Similarly, proof that a defendant knew that he was importing merchandise and that such was contrary to some law, even without an intent to defraud, is also sufficient.[55] Again, it is not necessary to show that the defendant knew that importing contrary to some law was, itself, illegal.

Merchandise is "imported" or brought into the United States when it is brought into the Customs territory of the United States, defined as the several states, the District of Columbia and Puerto Rico.

51 *See*, *United States v. Borello*, 766 F.2d 46 (2d Cir. 1985) and *United States v. Piascik*, 559 F.2d 545 (9th Cir. 1977) for a discussion of the relationship between 18 U.S.C. § 542 and 18 U.S.C. § 545. Counts are not duplicative where different proof is required for each offense.

52 *United States v. Davis*, 597 F.2d 1237 (9th Cir. 1979).

53 *United States v. Connery*, 867 F.2d 929 (6th Cir. 1989); *United States v. Ramirez*, 535 F.2d 125 (1st Cir. 1976); *United States v. Ehrgott*, 182 F. 267 (2d Cir. 1910).

54 *United States v. Davis*, 597 F.2d 1237 (9th Cir. 1979).

55 *Id.*

"Contrary to law" means contrary to *any* law in effect at the time of the violation.[56] It includes contrary to agency regulations and executive orders.[57] However, the Ninth Circuit has ruled that if the importation is contrary to a regulation, a statute must specify that violation of the regulation is a crime.[58] An importation can be "contrary to law" even if proper Customs duties are paid.[59] False statements made in Customs entry documents have been considered contrary to those Customs laws which require the submission of accurate information to import merchandise, e.g., the importation was "contrary to 19 U.S.C. §§ 1481, 1484 or 1485."[60] The *Lespier* case, discussed in 8.113a(3), could have been successfully prosecuted under this provision. Given that Lespier crossed into U.S. waters, he imported his cargo. Since the possession of the liquor without a manifest in the Customs waters of the United States and the importation without a license are both violations of law, the liquor was imported "contrary to law."

Also, it is proper to pursue a felony violation of § 545 for an importation contrary to a law that is only a misdemeanor in its own right.[61]

An indictment charging a violation of this provision must inform the defendant of the illegality of his conduct by reference to the statute or regulation which he is accused of violating by the importation.[62]

56 *Callahan v. United States*, 285 U.S. 512 (1932); *United States v. Lee*, 937 F.2d 1388 (9th Cir. 1992); *United States v. Normandeau*, 800 F.2d 953 (9th Cir. 1986); *United States v. Cox*, 696 F.2d 1294 (11th Cir. 1983); *United States v. Molt*, 615 F.2d 141 (3rd Cir. 1981).

57 *Duke v. United States*, 255 F.2d 721 (9th Cir. 1958); *Steiner v. United States*, 229 F.2d 745 (9th Cir. 1956); *United States v. Hassanzadeh*, 271 F.3d 574 (4th Cir. 2001).

58 *United States v. Alghazouli*, 517 F.3d 1179 (9th Cir. 2008) (Clean Air Act specified that violation of the regulation in question was a crime).

59 *United States v. Dall*, 918 F.2d 52 (8th Cir. 1990), (per curium) (Importation of adulterated animal drugs violated § 545 because it was an importation "contrary to" the Federal Food, Drug and Cosmetic Act, even though proper Customs duties were paid).

60 *United States v. One Eighteenth Century Colombian Monstrance*, 797 F.2d 1370 (5th Cir. 1986) (forfeiture based on the presentation of false and misleading certifications at the time of entry); *United States v. Cox*, 696 F.2d 1294 (11th Cir. 1983) (false statements as to the country of origin on Customs entry forms); and *United States v. Molt*, 615 F.2d 141 (3rd Cir. 1981) (failure to accurately represent value of imported goods considered contrary to 19 U.S.C. § 1485); *United States v. Ahmad*, 213 F.3d 805 (4th Cir. 2000), *cert. denied*, 531 U.S. 1014 (entry forms listed an inflated invoice price).

61 *Roseman v. United States*, 364 F.2d 18 (9th Cir. 1966); *Steiner v. United States*, 229 F.2d 745 (9th Cir. 1956); *Duke v. United States*, 255 F.2d 721 (9th Cir. 1958).

62 *See United States v. Menon*, 24 F.3d 550 (3rd Cir. 1994) (No need to cite other law); *United States v. Normandeau*, 800 F.2d 953 (9th Cir. 1986); *Olais-Castro v.*

Finally, the statute reaches conduct by persons who knowingly involve themselves with merchandise that has been imported contrary to law.

The elements of this aspect of § 545 are:

- ✓ Fraudulently or knowingly;
- ✓ Receiving, concealing, buying, selling or facilitating the transportation, concealment or sale of merchandise;
- ✓ Knowing the merchandise was imported or brought into the U.S. contrary to law.

The final provision of the statute penalizes one who performs any of the acts described, knowing that merchandise already imported or brought in was imported or brought into the U.S. contrary to law.[63] For example, if a retailer purchases merchandise from an importer for sale in his retail establishment knowing that it had been imported contrary to law, he would violate this section even if he played no part in the original illegal importation.

8.120 Specialized Customs Fraud Statutes

8.121 Customs Matters - 18 U.S.C. § 496

The elements of the two crimes found in this section are:

False Writing

- ✓ Falsifies, forges, counterfeits, or alters;
- ✓ Any writing;
- ✓ Made or required to be made in connection with the entry or withdrawal of imports or collection of duties.

Use of Any False Writing

- ✓ Uses any such writing;
- ✓ With knowledge of the falsity, forgery, counterfeiting, or altering.

United States, 416 F.2d 1155 (4th Cir. 1969); *Current v. United States*, 237 F.2d 268 (9th Cir. 1961); *United States v. Petrykievicz*, 809 F. Supp. (W.D. Wash. 1992).

[63] *United States v. Freeman*, 77 F.3d 812 (5th Cir. 1996); *United States v. Ivey*, 949 F.2d 759 (5th Cir. 1991) (conspiracy to receive/sell merchandise imported contrary to the Endangered Species Act); *United States v. Molt*, 615 F.2d 141 (3rd Cir. 1981); *Gillespie v. United States*, 13 F.2d 736 (2d Cir. 1926).

This section is mentioned in one case where the defendant was charged with § 496 for using falsely altered Customs forms to obtain certificates of title to automobiles that he allegedly smuggled into the United States.[64]

8.122 Relanding of Goods - 18 U.S.C. § 544

The elements for the unlawful relanding of goods are:

- ✓ Merchandise;
- ✓ Entered or withdrawn for exportation;
- ✓ Without payment of duties, or with intent to obtain drawback, or any other allowance;
- ✓ Relanded at any place in the United States;
- ✓ Without entry having been made.

This section was charged where a counterfeit Customs stamp was used to mark sales receipts for bonded merchandise owned by a duty-free store. (Brady's Tax & Duty-Free Shop, Houston, TX). In another case the defendant removed cartons of cigarettes from a bonded warehouse and stated they were to be exported on an outgoing vessel for use as vessel supplies. The cigarettes were loaded onto the vessel, but then unloaded and brought back to shore without payment of duty.

8.123 Removing or Repacking Goods in Bonded Warehouse - 18 U.S.C. § 548

The elements of the two crimes contained in this section are:

Removing or Repacking Goods in Bonded Warehouse

(1) Fraudulently;
(2) Conceals, removes, or repacks;
(3) Merchandise in bonded warehouse.

Altering or Defacing Goods in Bonded Warehouse

(1) Alters, defaces or obliterates any marks or numbers;
(2) On packages deposited in bonded warehouse.

64 *United States v. Gardner*, 894 F.2d 708, n.1 (5th Cir. 1990).

8.124 Removing Goods from Customs Custody; Breaking Seals – 18 U.S.C. § 549

In addition to the obvious applications of this statute, § 549 can be, and has been, used to prosecute those who unlawfully remove even their own baggage from CBP custody before inspection and release. CBP custody can be constructive and begins with arrival and continues until its final release.[65]

The elements of the five crimes in this section are:

Affixing Customs Seal Without Authority

(1) Without authority;
(2) Affixes anything purporting to be a Customs seal or mark,
(3) To any vessel, vehicle, warehouse, or package.

Removing or Breaking Customs Seals

(1) Willfully removes, breaks, injures, or defaces any Customs seal or other fastening or mark;
(2) On any vessel, vehicle, warehouse, or package;
(3) Containing merchandise or baggage in bond or in Customs custody.

Entering Bonded Warehouse

(1) Maliciously enters;
(2) Any bonded warehouse or any conveyance containing bonded merchandise;
(3) With intent to unlawfully remove merchandise or baggage.

Removing Merchandise from Bonded Warehouse

(1) Maliciously enters;
(2) Any bonded warehouse or any conveyance containing bonded merchandise;
(3) Unlawfully removes any merchandise therefrom.

Receives or Transports Merchandise Removed from Bonded Warehouse

(1) Receives or transports;
(2) Any merchandise or baggage unlawfully removed from bonded warehouse or conveyance;
(3) Knowing merchandise or baggage was unlawfully removed.

65 *United States v. Harold*, 588 F.2d 1136 (5th Cir. 1979); *Mungo v. United States*, 423 F.2d 1351 (4th Cir. 1970).

The government need not prove the defendant knew the goods were in CBP custody at the time of theft,[66] nor must the merchandise be in CBP actual custody to be a violation.[67] "Customs custody" can be either actual or constructive[68] and its interplay with 18 U.S.C. §§ 549 and 659 has been discussed.[69]

A vehicle used in an attempted theft from a bonded warehouse is subject to forfeiture under 19 U.S.C. § 1595a(a) because a theft from CBP custody is an "introduction" of merchandise "contrary to law."[70]

In one case an indictment charging the defendants under § 549 with "unlawfully" removing property from a Customs bonded area was held sufficient.[71]

8.125 False Claim for Refund of Duties - 18 U.S.C. § 550

The elements of the two crimes in this section are:

Filing a False Claim for Refund or Drawback

- ✓ Knowingly or willfully;
- ✓ Files false or fraudulent entry or claim;
- ✓ For drawback allowance or refund of duties;
- ✓ Upon exported merchandise.

Filing a False Document for Refund or Drawback

- ✓ Knowingly and willfully;
- ✓ Makes or files false affidavit, abstract, record, certificate, or other document;
- ✓ To obtain drawback allowance or refund of duties;

66 *United States v. Sarmiento*, 744 F.2d 755 (11th Cir. 1984) (Removal of cocaine from container in bonded warehouse.)
67 *United States v. Slocum*, 708 F.2d 587 (11th Cir. 1983) (Removal of imported birds from quarantine.)
68 *United States v. Harold*, 588 F.2d 1136 (5th Cir. 1979); *United States v. Mungo*, 423 F.2d 1351 (4th Cir. 1970).
69 *United States v. Garber*, 626 F.2d 1144 (3rd Cir. 1980).
70 *United States v. One 1976 Mercedes*, 667 F.2d 1171 (5th Cir. 1982).
71 *United States v. Parisi*, 365 F.2d 601 (6th Cir. 1966), *vacated on other grounds sub nom.*, *O'Brien v. United States*, 386 U.S. 345 (1967).

- ✓ Greater than legally due;
- ✓ Upon exported merchandise.

"Drawback" is defined in 19 C.F.R. § 191.2 as a "refund or remission in whole or in part, of a customs duty, Internal Revenue tax or fee lawfully assessed or collected because of a particular use made of the merchandise on which the duty, tax or fee was assessed or collected."

A claim may be filed with CBP, for example, to obtain a refund of duties when imported merchandise, usually components or raw materials, are processed in some fashion and subsequently exported from the United States. By way of illustration, under the CBP Duty Drawback Program and the Department of Agriculture Re-Export Program, a sugar refiner must pay duties when raw sugar is imported. He may, however, recover (drawback) 99% of those duties when the previously imported raw sugar is exported in a manufactured (refined) condition.[72] This creates a profound opportunity for fraud.[73]

8.126 Concealing or Destroying Invoices or Other Papers - 18 U.S.C. § 551

The elements of the two crimes in this section are:

Concealing or Destroying Documents After Demand

- ✓ Willfully conceal/destroy;
- ✓ Document;
- ✓ Related to imported merchandise;
- ✓ After demand for inspection.

Concealing or Destroying Documents for Purpose of Suppressing Evidence of Fraud

- ✓ Willfully conceal/destroy;
- ✓ Document;
- ✓ Related to imported merchandise;
- ✓ To suppress evidence of fraud therein

72 *Refined Sugar, Inc. v. Southern Commodity Corp*, 709 F. Supp. 1117 (S.D. Fla. 1988).

73 *United States v. Plewniak*, 947 F.2d 1284 (5th Cir. 1991).

This statute has not been used often, but is an alternative to general obstruction statutes. "After demand" could be after an administrative summons (19 U.S.C. § 1509), during an audit, a request at the border, etc., as well as in a criminal context. The government need not prove the motive for the destruction.

In one case the defendant was convicted of conspiracy (18 U.S.C. § 371) to violate §§ 542 and 551. The defendant concealed documents from Customs pertaining to country of origin and directed foreign suppliers to do "whatever needs to be done to defend yourself against Customs . . . even if it means preparing a set of duplicate books . . ." Although this case does not have any discussion of § 551, it does describe the indictment charging a conspiracy to violate this section.[74]

In a case involving a fraudulent transshipment of cheese, the defendant was charged with violating § 551 based upon the discovery of documents relating to the transshipment thrown in his garbage shortly after a grand jury subpoena was issued.

This same statute may also be violated by concealing or destroying an invoice, book or paper for the purpose of "suppressing any evidence of fraud therein." Under this latter provision the government must prove that the defendant's specific purpose was to suppress evidence of fraud in the documents destroyed.

8.130 Violations of Intellectual Property Rights – Copyrights, Trademarks and Trade Secrets

The emergence of a truly global marketplace has created an increased demand for U.S. brand-named consumer goods and, unfortunately, a concomitant rise in illegal copying and reproduction of these goods. The illicit trade in counterfeit records, films, audio and videotapes, compact disks, computer programs and other goods has also been greatly facilitated by the ease with which such goods can be reproduced and distributed. American companies and businesses are losing vast sums of money as a result of this bootlegging, piracy, and counterfeiting.

The terms "bootlegging," "piracy," and "counterfeiting" are similar but not synonymous. "Bootlegging" generally refers to the unauthorized recording and distribution of musical performances. "Piracy" involves the unauthorized reproduction of an existing copyrighted work or distribution of an infringing copy. However, the original packaging or graphics of the genuine merchandise are not copied. "Counterfeiting," by contrast, occurs when an infringer not only reproduces and distributes infringing merchandise, but also copies the genuine packaging of the product. In such cases the counterfeiter is attempting to pass off his products as legitimate goods produced by the original manufacturer.

[74] *United States v. Murray*, 621 F.2d 1163 (1st Cir. 1980).

Information, itself, has also become increasingly valuable. With the end of the Cold War, the focus of foreign espionage is no longer directed solely towards obtaining American military secrets, but to obtaining valuable proprietary information from U.S. companies. This theft of trade secrets has also been facilitated by emerging technology.

Investigations and inspections by CBP officers must become more sophisticated. Due to developing technology, this contraband can now be transferred electronically in a number of ways. Pirated computer programs, for example, can be copied and transferred over the Internet to hundreds of individuals in seconds, often making these electronic transfers difficult to detect and prosecute.

Similarly, a person stealing trade secrets no longer has to physically copy documents because much scientific and technical information is now stored on computers. Instead of copying hundreds of pages of information on a duplicating machine, a person can download that material onto a single computer disk, which can be easily concealed in a pocket. The information on the disk can then be sent or transmitted anywhere in the world without ever engendering the employer's suspicions. Additionally, if a thief is able to illegally penetrate a company's computer system, the company's trade secrets can be downloaded and transmitted on international computer networks without removing the originals from the victim company.[75]

8.131 Definition of Intellectual Property Terms

The law of *copyright*, in general, protects "original works of authorship" including the following broad categories: literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings, and architectural works.[76] It protects only a work's expression, not its underlying ideas; for example, one cannot copyright a machine process for manufacturing shoes.[77] Copyright protection attaches when the work is "fixed in a tangible medium of expression."[78] Once in place, it extends to the embodiment of the work itself, protecting against unlicensed reproduction, distribution, display, performance, or modification of the copyrighted work, generally for a term

75 This introduction and the following sections were adapted, in part, from *Prosecuting Intellectual Property Crimes*, January 2001, Computer Crime & Intellectual Property Section, Criminal Division, U.S. Department of Justice (published by the Executive Office for United States Attorneys, Office of Legal Education) (hereinafter "*Prosecuting Intellectual Property Crimes*").

76 17 U.S.C. § 102(a).

77 17 U.S.C. § 102(b).

78 "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101.

equivalent to the author's life plus seventy years (if the work was created before 1978, it is protected for ninety-five years from the date of creation).[79] Remedies for infringement may include injunctive relief; monetary relief in the form of damages (lost profits), profits (gained by defendant in excess of lost profits) or statutory damages; impoundment and destruction of infringing material; criminal penalties; and attorney's fees and costs.[80]

If copyright is the law of authorship, *trademark* is the law of consumer marketing and advertising. Trademarks are given federal protection by the *Lanham Act.*[81] The *Lanham Act*, in general, prohibits the imitation and unauthorized use of a trademark which is defined as "any word, name, symbol or device, or any combination thereof [used by a person] to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown."[82] If the trademark is used to distinguish the services of one person from the services of another, it is known more specifically as a service mark. The purpose of a trademark is to signify a single source of product and a certain level of quality to all consumers, as well as serve as a device for the advertising and sale of the product. Thus, trademarks, unlike other forms of intellectual property, are always connected to some commercial activity or item and have no function or independent existence apart from such goods or services. To be granted trademark protection, an applicant must demonstrate that the mark is actually used, and has been continuously used, in commerce. Unlike copyright, a trademark does not expire so long as it is used and retains its ability to distinguish a particular good and its source (even if it is continuously used in commerce, a trademark that becomes generic and loses its ability to represent a unique product ceases to be a valid trademark, a good example being "aspirin").

A *trade secret* is any formula, pattern, device or compilation of information, whether tangible or intangible, used in a business to obtain an advantage over competitors who do not know or use it.[83] Perhaps the most famous trade secret is the formula for manufacturing Coca-Cola. In a 1920 court decision, Coca-Cola was accorded trade secret protection because the recipe had been continuously maintained as a trade secret since the company's founding in 1892.[84]

The *Economic Espionage Act of 1996* created two separate provisions that criminalize the theft of trade secrets. The first provision penalizes the theft of trade secrets when the theft is done to intentionally benefit a foreign

79 *See* 17 U.S.C. §§ 106, 302.
80 17 U.S.C. §§ 502-506; 18 U.S.C. § 2319.
81 15 U.S.C. §§ 1051-1127.
82 15 U.S.C. § 1127.
83 *See* 18 U.S.C. 1839(3) (sets forth complete definition).
84 *See Coca-Cola Bottling Co. v. Coca-Cola Co.*, 269 F. 796, 799 (3d Cir. 1920).

government, instrumentality or agent.[85] In contrast, the second provision makes criminal the more common commercial theft of trade secrets, regardless of who benefits.[86] The act also provides for criminal forfeiture and permits the use of civil proceedings by the United States to enjoin violations. Finally, it seeks to protect the confidentiality of trade secrets during litigation and provides for extraterritorial jurisdiction when the thief is an American citizen or a permanent resident of the United States or an act in furtherance of the offense was committed in the United States.[87]

Finally, if copyright is the law of authorship and trademark is the law of marketing, patent is the law of invention. Generally, a patent can be obtained for "any new and useful process, machine, manufacture, or composition of matter, or any new or useful improvement thereof . . ."[88] A patent gives the patentee the right to exclude others from making, using, or selling or offering to sell any patented invention throughout the United States or importing the invention into the United States.[89] In order to be awarded a patent by the Patent and Trademark Office, the subject matter must be both novel and non-obvious to someone of ordinary skill in the art.[90]

Patents protect products and processes, not pure ideas. For example, Albert Einstein could not have received a patent for his theory of relativity. However, methods applying aspects of his theory to a nuclear power plant are patentable. Unlike copyrights, patent rights do not vest until the patent is granted although, pending approval, the substance of many patent applications may be protected under trade secret laws. A patent may last for a maximum of 14 or 20 years from filing depending on whether it is a design or a functional patent.

There are no federal laws that specifically criminalize patent infringement. This perhaps reflects the difficulty of proving that a person infringed a patent with the requisite intent for a criminal violation, given the possibility of independent creation and the arcane nature of the patent approval process conducted by the United States Patent Office. In the civil context, CBP enforces exclusion and seizure and forfeiture orders issued by the International Trade Commission against infringing articles pursuant to 19 U.S.C. § 1337.[91]

85 18 U.S.C. § 1831.
86 18 U.S.C. § 1832.
87 18 U.S.C. §§ 1833-1837.
88 35 U.S.C. § 101.
89 *See* 35 U.S.C. § 271(a).
90 *See* 35 U.S.C. § 103.
91 *See* 19 CFR § 12.39.

8.132 Criminal Copyright Infringement: 17 U.S.C. § 506(a) and 18 U.S.C. § 2319

The principal criminal statute protecting copyrighted works is 17 U.S.C. § 506(a). While the criminal prohibition is in that statute, the felony penalties for criminal copyright infringement are located in 18 U.S.C. § 2319.
Subsection 506(a) of the *Copyright Act* prohibits two types of criminal copyright infringement: for-profit and nonprofit. Each type contains four essential elements, three of which are the same. For-profit infringement is prohibited by 17 U.S.C. § 506(a)(1). In order to obtain a conviction under that provision, the government must prove that:

(1) A valid copyright exists;

(2) It was infringed by the defendant;

(3) Willfully; and

(4) For purposes of commercial advantage or private financial gain.[92]

The best evidence of the validity of a copyright is registration with the Register of Copyrights (an office within the Library of Congress). A certificate of copyright registration constitutes *prima facie* evidence of the validity of the copyright and any facts stated in the certificate in any judicial proceeding so long as the registration was made before or within five years after the date of the first publication of the copyrighted work.[93] Once the government presents such evidence, the burden shifts to the defendant to prove copyright invalidity or a legitimate affirmative defense.

A defendant may infringe a copyright by violating any of the copyright owner's exclusive rights, as provided by 17 U.S.C. §§ 106-118, or, more importantly for CBP, by importing copies or phonorecords into the United States in violation of 17 U.S.C. § 602.[94] However, not all forms of infringement constitute felonies under 18 U.S.C. § 2319; that section imposes felony penalties only on those who infringe the copyright owner's right to reproduce or distribute his or her works. Section 602 of Title 17 provides that, with certain exceptions (e.g., government importations, importations for personal use or for scholarly, educational, or religious purposes), anyone who imports copies or phonorecords of copyrighted works acquired abroad into the United States without the permission of the copyright owner infringes the copyright owner's exclusive right to distribute his or her works. Notwithstanding the broad language of § 602(a), § 602(b) provides that CBP is only responsible for preventing the importation of "piratical" copies or phonorecords, i.e., articles that were manufactured without any authorization by the copyright owner.[95] Aside from § 602, the most common allegation of

92 For a detailed discussion of these elements *see* Section III.B. at pages 46-64, *Prosecuting Intellectual Property Crimes*, January 2001, *supra*, note 1.
93 17 U.S.C. § 410(c).
94 17 U.S.C. § 501(a).
95 *See* also 19 CFR §§ 133.31-133.46

copyright infringement is that of unauthorized reproduction, where the copies at issue are substantially similar to the copyrighted work (i.e., a lay observer would recognize the alleged copy as having been appropriated from the original work).[96]

The infringement must be done willfully, i.e., intentionally and voluntarily done with an improper or illegal purpose or without justifiable excuse. It should be noted, however, that Congress did not provide a statutory definition for "willful" when it enacted 17 U.S.C. § 506, and the courts also have failed to agree on a standard definition for the term specific to § 506. However, "willfully" is generally understood to require proof of a known legal duty and a deliberate act to evade that duty.

The government must establish that the infringement was committed with the intent to obtain commercial advantage or private financial gain, whether or not such was actually realized. The government need only establish that the violator engaged in conduct with the hope or expectation of profit.[97]

However, nonprofit infringement, i.e., infringement not for purposes of commercial advantage or private financial gain, is also prohibited by 17 U.S.C. § 506(a)(2).[98] To obtain a conviction under that provision, the government must prove that the defendant willfully infringed a valid copyright as above, and

1. Reproduced or distributed (by any means);

2. One or more copies or phonorecords; of

3. One or more copyrighted works;

4. Aggregating a retail value greater than $1,000;

5. During any 180-day period.

The criminal copyright infringement statutes are arranged so that the substantive offenses are described in 17 U.S.C. § 506(a), but the penalty provisions are located in 18 U.S.C. § 2319. Section 2319(b) makes for-profit copyright infringement a felony, punishable by up to five years' imprisonment for a first-time violation, if the defendant reproduced or distributed, including by electronic means, during any 180-day period, at least ten copies for phonorecords, of one or more copyrighted goods having a total retail value of more than $2,500. Similarly, § 2319(c) makes nonprofit infringement a felony, punishable by up to three years' imprisonment for a first-time violation, if the

96 *See United States v. O'Reilly*, 794 F.2d 613 (11th Cir. 1986).

97 *United States v. Wise,* 550 F.2d 1180, 1195 (9th Cir. 1977).

98 The statute was enacted following the decision of the U.S. District Court for the District of Massachusetts in *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994), in which the court held, *inter alia*, that 17 U.S.C. § 506(a) as it was then written did not address nonprofit copyright infringement.

defendant reproduced or distributed, including by electronic means, during any 180-day period, at least ten copies for phonorecords, of one or more copyrighted goods having a total retail value of $2,500 or more. In addition, the plain language and legislative history of § 2319 evidences congressional intent that § 506(a) is not meant to be the sole statute under which the government can prosecute criminal copyright infringement.[99] For example, under the correct circumstances, the government may charge a defendant with violating not only § 506(a), but also § 602(a) and 19 U.S.C. § 545 and the *National Stolen Property Act* (18 U.S.C. § 2314).

A number of affirmative defenses to infringement exist in the copyright area, such as the doctrine of first sale (after the first valid sale of a copyrighted article, the owner of the copy can sell, display or dispose of the article as he wishes), lack of actual access to the copyrighted work by the violator, lack of substantial similarity between the copyrighted work and the infringing article, and fair use (anyone can use a copyrighted work for such purposes as criticism, parody, news reporting, and teaching).[100]

Title 18 U.S.C. § 2319 is listed as a "specified unlawful activity" under the money laundering statutes.[101] Thus, proceeds earned by a defendant from copyright infringement can now form the basis for a money laundering violation. In addition, violations of § 2319 are included within the definition of "racketeering activity" under RICO.[102] Both of these statutes carry much stronger penalties than just a violation of § 2319.

Once a conviction is obtained under 17 U.S.C. § 506(a), § 506(b) requires that "the court in its judgment of conviction shall . . . order the forfeiture" of the infringing copies or phonorecords and "all implements, devices, or equipment used in the manufacture of such infringing copies or phonorecords" (emphasis added). Subsection 506(b) also provides the court with the discretion to order the destruction or other disposition of the infringing copies or phonorecords or production equipment.

8.133 Trafficking in Sound Recordings of Live Musical Performances – 18 U.S.C. § 2319A

Section 2319A is specifically targeted for use against the burgeoning trade in so-called "bootlegged" musical recordings. It contains three subsections, each of which protects a different right of the performing artist. Section 2319A(a)(1) prohibits "fixing"[103] the "sounds" or "images" of a live musical performance; §

99 *See United States v. Gottesman*, 724 F.2d 1517, 1520-1521 (11th Cir. 1984), *rehearing denied*, 729 F.2d 1468 (1984).

100 *See* Section III.C., at pages 64-71, *Prosecuting Intellectual Property Crimes*, January 2001, *supra* note 1.

101 18 U.S.C. § 1956.

102 18 U.S.C. § 1961.

103 "A work is 'fixed' in a tangible medium of expression when its embodiment in

2319A(a)(2) prohibits transmitting the "sounds" or "images" of a live musical performance to the public;[104] and § 2319A(1)(3) prohibits distributing to the public or trafficking in any fixed recording of a live musical performance. Under each subsection, the government must also prove beyond a reasonable doubt that the defendant acted:

1. Without authorization from the performer involved;

2. Knowingly; and

3. For purposes of commercial advantage or private financial gain.

The maximum penalties for a first-time violation of § 2319A are five years' imprisonment and a $250,000 fine. The statute also provides for mandatory forfeiture and destruction of all infringing items upon a defendant's conviction.[105] Copies fixed outside the United States and imported into the United States are also subject to seizure and forfeiture.[106] Further, a violation of § 2319A is specifically listed in 18 U.S.C. § 1961(1)(b) as a "racketeering activity" and is subject to the RICO provisions of the *Organized Crime Control Act* of 1970.[107]

Finally, in addition to the prohibition against willful copyright infringement, the *Copyright Act* also contains lesser criminal sanctions (found at 17 U.S.C. §§ 506(c) and (d) - Protection of Copyright Notices - and (e) - False Representation in Copyright Applications) that share several characteristics. Unlike 17 U.S.C. § 506(a), which gives rise to civil as well as criminal liability, these three sections proscribe conduct that is not civilly actionable.[108]

In 1998, with the enactment of the *Digital Millennium Copyright Act* ("DMCA"),[109] Congress amended the *Copyright Act* to implement two 1996 World Intellectual

a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for the purposes of this title if a fixation of the work is being made simultaneously with its transmission." 17 U.S.C. § 101. *See* "*Fixed medium of expression*," *supra* p. 8.

104 This subsection was intended to apply to unauthorized transmission of bootleg performances through radio or television and not to the unauthorized reproduction of previously recorded but unreleased performances, i.e., studio out takes. The latter should be considered for prosecution under the criminal copyright law, 17 U.S.C. § 506(a) and 18 U.S.C. § 2319.

105 18 U.S.C. § 2319A(b).

106 18 U.S.C. § 2319A(c).

107 Pub. L. No. 104-153, 110 Stat. 1386 (1996).

108 *See Evans v. Continental Homes, Inc.*, 785 F.2d 897, 912-13 (11th Cir. 1986) (no private right of action exists to enforce 17 U.S.C. § 506(c)).

109 Pub. L. No. 105-304, 112 Stat. 2860 (1998).

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Property Organization ("WIPO") treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. For Customs purposes, the DMCA made two significant changes to the *Copyright Act*. First, the DMCA protects against circumvention of technological measures used by copyright owners to protect their works, e.g., the protection built in to many software disks and DVDs. *See* 17 U.S.C. § 1201. Section 1201 divides technological measures into two categories: measures that prevent unauthorized *access* to a copyrighted work and measures that prevent unauthorized *copying*[110] of a copyrighted work. Making or selling devices or services that are used to circumvent either category of technological measure is prohibited in certain circumstances.[111] The act of circumvention in itself is only prohibited when it is directed at measures preventing unauthorized *access* to copyrighted works, not when it is directed at measures preventing unauthorized *copying*. This distinction was employed to assure that the public has the continued ability to make fair use of copyrighted works.[112]

With certain specific exceptions,[113] § 1201 provides that no person "shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, or component, or part thereof" that falls within any one of the following three categories:

1. They are primarily designed or produced to circumvent technological measures protecting copyrights;

2. They have only limited commercially significant purpose or use other than circumvention; or

3. They are marketed for use in circumvention.[114]

110 The term "copying" is used here as a shorthand for the exercise of any of the exclusive rights of an author under section 106 of the Copyright Act. Consequently, a technological measure that prevents unauthorized distribution or public performance of a work would fall in this second category.

111 17 U.S.C. § 1201(a) and (b).

112 Copying a work may be a fair use under appropriate circumstances, so § 1201 does not prohibit the act of circumventing a technological measure that prevents copying. Nevertheless, because the fair use doctrine is not a defense to the act of gaining unauthorized *access* to a work, § 1201 prohibits the act of circumventing a technological measure in order to gain access.

113 These include exemptions for nonprofit libraries and archives (who may need to circumvent protective measures only to determine whether they wish to acquire protected works), law enforcement agencies, reverse engineering, encryption research, protection of minors, protection of personally identifying information, and security testing. 17 U.S.C. § 1201(d)-(j).

114 17 U.S.C. §§ 1201(a) and (b).

An example of a covered product would be a device that is sold solely for the purpose of allowing purchasers to "hack" copy-protected Nintendo or PlayStation video game cartridges or disks.

In addition to civil penalties similar to those for copyright infringement,[115] any person who violates 17 U.S.C. § 1201 willfully and for purposes of commercial advantage or private financial gain is subject to penalties of up to $500,000 in fines, up to five years imprisonment, or both for first offenses and up to $1,000,000 in fines, up to ten years imprisonment, or both for subsequent offenses.[116]

Second, the DMCA provides protection for a type of information known as "copyright management information."[117] Copyright management information is defined as any of the following information conveyed in connection with copyrighted works, except for personally identifying information about users, including:

(1) The title and other information identifying a work, including the information set forth on a notice of copyright.

(2) The name of, and other identifying information about, the author of a work.

(3) The name of, and other identifying information about, the copyright owner of a work, including the information set forth in a notice of copyright.

(4) With the exception of public performances of works by radio and television broadcast stations, the name of, and other identifying information about, a performer whose performance is fixed in a work other than an audiovisual work.

(5) With the exception of public performances of works by radio and television broadcast stations, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work.

(6) Terms and conditions for use of a work.

(7) Identifying numbers or symbols referring to such information or links to such information.

(8) Such other information as the Register of Copyrights may prescribe by regulation.[118]

115 17 U.S.C. § 1203.
116 17 U.S.C. § 1204.
117 *See* 17 U.S.C. § 1202.
118 17 U.S.C. § 1202(c).

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The DMCA protects copyright management information in two ways. The first is by making it a felony to knowingly provide, distribute, or import for distribution false copyright management information with intent to induce, enable, facilitate or conceal infringement. The second is by making it a felony for a person to:

1. Intentionally remove or alter copyright management information;

2. Distribute or import for distribution copyright management information knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law; or

3. Distribute, import for distribution, or publicly perform works knowing that copyright management information has been removed or altered without the authority of the copyright owner or the law, if that person knows that such actions will induce, enable, facilitate, or conceal an infringement.[119]

In addition to civil penalties similar to those for copyright infringement,[120] violating the integrity of copyright management information can bring penalties of up to $500,000 in fines, up to five years imprisonment, or both for first offenses and up to $1,000,000 in fines, up to ten years imprisonment, or both for subsequent offenses.[121]

8.134 Trafficking in Counterfeit Labels – 18 U.S.C. § 2318

This law enhances the integrity of the copyright system by specifically prohibiting trafficking in counterfeit labels designed to be affixed to phonorecords, copies of computer programs, motion pictures or audiovisual works. It also contains a separate prohibition for trafficking in counterfeit documentation or packaging for computer programs.

Section 2318 is not a copyright statute, and the scope of the protections under the statute is broader than those afforded by the *Copyright Act*. The predecessor to the current § 2318, for example, clearly encompassed trafficking in counterfeit labels on both copyrighted and uncopyrighted works,[122] and the text of the current law continues that coverage. It is important to note, however, that the legislative history suggests that the statute is intended to be applied to violations involving documentation, packaging or labels for computer programs only if affixed or designed to be affixed to "copies of copyrighted computer programs."[123]

119 17 U.S.C. §§ 1202(a) and (b).
120 17 U.S.C. § 1203.
121 17 U.S.C. § 1204.
122 *See United States v. Sam Goody, Inc.*, 506 F. Supp. 380, 386 (E.D.N.Y. 1981).
123 H.R. 104-556 at 6, 104th Cong., 2d Sess. (1996).

To obtain a conviction under § 2318, the government must prove four basic elements plus at least one of three different jurisdictional "conditions." The four basic elements are:

(1) The defendant was trafficking in labels for phonorecords, motion pictures, audiovisual works or computer programs or the packaging for computer programs. "Traffic" means "to transport, transfer or otherwise dispose of, to another, as consideration for anything of value or to make or obtain control of with intent to so transport, transfer or dispose of."[124] The term "transport" includes importation and exportation.

(2) The labels were "counterfeit." Counterfeit labels are labels that appear to be genuine when, in fact, they are not.[125] The requirement that these labels be counterfeit distinguishes this offense from the "bootlegging" or "pirating" of recordings or tapes. Counterfeit records or tapes are works that are made to appear legitimate. Bootleg or pirated records and tapes are copies with no pretense of legitimacy. Counterfeiting is usually more serious than bootlegging and piracy because counterfeiters not only reproduce and distribute the underlying copyrighted work, but also imitate its packaging to make it look like genuine merchandise. Thus, counterfeiting not only detracts from potential market share of the copyright holder, but also may create additional harm by defrauding the consumer and injuring the victim's reputation by leading the consumer to believe that he is purchasing an authentic product.[126] Under 18 U.S.C. § 2318, only trafficking in counterfeit items is prohibited.[127] The legislative history to § 2318 clarifies, however, that this section can be applied when "counterfeiters have simulated 'genuine' labels that have not previously existed," insofar as these simulated labels share the same basic criminal purpose as any counterfeit product--to defraud the consumer with regard to the authenticity of the product.[128]

(3) The counterfeit label was "affixed or designed to be affixed to a phonorecord, or a copy of a computer program or documentation or packaging for a computer program, or a copy of a motion picture or other audiovisual work." For purposes of 18 U.S.C. § 2318, the terms "copy," "phonorecord," "computer program," "motion picture" and "audiovisual work" have the same meanings given those terms by the copyright statute at 17 U.S.C. § 101. Moreover, the prohibitions of 18 U.S.C. § 2318 include counterfeit labels that

124 18 U.S.C. § 2318(b)(2).

125 *See* 18 U.S.C. § 2318(b)(1).

126 During the redrafting of § 2318 in 1981, the drafting committee expressed the position, shared by the Department of Justice, that counterfeiting is a more serious crime than traditional piracy. "Counterfeiting defrauds not only the . . . industries, but also the consumer by leading him to believe that he is purchasing an authentic product." S. Rep. 274, Pub. L. No. 97-180, at 8 (1981).

127 *See United States v. Schultz*, 482 F.2d 1179, 1180 (6th Cir. 1973).

128 Pub. L. No. 97-180, at 9 (1981).

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are affixed or designed to be affixed to one of these four enumerated categories of works. Therefore, it is not necessary that the label actually be attached to a work.

(4) The defendant knowingly trafficked in counterfeit labels. Knowledge is established by proof that the defendant had an awareness or firm belief that he or she was engaging in an illegal activity. Thus, this is a general intent crime, unlike the higher "willful" standard required to establish criminal copyright infringement under 17 U.S.C. § 506(a).

Once the government has proven the four basic elements, it must demonstrate that one of the three following additional jurisdictional "conditions" have been met:

(1) The offense occurred in the special maritime or territorial jurisdiction of the United States;

(2) The offense involved the use of the mails or facilities of interstate or foreign commerce; or

(3) The merchandise to be labeled was copyrighted.[129]

The maximum penalty for a violation of § 2318 is five years' imprisonment, a $250,000 fine, or both.[130] Officers should consider the applicability of the criminal trademark counterfeiting statute, as labels intended to be affixed to counterfeit works often carry counterfeit reproductions of federally registered trademarks. Further, a violation of § 2318 is a predicate offense under the RICO statute.[131]

8.135 Protection of Trademarks

Trademarks originated in antiquity to identify certain goods as the products of particular craftsmen. Today, courts recognize and protect four functions performed by trademarks. These are:

(1) Identifying a particular seller's goods and distinguishing them from goods sold by others;

(2) Signifying that all goods bearing the trademark come from or are controlled by a single source;

(3) Signifying that all goods bearing the trademark are of an equal level of quality; and

129 *See* 18 U.S.C. § 2318(c)(1)-(4).
130 *See* 18 U.S.C. § 2318(a).
131 Pub. L. No. 104-153, 110 Stat. 1386 (1996).

(4) As a prime instrument in advertising and selling the goods.[132]

A trademark is also an important "objective symbol of the good will that a business has built up. Without the identification function performed by trademarks, buyers would have no way of returning to buy products that they have used and liked."[133] Thus, trademarks (a term used here to include service marks)[134] are used not only to identify sources of goods, but also to obtain marketing advantage.

Both state and federal law provide trademark owners with remedies against infringement. State laws often are based on the tort concepts of "passing off" and "dilution." Federal trademark law is contained in the *Lanham Trademark Act* ("*Lanham Act*"), 15 U.S.C. §§ 1051-1127, which provides that the owner of a trademark has the exclusive right to use the mark, or license it. A trademark owner also has the right to prevent the use of counterfeit marks and confusingly similar marks by unauthorized third parties. The owner of a mark on the principal register of the United States Patent and Trademark Office can seek civil remedies against a counterfeiter.[135] In addition, CBP will prevent the importation of most infringing goods, including counterfeit goods, if the owner of a registered mark has recorded the mark with CBP.[136] Criminal remedies are provided for by 18 U.S.C. § 2320 and 18 U.S.C. § 545, Importation Contrary to Law.

Federal trademark law, unlike federal laws preempting and controlling patents and copyrights, coexists with state and common-law trademark rights. Ownership of a mark arises not through any single act of federal registration, but rather through continued use. Registration of a mark with the Patent and Trademark Office, however, offers a number of procedural and substantive legal advantages over reliance on common law rights.[137] Federal registration is a

132 1 J. THOMAS MCCARTHY, *McCarthy on Trademarks and Unfair Competition* § 3.01[2] (1995) (hereinafter *McCarthy*).

133 *Id.*

134 "Service marks" identify a service, as opposed to a product.

135 15 U.S.C. § 1116(d).

136 15 U.S.C. §§ 1124 and 1125, 19 CFR §§ 133.2-133.7, 133.21-133.27.

137 For example: (1) a registrant has access to the federal courts without pleading any required amount in controversy (15 U.S.C. § 1121); (2) in federal court, lost profits, damages and costs are recoverable, and treble damages and attorney fees are available (15 U.S.C. § 1117); (3) evidence of registration is "prima facie evidence of the validity of the registered mark, . . . of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark. . . ." (2 *McCarthy*, § 19.05 (1995). 15 U.S.C. § 1057(b)); and (4) registration may be used to establish priority of trademark rights, as the registration would specify either the date of first use in commerce (15 U.S.C. § 1051(a)), or the date of the intent to use the mark in commerce (15 U.S.C. § 1051(b). For a complete list of the advantages that federal registration offers, *see* 2 *McCarthy*, § 19.05 (1995)).

jurisdictional prerequisite to federal criminal prosecution and is an essential element in a prosecution for trademark counterfeiting.[138] The government must show that the genuine mark was registered on the principal register in the United States Patent and Trademark Office. To register a trademark on the principal register, the owner must establish (i) distinctiveness of the mark, and (ii) use or intend to use the mark in interstate or foreign commerce.[139]
Trafficking in counterfeit goods and services is a criminal offense. In order to establish such a criminal offense under 18 U.S.C. § 2320, the government must prove that:

(1) The defendant trafficked or attempted to traffic in goods or services;

(2) Such trafficking, or attempt to traffic, was intentional;

(3) The defendant used a "counterfeit mark" on or in connection with such goods or services; and

(4) The defendant knew that the mark used was counterfeit.

Conspiracies to violate this section can be prosecuted under 18 U.S.C. §§ 2 and 371.[140]

The term "traffic" is defined in 18 U.S.C. § 2320(d)(2) to mean "transport, transfer, or otherwise dispose of, to another, as consideration for anything of value, or make or obtain control of with intent so to transport, transfer or dispose of." This broad definition covers all aspects of commercial activity, from initial manufacture, to importation, to sale to the ultimate purchasers. However, Congress did not intend § 2320 to cover the knowing purchase of goods bearing counterfeit marks for the purchaser's personal use.[141]

There are two *mens rea* elements contained in § 2320. The defendant's trafficking (not the use of the counterfeit mark) must be "intentional," that is, that he must act deliberately or "on purpose."[142] The statute does not require, however, a specific intent to violate the statute.[143]

138 18 U.S.C. § 2320.
139 18 U.S.C. § 1052.
140 *United States v. Yamin*, 868 F.2d 130, 133 (5th Cir. 1989).
141 *See* Joint Statement on Trademark Counterfeiting Legislation, 130 Cong. Rec. H12076, H12078, 98th Cong., 2d Sess. (daily ed. Oct. 10, 1984) (hereinafter "Joint Statement"); *see also* United States Attorneys' Manual, Title 9, Criminal Resource Manual 1705 (October 1997) (hereinafter "U.S.A.M. Criminal Resource Manual").
142 *See* U.S.A.M. Criminal Resource Manual 1713; Joint Statement at H12076.
143 *See United States v. Baker*, 807 F.2d 427, 429 (5th Cir. 1986) (rejecting defendant's claim that, "even though he had the mental states required by the statute, he should not be convicted because he did not know that Congress had passed a statute criminalizing his conduct."); *United States v. Gantos*, 817 F.2d

The term "counterfeit mark" is defined in the criminal statute, 18 U.S.C. § 2320(e)(1), and in the *Lanham Act* (15 U.S.C. § 1127). Although the definitions differ slightly for technical reasons, they are intended to be identical in substance.[144] The *United States Attorney's Manual* identifies seven requirements of a counterfeit mark:[145]

(1) The mark is "spurious." A mark is "spurious" if it is "not genuine or authentic."[146]

(2) The mark was used in connection with goods or services.[147]

(3) The counterfeit mark is "identical with, or substantially indistinguishable from" the genuine trademark.[148] The phrase "substantially indistinguishable from" is intended to prevent a counterfeiter from escaping liability by modifying a protected trademark in trivial ways. At the other end, it also serves to exclude the arguable case of trademark infringement that is merely "reminiscent of protected trademarks."[149]

(4) The genuine mark is registered on the principal register in the United States Patent and Trademark Office.[150]

(5) The genuine mark is in use. The genuine mark must not only be registered, it must also be in use.[151]

41, 42-43 (8th Cir.), *cert. denied*, 484 U.S. 860 (1987).

144 Joint Statement at H12078.

145 U.S.A.M. Criminal Resource Manual 1714 and 1715. The Act also covers trademarks protected by the Olympic Charter Act. The designations protected are set forth at 36 U.S.C. § 380.

146 Joint Statement at H12078. At least one court, however, has softened this requirement where the trademark holder was deprived of its ability to control the quality of the products bearing its mark and where consumer confusion was likely, so long as the other requirements have been met. For example, in *United States v. Petrosian*, the defendant filled genuine Coca-Cola bottles with his own beverage. 126 F.3d 1232 (9th Cir. 1997), *cert. denied* 522 U.S. 1138 1998). The Court of Appeals for the Ninth Circuit rejected the defendant's argument that the use of the Coca-Cola mark could not be counterfeit because it was a "genuine" mark, observing that "[w]hen a genuine trademark is affixed to a counterfeit product, it becomes a spurious mark . . ." *Id.* at 1234.

147 18 U.S.C. § 2320(e)(1)(A)(I).

148 18 U.S.C.§ 2320(e)(1)(A)(ii).

149 Joint Statement at H12078; U.S.A.M. Criminal Resource Manual 1715.

150 18 U.S.C. § 2320(e)(1)(A)(ii). *See United States v. DeFreitas*, 92 F.Supp.2d 272, 278 (S.D.N.Y. 2000).

151 18 U.S.C. § 2320(e)(1)(A)(ii). The Lanham Act broadly defines "use in commerce" as "the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark." 15 U.S.C. § 1127.

(6) The goods or services are those for which the genuine mark is registered. The definition of a counterfeit mark extends only to imitations of registered marks that are used in connection with the goods or services for which the mark is registered.[152] For example, a mark used in connection with typewriter paper that is identical to or substantially indistinguishable from a mark registered only for use on typewriters would not be a counterfeit mark, although civil remedies might be available under the Lanham Act.[153]

(7) The use of the counterfeit mark is "likely to cause confusion, to cause mistake, or to deceive." The phrase "use of which is likely to cause confusion, to cause mistake, or to deceive" is taken from the Lanham Act,[154] and is intended to insure that no conduct will be criminalized which does not constitute trademark infringement under the Lanham Act.[155]

The likelihood of confusion is a question of fact for the jury.[156] However, criminal courts have adopted a number of factors used in the civil context when analyzing whether there is a likelihood of confusion between two marks.[157] These factors, which may be argued to a jury in a criminal case, include the type of trademark, the similarity of design, the similarity of product, identity of retailers and purchasers, similarity of advertising media used, the defendant's intent, and any actual confusion engendered.

Generally, the test is whether an average consumer would be deceived into thinking that the product was made by the genuine trademark owner.[158] Where counterfeit goods are involved in criminal cases under § 2320, the trier of fact may decide whether likelihood of confusion is likely either through a side-by-side comparison of products, through expert testimony, or both.[159]

The "likely to cause confusion" test may also be satisfied by a showing that it is likely that members of the public would be "confused, mistaken or deceived should they encounter the allegedly counterfeit goods in a post-sale context."[160] Because subsequent purchasers or recipients of the goods may be duped, it is not a defense that the original buyer was told that the goods were counterfeit;

152 *See* 18 U.S.C. § 2320(e)(1)(A)(i), (ii).
153 U.S.A.M. Criminal Resource Manual 1715, Joint Statement at H12079.
154 15 U.S.C. § 2320(e)(1)(A)(iii).
155 Joint Statement at H12079.
156 *United States v. Gonzalez*, 630 F.Supp. 894 (S.D. Fla. 1986).
157 *United States v. Torkington*, 812 F.2d 1347, 1354 (11th Cir. 1987); *United States v. McEvoy*, 820 F.2d 1170, 1172 (11th Cir. 1987).
158 *See Montres Rolex, S.A. v. Snyder*, 718 F.2d 524, 530-32 (2d Cir. 1983) (1984).
159 *See United States v. Yamin*, 868 F.2d 130 (5th Cir. 1989); *Rolex Watch USA, Inc. v. Canner*, 645 F.Supp. 484, 489 (S.D. Fla. 1986).
160 *Torkington*, 812 F.2d at 1352.

nor is it a defense that the buyer was actually not confused because of the comparatively low price of the fake goods.[161]
The government must also prove that the defendant "knew" that the mark used on or in connection with trafficked goods or services was counterfeit.[162] This element requires proof of actual knowledge of the counterfeit nature of the mark, defined in the Joint Statement as "an awareness or a firm belief to that effect."[163] "Thus, a manufacturer who believes in good faith that he has a prior right to use a particular mark, or that a mark does not infringe a registered mark, could not be said to 'know' that the mark is counterfeit."[164] This burden can be met, however, by demonstrating that the defendant was "willfully blind" to the counterfeit nature of the mark.[165] This showing can be made through circumstantial evidence regarding the defendant's purchase of the goods, the method of delivery, packaging conventions, and an unusually low price. Knowledge of the criminality of the conduct is not an element of the offense.[166]

"All defenses, affirmative defenses, and limitations on remedies which would be applicable in an action under the *Lanham Act* for trademark infringement are applicable for trafficking in counterfeit goods under 18 U.S.C. § 2320."[167] Incorporating all civil defenses into the criminal statute insures that no person will be found criminally culpable of trademark counterfeiting if he could have successfully defended a civil infringement action.[168]

Under the *Lanham Act*, defenses include laches, unclean hands, fraud in obtaining trademark registration, or use of the mark in violation of the antitrust laws. Possible defenses may also involve a challenge to the continuing validity of the trademark infringed: the mark may not be properly registered, may have been abandoned or may have fallen into common or generic usage.

The statute expressly excludes from the definition of "counterfeit mark" any items commonly termed "overrun goods," which are:

161 *Id.* at 1350. See also *United States v. Gantos*, 817 F.2d 41, 43 (8th Cir. 1987) (a "counterfeit" is not limited to goods which deceive only the immediate purchaser; the fact that the defendant told the buyer that the "Rolex" watches were counterfeit does not make them any the less counterfeit); *United States v. Hon*, 904 F.2d 803, 806 (2d Cir. 1991) ("an interpretation of § 2320's confusion requirement to include the non-purchasing public advances the important purpose underlying the trademark laws of protecting the trademark owner's investment in the quality of the mark and his product's reputation. . . .").
162 *See* U.S.A.M. 9-68.340.
163 Joint Statement at H12076.
164 Joint Statement at H12077.
165 *See* Joint Statement at 12077; see also *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976).
166 *United States v. Baker*, 807 F.2d 427 (5th Cir. 1986).
167 18 U.S.C. § 2320(c).
168 U.S.A.M. Criminal Resource Manual 1718.

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> goods or services of which the manufacturer or producer was, at the time of the manufacture or production in question authorized to use the mark or designation for the type of goods or services so manufactured or produced, by the holder of the right to use such mark or designation.[169]

The legislative history provides an example: if a licensee was authorized to make 500,000 umbrellas bearing a trademark owner's mark and the licensee manufactured without authorization an additional 500,000 umbrellas bearing that mark during the course of the license, the contractual and other civil remedies already existing make it inappropriate to criminalize such practices.[170] The overrun exclusion cannot be claimed, however, where a licensee produces a type of good other than the one for which he is licensed. For example, "if a licensee is authorized to produce 'Zephyr' trench coats, but without permission manufactures 'Zephyr' wallets,' the overrun exception would not apply."[171] The legislative history also makes clear that the burden is on the defendant to prove that the goods or services in question fall within the overrun exclusion.

"Gray market" or "parallel import" goods are also excluded from the definition of counterfeit marks. A gray market or parallel import good is a foreign-manufactured good that bears a legitimate trademark, but is imported into the United States without the authorization of the U.S. trademark owner. Congress considered gray market goods, and intended that they fall outside 18 U.S.C. § 2320.[172]

Trademark counterfeiting under 18 U.S.C. § 2320(c)(7)(D) constitutes a "specified unlawful activity" under the money laundering statutes.[173] Thus, proceeds earned by a defendant from trafficking in counterfeit goods can now form the basis of a money laundering charge. In addition, violations of § 2320 are included within the definition of "racketeering activity" under RICO.[174] This is an important development because the penalties for violations of 18 U.S.C. § 1956 and § 1961 are substantially greater than for trafficking in counterfeit goods.

169 18 U.S.C. § 2320(e)(1)(B). Neither is the statute intended to apply to mere imitations of "trade dress," such as the color, shape, or design of a product or its packaging--unless such features are also registered as trademarks. Thus the criminal statute cannot be used to reach those who traffic in goods that were produced by a licensed manufacturer at the time that the license was valid, even if the goods were then sold at a time when the license was not. Subsequent legislative history indicates, however, that these exceptions should not necessarily be read to preclude prosecution of cases involving factory "seconds" or "rejects" that are knowingly sold as first quality goods. *See* H.R. Rep. No. 556, 104th Cong., 2d Sess. 3 (1996).

170 Joint Statement at H12077.

171 *Id.*

172 *Id.* at H12077, H12079.

173 18 U.S.C. § 1956.

174 18 U.S.C. § 1961.

The forfeiture provision, contained at 18 U.S.C. § 2320(b), resembles a civil, rather than a criminal provision. It provides that "[u]pon a determination by a preponderance of the evidence that any articles in the possession of a defendant in a prosecution under this section bear counterfeit marks, the United States may obtain an order for the destruction of such articles." In choosing a civil-type forfeiture provision, the joint committee explained that "[e]ven if the defendant is ultimately acquitted of the criminal charge, there is no valid public policy reason to allow the defendant to retain materials that are in fact counterfeit."[175]

CBP may impose a civil fine on any person who directs, assists financially or otherwise, or aids and abets the importation of merchandise bearing a counterfeit mark.

For the first seizure of such merchandise, the fine imposed may be up to the domestic value of the merchandise as if it had been genuine, based on the manufacturer's suggested retail price of the merchandise at the time of seizure.

For the second and each subsequent seizure of such merchandise, the fine imposed may be up to twice the domestic value of the merchandise as if it had been genuine, based on the manufacturer's suggested retail price of the merchandise at the time of seizure.[176]

Any merchandise bearing a counterfeit mark imported into the United States is required to be seized and, in the absence of the written consent of the trademark owner, forfeited.[177] Merchandise forfeited is required to be destroyed unless it is determined that the merchandise is safe or not a hazard to health and CBP has the written consent of the U.S. trademark owner. Then CBP may dispose of the merchandise, after obliteration of the trademark where feasible, by:

(1) Delivery to any federal, state, or local government agency that, in the opinion of CBP, has established a need for the merchandise; or

(2) Gift to any charitable institution that, in the opinion of CBP, has established a need for the merchandise; or

(3) Sale at public auction.[178]

175 Joint Statement at H12077.
176 19 C.F.R. § 133.27.
177 19 U.S.C. § 1526(e).
178 19 C.F.R. § 133.52. Note that in the alternative, for any statute that is either a "specified unlawful activity" under 18 U.S.C. 1956 or a RICO predicate, the government can initiate a civil forfeiture action against the proceeds, or property traceable to proceeds, under 18 U.S.C. 981.

8.136 Contrasting Trademark and Copyright Laws

The trademark counterfeiting statute may apply in some cases where the criminal copyright statute does not. For example, unlike the criminal copyright scheme, the trademark counterfeiting statute does not require that a minimum number of copies be reproduced or distributed to constitute a felony. Rather, the law reaches all trafficking in counterfeit goods, "including trafficking that is discovered in its incipiency, such as before the counterfeit merchandise has left the factory."[179]

The trademark statute also can be used in certain cases where proving the *Copyright Act*'s element of "commercial advantage or private financial gain" may be difficult. The definition of trafficking expressly includes instances where an individual makes or obtains control of a counterfeit item with an intent to "transport, transfer, or otherwise dispose of to another, as consideration for anything of value."[180] At least one court has read the "anything of value" requirement broadly to include goods offered by a defendant in exchange for a "good will" arrangement to provide a continuing supply of other counterfeit goods. "Such 'good will' can be considered a thing of value in the form of an intangible asset."[181]

Importantly, while the criminal copyright statute is subject to a three-year statute of limitations,[182] prosecutions for trademark counterfeiting under 18 U.S.C. § 2320 are covered by the traditional five-year limitations period.[183]
Charging both copyright and trademark violations arising from the same act or acts does not violate the Double Jeopardy Clause of the Fifth Amendment of the Constitution because "each offense contains an element not contained in the other."[184] Accordingly, inconsistent verdicts from a trial involving charges of copyright infringement and trademark counterfeiting should not jeopardize a successful conviction.[185] Similarly, a jury's inability to reach a verdict on an accompanying conspiracy count does not necessarily affect a finding of guilt on the substantive count or counts.[186]

It may be appropriate to bring trademark counterfeiting charges in criminal copyright infringement cases. Often, for example, manufacturers or vendors of infringing items may illegally attempt to reproduce the packaging for genuine

179 Joint Statement at H12079.
180 18 U.S.C. § 2320(e)(2).
181 *United States v. Koehler*, 24 F.3d 867, 871 (6th Cir.1994) (citing *Newark Morning Leger Co. v. United States*, 507 U.S. 546, 556 (1993)).
182 17 U.S.C. § 507(a)
183 *See* 18 U.S.C. § 3282.
184 *United States v. Dixon*, 509 U.S. 688, 698 (1993) (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).
185 *See United States v. Sheng*, 26 F.3d 135 (9th Cir. 1994).
186 *United States v. Steele*, 785 F.2d 743, 750 (9th Cir. 1986) (criminal copyright case).

copyrighted works. This packaging often carries counterfeit trademarks, which will support charges under the trademark counterfeiting statute. In several early cases involving sound recordings and motion pictures, pirates were charged under 18 U.S.C. § 2320 with illegitimately reproducing recording labels, manuals, or packaging, in addition to being charged with copyright violations for reproducing the underlying work on audio or videotape.[187] Similarly, it is not uncommon for software counterfeiters to reproduce not only the underlying code (supporting charges for copyright infringement), but also to reproduce the instruction manuals and packaging traditionally offered by a legitimate seller of these products. Reproducing the text of an instruction manual can give rise to another charge of copyright infringement, as well as an additional charge under § 2320 if the infringing copy bears a registered trademark.[188]

It may be possible to charge a § 2320 violation even in cases where the defendant did not attempt to copy genuine packaging, but did knowingly reproduce the counterfeit mark in the course of reproducing the product itself. "Once a product is put into commerce, any confusion, mistake, or deception occurring at some future time is sufficient to establish liability for trademark infringement."[189] In one case, the court granted plaintiff's motion for summary judgment where the defendant operated an electronic bulletin board service ("BBS") that facilitated the distribution of plaintiff's computer games. When the downloaded game was played, the game began with a screen showing plaintiff's federally registered trademark. The court rejected defendant's claim that plaintiff's trademark was being used merely "as a file identifier" and such use does not violate the *Lanham Act*. The court stated that the use of plaintiff's trademark "creates the likelihood of confusion as to whether Sega endorsed or sponsored the games made available on defendant's BBS." "Accordingly . . . [defendant's] use of Sega's trademark on virtually identical Sega game programs constitutes counterfeiting."[190]

8.137 The *Economic Espionage Act of 1996* - Overview

The *Economic Espionage Act of 1996* ("EEA") contains two separate provisions that criminalize the theft or misappropriation of trade secrets. The first provision, codified at 18 U.S.C. § 1831, is directed towards foreign economic espionage and requires that the theft of the trade secret be done to benefit a

187 Note that in such cases, prosecutors might also consider the propriety of charging violations of 18 U.S.C. § 2318. See "Trafficking in Counterfeit Labels, 18 U.S.C. § 2318."

188 Literally thousands of trade and service marks have been registered, relatively recently, by the computer industry. A very small sampling of marks contained on the principal register appears below: "Apple," "Macintosh," "PowerBook," "Newton, "IBM," "ThinkPad," "Prodigy," "Lotus," "SmartSuite," "Symphony," "123," "Microsoft," "Bookshelf," "PowerPoint," "Novell" "NetWare," "WordPerfect," "Page Perfect."

189 *Sega Enters. Ltd. v. Maphia*, 948 F. Supp. 923 (N.D.Ca. 1996).

190 *Id.*, at 16.

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foreign government, instrumentality, or agent. In contrast, the second provision makes criminal the more common commercial theft of trade secrets, regardless of who benefits.[191]

There are a number of important features to the EEA, including a provision for the criminal forfeiture of any property or proceeds derived from a violation of the EEA.[192] The EEA also permits the Attorney General to institute civil enforcement actions and obtain appropriate injunctive relief for violations.[193] Further, because of the recognized difficulty of maintaining the secrecy of a trade secret during litigation, the EEA requires that courts take such actions as necessary to preserve the confidentiality of the trade secret.[194] The EEA also covers conduct occurring outside the United States where the offender is a citizen or permanent resident alien of the United States, or an act in furtherance of the offense was committed in the United States.[195]

8.140 Origin Marking and General Fraud Statutes

8.141 Marking of Imported Articles and Containers - 19 U.S.C. § 1304(l)

This section was designed to insure that U.S. consumers are aware of, and able to make informed purchasing decisions regarding, merchandise of foreign origin.

The statute punishes one who:

- ✓ Defaces, destroys, removes, alters, covers, obscures, or obliterates;
- ✓ Any mark required by 19 U.S.C. § 1304;
- ✓ With intent to conceal the true foreign origin of merchandise.

In general, every article of foreign origin imported into the United States must be marked in such a manner as to indicate the country of origin to an ultimate purchaser in the U.S.[196] The mark which is removed, defaced, etc., must be one required by statute (19 U.S.C.§ 1304) and/or regulation (19 C.F.R. Part 134).[197] In certain circumstances, marking the container in which an article is imported will satisfy the marking requirements of § 1304. (See, e.g., § 1304(a)(3)(J) "J" list items). Removing such articles from their marked, containers and repackaging into retail containers without markings or with misleading country of origin

191 18 U.S.C. § 1832.
192 18 U.S.C. § 1834.
193 18 U.S.C. § 1836.
194 18 U.S.C. § 1835.
195 18 U.S.C. § 1837.
196 19 U.S.C. § 1304(a); see *Pabrini v. United States*, 630 F.Supp. 360 (Ct. Int'l Trade 1986), for a discussion of "ultimate purchaser."
197 *United States v. Mersky*, 361 U.S. 431 (1960); *Didia v. United States*, 106 F.2d. 918 (9th Cir. 1939).

markings is viewed as a removal of required markings under 19 U.S.C. § 1304(l). It is not an element of the offense, however, for the violator to affirmatively misrepresent the origin of the article. The violation is complete when any person removes, conceals, etc., the required marks with the requisite intent.[198]

Violations of § 1304(l) need not be tied directly to the importation process. Any person who removes, defaces, etc., a required mark, with the requisite intent to conceal, violates the statute. This could include an importer, distributor, retailer or even the consumer.[199]

The practice of importing merchandise with easily removable markings and the subsequent removal of those marks constitutes a "false practice" under 18 U.S.C. § 542. An indictment charging 19 U.S.C. § 1304(l) and 18 U.S.C. § 542 is not duplicitous.[200]

A false country of origin, as opposed to a removal of the origin marks, is generally pursued under 18 U.S.C. §§ 542 or 545.[201]

The theory for using 18 U.S.C. § 545 in connection with marking violations is that since § 1304 requires articles to be marked when they reach the ultimate purchaser, importing merchandise with the intent to remove/alter markings coupled with a subsequent removal would be an importation "contrary to law" i.e., contrary to § 1304. On the other hand, if the merchandise is not marked at the time of entry in a manner designed to reach purchasers, the merchandise is considered to be improperly marked.[202]

8.142 General False Statements - 18 U.S.C. § 1001

This statute is familiar to most federal officers. It prohibits the making of any material false statement in a matter within the jurisdiction of any agency of the United States and has been broadly construed. Given its greater penalty, it is frequently preferred by United States attorneys even in cases where the Customs-specific false statement statute may apply. Therefore, U.S. attorneys will often charge this generic offense, rather than the more specific Customs violation. Some circuits, however, hold to the general rule that a specific statute precludes application of a general one.

All of the elements of § 1001 are included in a violation of § 542. A § 542 violation, however, requires proof of the additional element of an "importation by

198 *Id.* (removal of "Made in Japan" label.)
199 *United States v. Ury*, 106 F.2d 28 (2d Cir. 1939).
200 *United States v. Shields Rubber Corp.*, 732 F.Supp. 569 (W.D. Pa. 1989).
201 *United States v. Murray*, 621 F.2d 1163 (1st Cir. 1980). See, also, *United States v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999) (Country of origin is "material" for purpose of 18 U.S.C. § 542).
202 *United States Wolfson Bros. Corp. v. United States*, 52 C.C.P.A. 46 (1965). *See*, also, *United States v. Nathan*, 188 F.3d 190 (3rd Cir. 1999).

means of" the false statement.[203] For that reason, double jeopardy would not prohibit charging both in an indictment, although the government would likely be called upon to elect which would go to the jury. Section 1001 is used with some frequency in Customs false statement cases.[204]

Section 1001 may be considered an alternative to § 542 in the Fifth and Ninth Circuits where the *Teraoka* "by means of" issue presents problems with use of § 542.

8.143 Conspiracy - 18 U.S.C. § 371

This section is frequently applicable in Customs cases because by its very nature the process of importing usually involves at least two persons, or entities, i.e., the foreign shipper and the importer. Conspiracy counts involving Customs violations often include the foreign entity.[205]

To establish a conspiracy to import merchandise "contrary to law" in violation of § 545, the government must show more than the agreement to import. Knowledge that the intended importation is contrary to law is also required because knowledge is an essential element of § 545.[206] To establish a conspiracy to sell or receive merchandise imported contrary to law in violation of § 545, for example, the government must show the defendants *knew* the merchandise was imported contrary to law.[207] The statute extends to co-conspirators whose acts are solely extraterritorial so long as the agreement or at least one overt act by any co-conspirator occurred within the territorial jurisdiction of the United States.[208]

203 *United States v. Rose*, 570 F.2d 1358 (9th Cir. 1978).

204 *United States v. Mills*, 138 F.3d 928 (11th Cir. 1998); *United States v. Gardner*, 894 F.2d 708 (5th Cir. 1990); *United States v. Lichenstein*, 610 F.2d 1272 (5th Cir. 1980). Language of plea under § 1001 for false statement to Customs discussed in *United States v. Daewoo Int'l (America) Corp.*, 696 F.Supp. 1534 (Ct. Int'l Trade 1988) and *United States v. Loescher*, 688 F.Supp. 649 (Ct. Int'l Trade 1988).

205 *United States v. Murray*, 621 F.2d 1163 (1st Cir. 1980) (Importer and foreign exporter/manufacturer charged with conspiracy to violate § 542); *United States v. Broker*, 246 F.2d 1328 (2d Cir. 1957) (German exporter charged with conspiracy to violate § 542); *United States v. Nomura Trading Co.*, 213 F. Supp. 704 (D.C. Cir. 1963) (Two foreign corporations and the importer charged with conspiracy to violate § 542).

206 *United States v. Molt*, 615 F.2d 141 (3rd Cir. 1980) (conspiracy to violate § 545 by importing articles contrary to 19 U.S.C. § 1485 (undervaluation) dismissed because government did not establish knowledge of co-conspirators).

207 *United States v. Gardner*, 894 F.2d 708 (5th Cir. 1990); *United States v. Lichenstein*, 610 F.2d 1272 (5th Cir. 1980). See also, *United States v. Ismail*, 97 F.3d 50 (4th Cir. 1996) (circumstantial evidence established knowledge for purposes of a conspiracy to violate section).

208 *United States v. Ivey*, 949 F.2d 759 (5th Cir. 1991) (conspiracy to violate §

8.144 Frauds and Swindles (Mail Fraud) - 18 U.S.C. § 1341

Mail or wire fraud, or both, are frequently woven into the fabric of a Customs fraud violation. The mail fraud statute, 18 U.S.C. § 1341, requires only that the mails be used for the purpose of carrying out a fraud by either mailing, receiving or causing to be delivered through the mail, any matter whatever.

Elements:

- ✓ Intending to devise/having devised;
- ✓ Scheme/artifice;
- ✓ To defraud/obtain money by false/fraudulent representations; or
- ✓ To sell, loan, furnish or procure for unlawful use any counterfeit or spurious article; or
- ✓ For the purpose of executing such scheme or artifice;
- ✓ Mails/receives/causes to be delivered through mail;
- ✓ Any matter whatever.

8.145 Fraud by Wire, Radio or Television - 18 U.S.C. § 1343

The wire fraud statute requires only that the offender, for the purpose of carrying out a fraud, transmit or cause to be transmitted in interstate commerce by radio, wire or television, any writings, signs, signals, pictures or sounds. The target of the scheme need not be in the United States. As long as the United States wire systems are used in the scheme, the target can be a foreign government or other entity.[209]

The Elements of Wire Fraud are:

- ✓ Intending to devise/having devised;
- ✓ Scheme/artifice;

545 by receiving articles contrary to the *Endangered Species Act* upheld).

209 *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997), *cert. denied*, 525 U.S. 812 (1998) (section 1343 applies to scheme to smuggle liquor into Canada without paying Canadian revenue taxes). But *see United States v. Pierce*, 224 F.3d 158 (2d Cir. 2000) (convictions reversed where government failed to present evidence that Canada imposed taxes on imported liquor, therefore no evidence that the scheme deprived the Canadian government of money).

- ✓ To defraud/obtain money by false, fraudulent pretension/ representations;
- ✓ Transmits/causes transmission;
- ✓ By wire, radio, television;
- ✓ In interstate/foreign commerce;
- ✓ Writings, signals, pictures, sounds;
- ✓ For purpose of executing scheme.

8.146 Fraudulent Returns, Statements and Other Documents (Misdemeanor) - 26 U.S.C. § 7207

This section is used in some districts as a means for accepting a misdemeanor plea in lieu of a felony prosecution. However, its use is governed by local policy and some districts will not use it in connection with Customs violations.

8.147 Destruction, Alteration, or Falsification of Records in Federal Investigations and Bankruptcy – 18 U.S.C. § 1519

It is a crime to corruptly alter, destroy, or falsify records or documents with the intent to impede or obstruct an investigation of any matter within the investigative jurisdiction of any department or agency of the United States. Offenders may be fined and/or imprisoned for up to twenty years.[210] Although not defined in the statute, case law interpreting "corruptly" in the context of other obstruction statutes has held that the government must show that a defendant knowingly and intentionally undertook an action from which an obstruction of justice was a reasonably foreseeable result.[211]

8.150 Venue in Criminal Trade Cases

Congress has determined that any offense involving the use of mails, transportation in interstate or foreign commerce, or any importation into the United States is a continuing offense. This being so, the statute authorizes prosecution in any judicial district from, through, or into which the imported object moves.[212]

210 18 U.S.C. § 1519.
211 *United States v. Barfield*, 999 F.2d 1520, 1524 (11th Cir. 1993); *United States v. Jackson*, 204 F. Supp. 2d. 1126 (N.D. Ill. 2002); *United States v. Lundwall*, 1 F. Supp. 2d. 249 (S.D.N.Y. 1998).
212 18 U.S.C. § 3237.

Any offense begun in one district and completed in another, or committed in more than one district, may be prosecuted in any district in which the offense was begun, continued or completed.

8.200 Civil Trade Enforcement - 19 U.S.C. § 1592

8.210 Elements of Civil Fraud under 19 U.S.C. § 1592

Whether or not the United States is or may be deprived of any or all lawful duty, a person, or anyone who aids or abets such person, may be liable for a monetary penalty under § 1592 if:

1. A false statement, oral or written, omission or a false act or practice is committed with the entry or introduction or attempted entry or introduction of merchandise into the commerce of the United States; and

2. Such statement, omission or false act is material;

 and

3. Such statement, omission, or false act resulted from negligence, gross negligence or fraud.

8.211 Enter, Introduce or Attempt to Enter or Introduce Defined

Although § 1592 does not define the term "enter," guidance for what this term means can be found elsewhere.[213] See, also § 8.112a(1). In addition, courts have held that the entry process includes the actual release from CBP custody and other events associated with the process of moving merchandise into the commerce of the United States.[214] Other examples are the submissions of information to permit warehousing or transportation of merchandise under bond.[215]

An attempted entry occurs when there is evidence of a person's *intent to enter* the goods into the commerce of the United States (such as filing entry documentation). An "attempted" entry can occur even before entry documents are filed. For example, a commercial importer presented for entry articles purchased in Canada at the port of West Berkshire, Vermont. He falsely said he had been out of the country more than 48 hours and that he was importing the

213 19 U.S.C. § 1484.

214 *United States v. Ven-Fuel Inc.*, 758 F.2d 741 (1st Cir. 1985); *United States v. Steinfels*, 753 F.2d 373 (5th Cir. 1985) (regarding 18 U.S.C. § 542) and *United States v. Shields Rubber Corp.*, 732 F.Supp. 569 (W.D.Pa. 1989) (regarding 18 U.S.C. § 542).

215 19 C.F.R. § 171, App. B(A) (2001).

articles for his personal or household use and not for commercial purposes. This was an attempted entry.[216]
An introduction occurs when goods *consigned* to a person in the United States are merely presented at a United States port.[217]

An attempted introduction occurs when goods are *consigned* to a person in the United States, but the falsity is discovered *before* the goods are actually presented at the CBP port.

8.212 The False Statement, Omission, or False Act Must Be Material

The act or omission must have the potential of influencing CBP regarding:

(1) Classification, appraisement or admissibility of the imported goods (e.g., whether merchandise is prohibited or restricted); or

(2) Liability for duty including marking, antidumping or countervailing duty; or,

(3) Collection and reporting of accurate trade statistics; or

(4) Determination as to the source, origin or quality of merchandise; or

(5) Determination of whether an unfair trade practice has been committed under the antidumping countervailing duty laws or similar statute; or

(6) Determination of whether an unfair act has been committed involving a patent, trademark or copyright infringement; or

(7) Determination of whether any other unfair trade practice has been committed in violation of federal law.[218]

216 *United States v. Quintin*, 7 Ct. Int'l Trade 153 (1984) (and cases cited). (Violation complete since importer intended to import when he made the false statement. Importer cannot "undo" violation by deciding not to import.)
217 *United States v. Complex Machine Works Co.*, 83 F. Supp. 2d 1307 (C.I.T. 1999).
218 19 C.F.R. § 171, App. B(B) (2001). *See* also *United States v. Pentax Corp.*, 69 F. Supp.2d 1361 (Ct. Int'l Trade 1999) (country of origin is material); *United States v. Daewoo Intn'l. (America) Corp.*, 628 F. Supp. 206 (Ct. Int'l Trade 1988) (overvaluation was material where it could impact accuracy of information needed to carry out a trade program); *United States v. F.A.G. Bearings Corp.*, 615 F. Supp. 2d 562 (C.I.T. 1984) (false statements as to identity of merchandise and its value are material, even if revenue is not affected); *U.S. v. Rockwell Int'l Corp.,* 628 F. Supp. 206 (C.I.T. 1986) (over-estimation of duties is material); *United States v. Menard*, 795 F. Supp. 1182 (C.I.T. 1992) (understated prices material); *United States v. Thorson Chemical Corp.,* 795 F. Supp. 1190 (1992)

CBP does not have to prove it relied upon or was actually misled by the falsity.[219]

Although the question of materiality historically has been one of law, determined by the court,[220] this appears to be changing. The Court of International Trade recently held "that the question of whether Defendant's allegedly false representations were 'material' is a mixed question of law and fact which, in accordance with [Supreme Court precedence, in particular, *United States v. Gaudin*, 515 U.S. 506 (1995)], should be decided by the trier of fact; and that having a jury decide the issue of materiality under 19 U.S.C. § 1592(a)(1) is consistent with Defendant's Seventh Amendment right to a have a jury decide disputed factual questions."

A material omission occurs when the alleged violator fails to provide a document or information to CBP which is required to be provided by law (i.e., by statute or regulation) and which ordinarily is necessary to determine the classification, appraisement, admissibility and duties.

Example: An importer fails to provide CBP with the necessary visa for imported goods subject to quota or visa requirements and the importer attempts to enter the items as nonquota/visa merchandise. In this scenario, the importer may also falsely describe the merchandise subject to visa/quota restrictions. Therefore, you may also have a false statement.[221]

A false act may be found when the items meet all CBP requirements upon entry, but evidence is discovered which indicates that the importer intends to do an act that defrauds the revenue or otherwise violates a law enforced by CBP.

Example: Prior to the goods entering the U.S., a Canadian shipper removes country of origin markings showing that the goods were from foreign and replaces them with "made in Canada" markings.

Example: An importer who enters goods properly marked with the correct country of origin, but who subsequently removes the country of origin marking

(misidentification of buyer and seller material); *United States v. Modes, Inc.*, 804 F. Supp. 360 (C.I.T. 1998) (undervaluation of duty-free merchandise from a GSP country material); *United States v. Hitachi America Ltd.*, 946 F. Supp. 344 (C.I.T. 1997) (*rev'd in part and aff'd in part on other grounds* 172 F.3d 1319 (Fed. Cir. 1999) (failure to disclose that final price will be determined post entry per a pre-existing pricing formula is material); *United States v. Yuchius Morality Co. Ltd.*, C.I.T. Slip. Op. 02-124 (2002) (failure to maintain records material).

219 *United States v. Nippon Miniature Bearing Corp.*, 155 F. Supp.2d 701 (Ct. Int'l Trade 2001).

220 *United States v. Tri-State Hospital Supply Corp.*, 74 F. Supp.2d 1311 (Ct. Int'l Trade 1999).

221 *United States v. Snuggles*, 937 F.Supp. 923 (Ct. Int'l Trade 1996) (failure to have visa and undervaluation).

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to sell the goods as "U.S. made" where the evidence shows that the importer had the intent to remove the marking prior to or at the time of entry.

A statement or document may be false as to:

(1) Price

Example: Undervaluation of dutiable merchandise,[222] undervaluation of duty-free (GSP) merchandise,[223] overvaluation of merchandise,[224] failure to include quota charges in invoiced price,[225] or "double" invoicing.[226]

(2) Origin

Example: Articles falsely claimed to be of U.S. origin,[227] false certification that articles were a product of a GSP country,[228] or false origin marking on the articles.[229]

(3) Description

The false description may be on the invoice, CF 7501 or by "tariff number," discussed under "classification" below.

Example: Failure to reveal a component that could affect classification,[230] hardwood lumber falsely described as softwood,[231] false company part number stated on invoice,[232] or footwear less than 90% rubber, and thus dutiable at

[222] *United States v. Ross*, 574 F.Supp. 1067 (Ct. Int'l Trade 1983).
[223] *United States v. Modes Inc.*, 826 F.Supp. 504 (Ct. Int'l Trade 1993).
[224] *United States v. Daewoo Int'l (America) Corp.*, 696 F.Supp. 1534 (Ct. Int'l Trade 1988); *United States v. Valley Steel Products Co.*, 12 Ct. Int'l Trade 1161 (1988).
[225] *United States v. Appendagez Inc.*, 560 F.Supp. 50 (Ct. Int'l Trade 1983).
[226] *United States v. Thorson Chem. Corp.*, 795 F.Supp. 1190 (Ct. Int'l Trade 1992) (Court also noted that defendant made a false statement by signing the declaration on face of CF 7501 that "no other invoices exist").
[227] *United States v. Rockwell International Corp.*, 628 F. Supp. 206 (Ct. Int'l Trade 1986).
[228] *United States v. Bonneau Co.*, 12 Ct. Int'l Trade 246 (1988).
[229] *United States v. Pentax Corp.*, 69 F. Supp.2d 1361 (Ct. Int'l Trade 1999) (country of origin is material).
[230] *United States v. Obron Atl. Corp.*, 862 F.Supp. 378 (Ct. Int'l Trade 1994).
[231] *United States v. Dantzler Lumber & Export Co.*, 810 F.Supp. 1277 (Ct. Int'l Trade 1992).
[232] *United States v. F.A.G. Bearings Corp.*, 615 F.Supp. 562 (Ct. Int'l Trade 1984).

20%, which is claimed to be made of more than 90% rubber dutiable at 6%,[233] and misrepresenting the quality of steel.[234]

(4) Classification

Importers are required to supply the "appropriate" tariff item number on their entry documents and are required to use reasonable care in doing so.[235]

Under 19 C.F.R. § 177.8(a)(2), importers who receive binding classification rulings are required to use the classification stated in the ruling when importing the merchandise in issue. CBP currently takes the position that failure to bring the ruling to CBP's attention and follow the classification stated in the binding ruling will constitute a material omission in violation of § 1592.[236]

Where wrong tariff numbers are deliberately used, the product description will often be false so this aspect should be considered as a separate, but related, false statement.

(5) Miscellaneous

False statement as to the identity of the buyer and the foreign seller,[237] international routing of the shipment,[238] to obtain a personal exemption: that articles were for personal use or that importer had been out of the U.S. for more than 48 hours.[239]

It is unlawful by fraud, gross negligence or negligence, for any person to certify falsely a NAFTA certificate of origin. The same procedures and penalties for violation of § 1592(a) apply but § 1592(d) does not apply.[240]

If the information in the certificate of origin was correct at the time it was provided, but later rendered incorrect due to a change of circumstances and the person voluntarily and promptly provides written notice of the change to the person in receipt of the incorrect certificate, there is no violation.

233 *United States v. Joan and David Helpern, Co.*, 611 F.Supp. 985 (Ct. Int'l Trade 1985).
234 *United States v. Nippon Miniature Bearings*, 155 F. Supp.2d 701 (Ct. Int'l Trade 2001).
235 19 U.S.C. § 1484, 19 C.F.R. §§ 141.61(e) and 142.6(a)(4) (2001).
236 *United States v. Rockwell International Corp.*, 628 F. Supp. 206 (Ct. Int'l Trade 1986).
237 *United States v. Thorson Chem. Corp.*, 795 F.Supp. 1190 (Ct. Int'l Trade 1992).
238 *United States v. Gold Mountain Coffee, Ltd.*, 9 Ct. Int'l Trade 16 (1985).
239 *United States v. Quintin*, 7 Ct. Int'l Trade 153 (1984).
240 19 U.S.C. § 1592(f).

8.213 Such Statement, Act or Omission Resulted from Negligence, Gross Negligence or Fraud

The omission or false statement or act must result from negligence, gross negligence or fraud.[241]

The following definitions are from Customs Regulations, Revised Penalty Guidelines,[242] which the courts have been inclined to adopt.[243]
Clerical Errors or Mistakes of Fact Excepted

A clerical error is an error in the preparation, assembly, or submission of documents as information that results when a person intends to do one thing, but does something else.

A clerical error or mistake of fact is not a violation of the statute unless it is a part of a pattern of negligent conduct. However, the mere unintentional repetition by an electronic system does not constitute a pattern of negligent conduct.[244] Nevertheless, if CBP has called attention to the unintentional repetition by an electronic system of an initial clerical error, subsequent failure to correct the error could constitute a violation.[245] Examples of clerical errors would be a failure to assemble all documents in a record, or an error in arithmetic or transcription, which is not part of a pattern of negligence.[246]

A mistake of fact is a false statement or omission based on a bona fide erroneous belief as to the facts, so long as the belief itself did not result from negligence in ascertaining the accuracy of the facts, by a person that the material facts are other than they really are.[247] It can be that a fact exists, but is unknown to the person, or that he believes something is a fact when in reality it is not. An action is not a mistake of fact if the erroneous belief is caused by the neglect of a legal duty.[248]

Negligence

A false statement is an omission or act done through the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances either: (a) in ascertaining the facts or in drawing inferences therefrom, in ascertaining the offender's obligations under the statute; or (b) in communicating information in a manner so that it may be understood by the

241 19 U.S.C. § 1592(a)(1). See 19 C.F.R. § 171 App. B(C) (2001).
242 19 C.F.R. § 171, App.B(D) (2001).
243 *United States v. Obron Atl. Corp.*, 862 F.Supp. 378 (Ct. Int'l Trade 1994); *United States v. Jac Natori Co.*, 821 F.Supp. 1514 (Ct. Int'l Trade 1993).
244 19 U.S.C. § 1592(a)(2).
245 19 C.F.R. § 171, App. B(A) (2001).
246 19 C.F.R. § 162.71(e) (2001).
247 19 C.F.R. § 162.71(f) (2001).
248 19 C.F.R. § 162.71(f) (2001).

recipient. As a general rule, a violation is negligent if it results from failure to exercise reasonable care and competence: (a) to ensure that statements made and information provided in connection with the importation of merchandise are complete and accurate; or (b) to perform any material act required by statute or regulation.[249]

The government need only show the material falsity (i.e., the act or omission occurred) after which the burden *shifts* to the alleged violator to prove by a preponderance of the evidence that care and competence were exercised (i.e., the act or omission was not a result of negligence).[250]

Gross Negligence

A false statement, omission or act done with actual knowledge of, or wanton disregard for, the relevant facts and with indifference to or disregard for the offender's statutory obligations is the result of gross negligence.

The government bears the burden of proving all the elements of the violation, including the gross negligence, by a preponderance of the evidence.[251]

Fraud

A violation is determined to be fraudulent if a material false statement, omission, or act in connection with the transaction was committed (or omitted) knowingly, i.e., was done voluntarily and intentionally, as established by clear and convincing evidence.[252] The intent is directed to making a false statement, representation or omission as opposed to causing the consequences of such falsities.[253] CBP will not be required to show that the violator specifically intended to defraud the revenue or violate U.S. laws.

The government bears the burden of establishing the alleged violation by clear and convincing evidence (more than a mere preponderance).[254]

Fraud must be pleaded with particularity.[255]

Customs Broker Not Excepted

249 19 C.F.R. § 171, App. B(B)(1) (2001).
250 19 U.S.C. § 1592(e)(4). *United States v. Menard, Inc.*, 795 F.Supp. 1182, 1184 (Ct. Int'l Trade 1992).
251 19 U.S.C. § 1592(e)(3), i.e., the evidence must show the proposition is more likely true than not true. See *United States v. Jac Natori Co.*, 821 F.Supp. 1514 (Ct. Int'l Trade 1995).
252 19 C.F.R. § 171, App. B(B)(3) (2001).
253 19 C.F.R. § 171, App. B(C) (2001). (Definition adopted in *Obron* and *Jac Natori*, *supra*.)
254 19 U.S.C. § 1592(e)(2).
255 *United States v. Kirk Koo Chow*, 841 F.Supp. 1286 (Ct. Int'l. Trade 1993).

Section 1592 provides for penalties against *any* person who violates its terms and makes no distinction between importers and Customs brokers.[256] As a matter of policy, however, CBP treats brokers differently.

According to current guidelines,[257] a Customs broker is liable under the same mitigation guidelines as others only if he is determined to have (1) committed a fraudulent violation; or (2) committed a grossly negligent or negligent violation and shared in the financial benefits of the violation to an extent over and above the prevailing brokerage fee. Special procedures apply in all other situations. When the broker is *also* the importer of record, the situation more complex. Agency policy for such situations is currently under review. Subjecting the broker to importer of record liability is, however, legally permissible.

A broker is *not* negligent if he acts with reasonable care (as measured by the prevailing standards of the profession) in the preparation and presentation of the entry or entry summary and reasonably relies on the information or documents supplied to him by the actual owner, consignee, shipper or their agent.

Separate penalties involving the entry of the same merchandise may be assessed if CBP can show that each alleged violator committed separate acts.[258] In one case the government was able to prove that the broker/importer of record, who was assessed a penalty of $250.00, was negligent in using the invoice documents prepared by the shipper and by certifying on the Consumption Entry that the currency of value was Canadian. The shipper, who was assessed a separate penalty, provided false invoices to Customs stating the transaction (payment for crabmeat) was in Canadian currency instead of U.S. currency. A loss of revenue resulted when the broker converted the Canadian value to U.S. dollars on the Consumption Entry.[259]

8.220 Aiding and Abetting Customs Civil Fraud

An aider or abettor must be objectively aware of the acts committed by the principal offender *and* must be involved in some act in support of the principal offender's conduct, e.g., assistance or encouragement.[260]

Three elements are involved:

256 *United States v. Action Products*, Slip Op. 2001-21 (February 17, 2001) (§ 1592 not limited to importers of record).
257 19 C.F.R. § 171 App. B(K) (2001).
258 *United States v. F.H. Fenderson Inc.*, 658 F.Supp. 894 (Ct. Int'l Trade 1987).
259 *United States v. Valley Steel Products Co.*, 765 F.Supp. 752 (Ct. Int'l Trade 1991).
260 *Id.* (Valley Steel aided and abetted the importers of record by participating in a scheme that enabled others to supply false documents to Customs.)

(1) The party aided must perform a wrongful act;

(2) The aider or abettor must be objectively aware of his role as part of the tortious activity; and,

(3) The aider or abettor must knowingly and substantially assist the principle violation.[261]

A court is likely to look to six factors to determine that substantial assistance prong:

(1) The nature of the act assisted or encouraged;

(2) The amount of assistance;

(3) Presence during the act;

(4) Their relationship;

(5) State of mind; and

(6) The duration of the assistance provided.[262]

8.230 Parties Liable in a § 1592 case

8.231 Joint and Several Liability

CBP may assess a single penalty against more than one party.

Where the statute imposes a single penalty, there can be but one satisfaction, but the participants in the wrong may be sued jointly or severally.[263]

The corporate officers as well as the corporation may be sued individually to recover a penalty even though they were not named in their individual capacities in the penalty and prepenalty notices, provided they knew or should have known of the penalty proceeding. For example, where the officers receive notices sent to the corporation and respond to them, such establishes at least implicit knowledge of the proceeding.[264]

261 Restatement (Second) of Torts § 876(b).
262 *United States v. Hitachi America, LTD.*, 172 F.3d 1319 (Fed. Cir. 1999); *United States v. Action Products, Int'l.*, Slip Op. 2001-21 (February 27, 2001).
263 *United States v. Leon Rheims Co.*, 246 F. 179, 184 (S.D.N.Y. 1917).
264 *United States v. Priority Products, Inc.*, 793 F.2d 296 (Fed. Cir. 1986) and *United States v. Nussbaum*, 94 F. Supp.2d 1343 (Ct. Int'l Trade 2000) and *KAB Trade*, Slip Op. 97-35 (Ct. Int'l Trade, March 26, 1997). This reasoning would more likely apply where the corporation and the individuals are basically identical.

Notice to each party should indicate that they are jointly and severally liable with the others for no more than the domestic value (fraud) or penalty imposed for either negligence or gross negligence.

8.232 Multiple Penalties

CBP may assess against one violator multiple penalties involving one importation or issue a separate penalty to each violator if it can be shown that each violator committed different acts.[265] Where multiple penalties are issued, CBP may pursue each separately.[266]

8.240 Collection of Duties under 19 U.S.C. § 1592(d)

Notwithstanding § 1514, dealing with the finality of liquidations, if the United States has been deprived of lawful duties, taxes or fees as a result of a violation of the statute, CBP requires restitution whether or not a monetary penalty is assessed. The phrase "notwithstanding § 1514" means that the government can recover the lost revenue even though the entry was liquidated without assessment of these additional duties, fees and taxes. CBP guidelines refer to such duties as an "actual loss of revenue" and state they include marking duties, anti-dumping duties and countervailing duties as well as regular Customs duties.[267]

Section 1592(d) provides an independent cause of action to recover duties actually lost as a result of a violation of § 1592. This is not a penalty provision but is the sole means by which lost duties may be recovered. The recovery of lawful duties is allowed not only from persons who violate § 1592(a), but also from "those parties traditionally liable for such duties, e.g., the importer of record and its surety."[268] In certain circumstances, lost duties under 1592(d) include marking duties under 19 U.S.C. § 1304.[269]

When penalties are to be assessed concurrently with a demand for duties, the demand for duties should be made in the penalty notice.[270] If no penalties are

265 *United States v. F.H. Fenderson Inc.*, 658 F.Supp. 894 (Ct. Int'l Trade 1987); *United States v. Snuggles*, 937 F.Supp. 923 (Ct. Int'l Trade 1996).
266 *United States v. Valley Steel Products Co.*, 765 F.Supp. 752 (Ct. Int'l Trade 1991) (Valley was sued for aiding and abetting after importer settled with Customs via offer in compromise.)
267 19 C.F.R. Part 171, App. B(D).
268 *United States v. Blum*, 858 F.2d 1566, 1570 (Fed. Cir. 1988); *United States v. Almany*, Slip Op. 98-72 (Ct. Int'l Trade, June 3, 1998). See also CD 4400-09, February 6, 1989.
269 *Pentax v. Robinson*, 125 F.3d 1457, 1463 (Fed. Cir. 1997), op. *amended on reh'g*, 135 F.3d 760 (Fed. Cir. 1998); *United States v. Golden Ship Trading*, Slip Op. 98-138 (Ct. Int'l Trade 1998).
270 19 C.F.R. § 162.79(b) (2001).

contemplated, the demand for payment must contain the type of information ordinarily provided in the prepenalty notice and the recipient can request that the Commissioner review the demand.[271]

CBP must establish a violation of § 1592(a) to collect duties under § 1592(d).[272]

Once a violation of § 1592 is established, the court *must* require the violator to pay the actual loss of revenue. There is no discretion.[273]

8.250 Prior Disclosure in a § 1592 case

The concept of "prior disclosure" was first added to the Internal Revenue laws. The idea was that if someone comes forward voluntarily and admits to the Internal Revenue Service that they have underpaid their taxes, the penalty provision against that person should be reduced. This same idea has been incorporated in Customs laws. The Customs statutes are very clear as to the circumstances under which an importer may have the benefit of prior disclosure.

A prior disclosure is made if an importer discloses to a CBP officer either orally or in writing the circumstances of a violation of 19 U.S.C. § 1592 or 19 U.S.C. § 1593a either before or without knowledge of the commencement of a formal investigation of that violation.[274] A valid prior disclosure serves to reduce or eliminate penalty liability but does not negate criminal liability.[275] In the case of an oral disclosure, the disclosing party is required to confirm the oral disclosure in writing to the Fines, Penalties and Forfeiture Office (FP&F) within ten days.
A person who discloses the circumstances of the violation is required to tender any *actual loss of duties, taxes or fees* at the time of the disclosure or within 30 days after CBP in writing notifies the party of the calculation of the actual loss of duties, taxes or fees. Extensions of the 30-day period may be granted.[276] .[277]
Failure to tender the actual loss of duties, taxes or fees finally calculated by CBP will result in the denial of the benefits of prior disclosure. Headquarters review of the calculations is available in special situations.[278]

271 19 C.F.R. § 162.79b (2001).
272 19 U.S.C. § 1592(d).
273 *United States v. Snuggles*, 937 F. Supp. 923 (Ct. Int'l Trade 1996); *United States v. Menards*, 64 F.3d 678 (Fed. Cir. 1995).
274 19 U.S.C. § 1592(c)(4); C.F.R. § 162.74(a) (2001).
275 *United States v. Rockwell International Corp.*, 924 F.2d 928, 935 (9th Cir. 1991) (Defendant prosecuted for fraud after a voluntary disclosure under DOD procedures.)
276 19 U.S.C. § 1592(c)(4)(B).
277 Brother International Corp. v. United States, 294 F. Supp.2d. 1373 (C.I.T. 2003).
278 19 C.F.R. § 162.74(c) (2001). The Department of Justice maintained that position in *Pentax Corp. v. Myhra*, 61 F.3d 731 (9th Cir. 1995) and *Pentax v. United States*, 135 F.3d 760 (Fed. Cir. 1998). But See *Pentax Corp. v. Robinson*,

In order to "disclose the circumstances of the violation," the disclosing party must provide CBP the following:

1. The class or kind of merchandise involved in the violation;

2. The importation or drawback claim included in the disclosure by entry number, drawback number entries involved, or the port(s) of entry and the approximate dates of entry or drawback claims;

3. A specification of the material false statements, omissions, or acts committed (or omitted) including an explanation as to how and when they occurred; and

4. The true and accurate information which should have been provided in the entry or drawback claim documents, or indicate that the information will be provided within 30 days of the initial disclosure. The FP&F Officer may grant extensions.[279]

Upon receipt of a prior disclosure, a copy of the disclosure must be provided ICE and the local FP&F office.[280]

8.251 Commencement of a Formal Investigation

Once there has been a valid prior disclosure, then and only then is the next level of inquiry reached, i.e., whether or not the disclosure was made before or without knowledge of the commencement of a formal investigation.

A formal investigation of a violation is considered to be commenced on the date, recorded in writing by Customs as the date on which facts and circumstances were discovered or information was received that caused Customs to believe that a possibility of a violation existed. When a party affirmatively asserts a prior disclosure, which is denied, a copy of a "writing" which evidences the commencement of a formal investigation is required to be attached to the prepenalty notice.[281]

Additional violations not disclosed or included within the scope of the party's disclosure which are discovered by Customs as a result of an investigation and/or verification of the disclosure are not entitled to treatment under the prior disclosure provisions.[282]

8.252 Knowledge of the Commencement of a Formal Investigation

125 F.3d 1457 (Fed. Cir. 1997).
[279] 19 C.F.R. § 162.74(c) (2001).
[280] 19 C.F.R. § 162.74(f) (2001).
[281] 19 C.F.R. § 162.74(g) (2001).
[282] 19 C.F.R. § 162.74(h) (2001).

A person who claims a lack of knowledge of the commencement of a formal investigation has the burden to prove that lack of knowledge.[283] A person is presumed to have had knowledge of the commencement of a formal investigation of a violation if before the claimed prior disclosure of the violation:

(1) Customs, having reasonable cause to believe that there has been a violation, has so informed the person concerning the type of or circumstances of the disclosed violation; or

(2) An agent made an inquiry of the alleged violator concerning the type of or circumstances of the disclosed violation, after having properly identified himself and the nature of his inquiry; or

(3) An agent requested books and records of the person relating to the disclosed information after having properly identified himself and the nature of his inquiry.

(4) The agency issues a prepenalty or penalty notice to the disclosing party relating to the types of or circumstances of the disclosed violation.

(5) The merchandise that is the subject of the disclosure was seized; or

(6) In the case of violations involving merchandise accompanying persons entering the United States or commercial merchandise inspected in connection with entry, the person has received oral or written notification of the agency finding of a violation.[284]

Also, the presumption of knowledge may be rebutted by evidence that despite the above actions by the agency, the person making the disclosure still did not have knowledge that a formal investigation had commenced with respect to the disclosed information.

8.253 Prior Disclosure Regarding NAFTA Claims

(a) An importer is not subject to penalties under § 1592(a) for making an incorrect claim for preferential tariff treatment under 19 U.S.C. § 3332, if the importer:

(1) Has reason to believe that the NAFTA Certificate of Origin on which the claim was based contains incorrect information; and

(2) In accordance with regulations issued by the Secretary voluntarily and promptly makes a corrected declaration and pays duties, taxes and fees owing, prior to commencement of a formal investigation, and

283 19 C.F.R. § 162.74(i) (2001); 19 U.S.C. § 1592 (c)(4).
284 19 C.F.R. § 162.74(i)(1) (2001).

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(3) Did not fraudulently submit the incorrect claim.[285]

[285] 19 U.S.C. § 1592(c)(5); 19 C.F.R. § 181.82.

8.260 Penalties for Customs Civil Fraud - summary chart

Statutory Ceilings		
Fraud	**Gross Negligence**	**Negligence**
Duty Loss: **Penalty equal to Domestic Value of the Merchandise** **Nonrevenue Loss:** **Penalty equal to Domestic Value of the Merchandise**	**Duty Loss:** **Penalty equal to Domestic Value of the Merchandise, or four (4) times the Loss of Revenue, Whichever is Less** **Nonrevenue Loss:** **Penalty equal to 40% of the Dutiable value of the Merchandise**	**Duty Loss:** **Penalty equal to Domestic Value of the Merchandise, or two (2) times the Loss of Revenue, Whichever is Less** **Penalty equal to 20% of the Dutiable Value of the Merchandise**
Administrative Penalty Dispositions **19 C.F.R. Part 171, App. B(F)(2)(a)-(c)**		
Duty Loss: **Minimum of five (50 times the Loss of Duty to a Maximum of eight (8) times the Loss of Duty.** **Nonrevenue Loss:** **50% to 80% of the Dutiable Value of the Merchandise.**	**Duty Loss:** **Minumum of 2.5 Times the Loss of Duty to a Maximum of four (4) times the Loss of Duty.** **Nonrevenue Loss:** **25% to 40% of the Dutiable Value of the Merchandise.**	**Duty Loss:** **Minimum of .5 times the Loss of Duty to a Maximum of two (2) times the Loss of Duty.** **Nonrevenue Loss:** **5% to 20% of the Dutiable Value of the Merchandise.**

Note: A penalty may never exceed the domestic value of the merchandise.

Prior Disclosure Dispositions **19 C.F.R. Part 171 App. B(F)(2)(f)**		
Duty Loss: **Penalty equal to 100% of the Total Losss of Duty (i.e., Actual + Potential) Resulting from the Violation. No Mitigation Permitted.** **Nonrevenue Loss:** **Penalty equal to 10% of the Dutiable Value of the Merchandise. No Mitigation Permitted.**	**Duty Loss:** **Penalty equal to Interest on the Actual Loss of Duty Computed From Date of Liquidation to the Date of the Party's Tender of Duty Actually Lost.** **Nonrevenue Loss:** **No Monetary Penalty.**	**Duty Loss:** **Interest on the Actual Loss Duty Computed From Date of Liquidation to the Date of the Party's Tender of Duty Actually Lost.** **Nonrevenue Loss:** **No Monetary Penalty.**

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8.261 Definitions of Terms Used with Respect to Assessing Penalties

Domestic Value

"Domestic value" is the price at which such or similar property is freely offered for sale at the time and place of appraisement, in the same quantity or quantities as seized, and in the ordinary course of trade. If there is no market for the seized property at the place of appraisement, such value in the principal market nearest to the place of appraisement shall be reported.[286] Domestic value is similar to importer's selling price. CBP generally calculates the domestic value by adding to the entered value amounts equal to freight, duty and profit.[287]

Seized Property

Seized property is appraised at domestic value.[288]

Property Not Under Seizure

The basis for a claim for forfeiture value or for an assessment of penalty relating to the forfeiture value of property not under seizure is the domestic value.

The value shall be *fixed* as of the date of violation, i.e., date of entry of merchandise or filing of document or commission of the act forming the basis of the claim, *whichever is later*.

Entered Value

"Entered value" is the value of the goods used by the person filing the entry documents in accordance with 19 C.F.R. § 141.61. This should ordinarily be the purchase price.[289]

Dutiable Value

"Dutiable value" is the value of the goods upon which duty is based. It is generally referred to as the appraised value.

Actual Loss of Duties

"Actual loss of duties" is amount of duties of which the government has been deprived by reason of a violation of § 1592(a) in respect to entries on which liquidation had become final.[290]

286 19 C.F.R. § 162.43a (2001).
287 *United States v. Quintin*, 7 Ct. Int'l Trade 153 (1984). In § 1592 cases it is generally the dutiable value plus the duty, profit and freight.
288 19 U.S.C. § 1606.
289 *See* 19 C.F.R. §§ 141.62 and 141.86 (2001).

Potential Loss of Duties

"Potential loss of duties" is the amount of duties of which the government tentatively was deprived by reason of the violation in respect to entries on which liquidation had not become final.[291]

8.262 Loss of Revenue in Determining a Penalty

Loss of Revenue (LOR), which includes Anti-dumping duties (ADD), Countervailing duties (CVD) and marking duties, is a multiple of the sum of the potential and actual loss of revenue (i.e., duties of which the United States *is* or *may be* deprived).[292] This should include all duties due as of the time of the violation regardless of whether they were subsequently paid. Merchandise processing and harbor maintenance fees are also treated as duties for penalty purposes, as are ADD, CVD and marking duties.[293]

8.270 Statute of Limitations in a § 1592 case

Under 19 U.S.C. § 1621, the agency's ability to recover a penalty or forfeiture of property or lawful duties under § 1592 is forever barred, unless the § 1592 judicial complaint is filed with the Court of International Trade (CIT) within five years from the date of discovery of the alleged fraud; or five years from the date the alleged violation was committed if the violation resulted from gross negligence or negligence. The statute of limitations is tolled while the person who may be subject to the penalty is absent from the United States.[294]

Under the "discovery rule" in fraud cases, the statute of limitations is tolled until the date when the agency learns of the fraud or is sufficiently on notice as to the possibility of fraud to discover its existence with the exercise of due diligence.[295]

The date of discovery usually involves questions of fact and is rarely capable of being resolved by summary judgment.[296]

290 19 C.F.R. § 162.71(a)(1) (2001).
291 19 C.F.R. § 162.71(a)(2) (2001).
292 19 U.S.C. § 1592(c).
293 19 C.F.R. § 24.23(e) (2001), Part 171, App. B(D).
294 *United States v. Islip*, 18 F. Supp.2d 1047 (Ct. Int'l Trade 1998) (discussion of "absence")
295 *United States v. Spanish Foods, Inc.*, 131 F. Supp.2d 1374 (Ct. Int'l Trade 2001); *United States v. Zeigler Bolt and Parts Co.*, 883 F.Supp. 740 (Ct. Int'l Trade 1995), *dismissed on other grounds*, 111 F.3d 878 (Fed. Cir. 1997).
296 *Id.*; *United States v. R.I.T.A. Organics, Inc.*, 487 F.Supp. 75 (N.D. Ill. 1980); *United States v. Dantzler Lumber & Export Co.*, 810 F.Supp. 1277, 1281 (Ct. Int'l Trade 1992).

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8.271 CBP Claims for Duties Pursuant to § 1592(d)

With respect to § 1592(d), the statute of limitations is the same as for penalties and only applies prospectively from the date of enactment (December 8, 1993). (Prior to the enactment of the *NAFTA Act*, § 1621 did not limit the filing of § 1592(d) duty claims.)[297]

The new statute of limitations does not affect CBP claims against importers or sureties for the recovery of duties pursuant to § 1592(d) that were instituted administratively or judicially before December 8, 1993.

The five-year statute of limitations under § 1621, as amended, and not the six-year statute of limitations under 28 U.S.C. § 2415, applies to claims against sureties accruing on or after December 8, 1993.

8.272 Waiver of Statute of Limitations

According to the International Trade Compliance Division of the Office of Regulations and Rulings (OR&R), waivers of the statute of limitations should be requested from the alleged violator when there is less than two years remaining under the statute with respect to negligence or gross negligence (looking at the date of the first entry involved).

All waivers should be forwarded to the FP&F officer, unless the case is pending at headquarters.

It is CBP policy that waivers should be for two years, commencing on the date of the waiver, unless another date is specified by the waiving party. CBP can request a waiver as a condition of a supplemental petition.[298]

Defendants will be bound by valid waivers[299] and can be retroactive.[300]

A waiver is a unilateral act and need not be acknowledged or "accepted" by the Government to be valid.[301]

8.280 Prepenalty Notice, Penalty Claims and Procedures

297 *United States v. Jac Natori Co.*, 821 F.Supp. 1514, 1520 (Ct. Int'l Trade 1995) (No statute of limitations for duty claims prior to NAFTA.) *affirmed*, 108 F.3d 295.

298 19 C.F.R. § 171.64

299 *United States v. Thorson Chem. Corp.*, 795 F.Supp. 1190 (Ct. Int'l Trade 1992); *United States. v. Neman Bros. & Assoc.*, 777 F.Supp. 962 (Ct. Int'l Trade 1991) (Complaint filed on anniversary date of waiver would be timely.)

300 *United States v. Hitachi*, 172 F.2d 1319 (Fed. Cir. 1999).

301 *U.S. v. Ford Motor Company*, 497 F.3d 1331 (Fed. Cir. 2007).

8.281 Required Contents of Prepenalty Notice

The prepenalty notice shall:

(1) Describe the merchandise involved in the violation, e.g., "ladies knit blouses";

(2) Set forth the details of the entry or introduction, i.e., a list of the entries or approximate dates and ports involved in the entry, introduction or attempt;

(3) Cite the laws violated (e.g., §§ 1481, 1484, bilateral textile agreements, *plus* § 1592);

(4) Disclose all material facts establishing the alleged violation. These are the specific statements, omissions, or acts forming the basis for the alleged violation as well as the circumstances of the importation or attempted importation of the merchandise. In other words, who filed the entry and what was the falsity or omission. The statute does not require CBP to identify its evidence, but CBP must include a clear and concise statement of the violation.

(5) State the alleged degree of culpability; e.g., gross negligence;

(6) State the estimated loss of duties, if any, and the amount of the proposed penalty claim, taking into account all circumstances:[302]

The alleged violator must be notified of the right to make both an oral and written presentation as to why the proposed penalty should not be issued in the amount stated.[303]

8.282 Prepenalty requirements

No prepenalty notice is required for a violation of § 1592(a) that is not commercial in nature or the amount of penalty is $1,000 or less.[304]

8.283 Response by Person Concerned

The period of time for a person to respond is set by regulation and depends upon when the statute of limitations may run.[305] If at least one year remains under the statute of limitations, thirty days is permitted. If *less than one year* remains, then as little as seven days may be permitted.[306]

302 19 U.S.C. § 1592(b)(1), 19 C.F.R. §§ 162.77 and 162.77a (2001).
303 19 C.F.R. §§ 162.77(b)(2) and 162.77a(b)(2) (2001).
304 19 C.F.R. § 162.77(c) (2001).
305 19 C.F.R. § 162.78(a) (2001).
306 19 C.F.R. 162.78.

A statement as to the period of time in which to respond should be in the prepenalty notice.[307]

Both oral and written responses must be completed within the time allotted.

8.284 Agency Determinations

If, after considering any presentations made in response to the prepenalty notice, CBP determines that there is no violation, written notice must be given.

If a determination is made that there is a violation, then a written penalty claim is made. This contains the same information as the prepenalty notice, and any changes thereto, and advises that the person concerned has the right to make an oral and/or written presentation under § 1618.[308]

Petitions for relief shall be filed within 60 days of the date of mailing the penalty notice.[309] If fewer than 180 days remain before the statute of limitations expires, CBP may specify in the notice a shorter period of time to respond, but no less than seven days.[310]

As noted previously, the statute of limitations expires five years from discovery of fraud or five years from the date of the violation (negligence or gross negligence). As a matter of policy to protect the revenue, however, CBP assumes the statute will expire five years from the date of the violation for purposes of determining a shortened response time.

In addition, whenever fraud is to be alleged in the penalty notice and the statute of limitations is shortly expiring for negligent violations, the level of culpability should be stated *in the alternative* on the penalty notice to hopefully avoid the following pitfalls:

Two cases have been dismissed by the CIT because the statute of limitations was expiring less than one year from the date of the violation but more than one year from the date of discovery of the violation.[311] Since Customs had only alleged fraud and the statute of limitations for fraud was more than one year, a seven-day response time for a prepenalty and penalty notice was inappropriate. If fraud and negligence had been alleged in the alternative, the seven-day response

307 If less than 30 days to respond is required, the FP&F Officer should contact the party by telephone and fax at the time of issuance. See also, 19 C.F.R. 162.78(a). The party must have sufficient time have a "reasonable opportunity to be heard" *United States v. Islip*, 18 F. Supp. 2d 1047 (C.I.T. 1998).
308 19 U.S.C. § 1592(b)(2); 19 C.F.R. § 162.79 (2001).
309 19 C.F.R. § 171.2(b)(2) (2001).
310 19 C.F.R. § 171.2(e) (2001). Once again, both oral and written response must occur within the time allotted.
311 *United States v. Chow,* 841 F. Supp. 1286 (C.I.T. 1993) and *United States v. Stanley Works*, 849 F. Supp. 46 (C.I.T. 1993).

time would have been appropriate since the statute of limitations for negligence was less than one year.

The seven-day response time to prepenalty and penalty notices has been upheld where the statute of limitations can be asserted within a year or six months, respectively.[312]

In another fraud case, the court found that Customs erred by measuring the statute of limitations from the date the alleged violations were committed, thereby limiting the defendant's response time to seven days. The limitation period should have been measured from when Customs became aware of the fraudulent violations. Since the importer ultimately was able to argue its case in the administrative process for over a six-month period, the CIT found the failure by Customs to provide a thirty-day response period was harmless error.[313]

Another case involved entries from June 1983 to March 1988 with prepenalty and penalty notices in October 1989 of seven and fourteen-day response times. However, the complaint in the CIT alleged fraud, gross negligence and negligence, thus shifting the start of the limitation period to the dates of the entries rather than the date the fraud was discovered.[314]

8.285 Administrative Handling of Petitions

Currently, Fines, Penalties and Forfeiture (FP&F) officers have been delegated the authority to act upon certain original and supplemental petitions for relief submitted pursuant to 19 C.F.R. §§ 171.11 and 172.11.[315]

Generally, the delegated authority in a particular case is tied to the amount assessed and the statute violated. For example, FP&F officers may mitigate penalties not exceeding $50,000 where assessed pursuant to 19 U.S.C. §§ 1592 and 1593a.[316]

Penalty claims of more than $50,000 are referred to Chief of the Penalties Branch, CBP Headquarters, by the FP&F officer, with a written recommendation and findings of fact and conclusions with respect to the claims raised by petitioner, along with exhibits and pertinent data.

312 *United States v. Ross*, 574 F.Supp. 1067 (Ct. Int'l Trade 1983).
313 *United States v. Obron Atl. Corp.*, 862 F.Supp. 378, 382 (Ct. Int'l Trade 1994).
314 *United States v. Ziegler Bolt and Parts Co.*, 883 F.Supp. 740 (Ct. Int'l Trade 1995), *dismissed on other grounds*, 111 F.3d 878 (Fed. Cir. 1997).
315 Treas. Dec. 00-58, Fed. Reg. Vol. 65, No. 172, September 5, 2000.
316 *Id.* at 53804, and 19 C.F.R. § 171.11.

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8.286 Supplemental Petitions

A supplemental petition may be filed with the FP&F officer within 60 days from the date of the notice to the petitioner from which further relief is requested, or within 60 days following an administrative or judicial decision with respect to the entries involved in a penalty case which reduces the loss of duties upon which the mitigated penalty amount was based (whichever is later) unless another time to file such a supplemental petition is prescribed in the decision. A supplemental petition may be filed whether or not the mitigated penalty or forfeiture remission amount designated in the decision on the original petition is paid.[317]

The supplemental petition is the same as the original petition authority. Supplemental petitions filed on cases where the original decision was made by the FP&F officer will be initially reviewed by that officer. If upon review of the supplemental petition the FP&F officer decides that no further relief is warranted, or the petitioner is not satisfied the FP&F officer's decision, the supplemental petition is forwarded on to a National Seizures and Penalties officer (NSPO) for decision. A NSPO is a CBP Headquarters employee located in a CBP field office.[318]

In cases where the original penalty claim exceeds $25,000, the supplemental petition must be forwarded to the Chief, Penalties Branch at Headquarters, along with an analysis of the petition and recommended disposition.

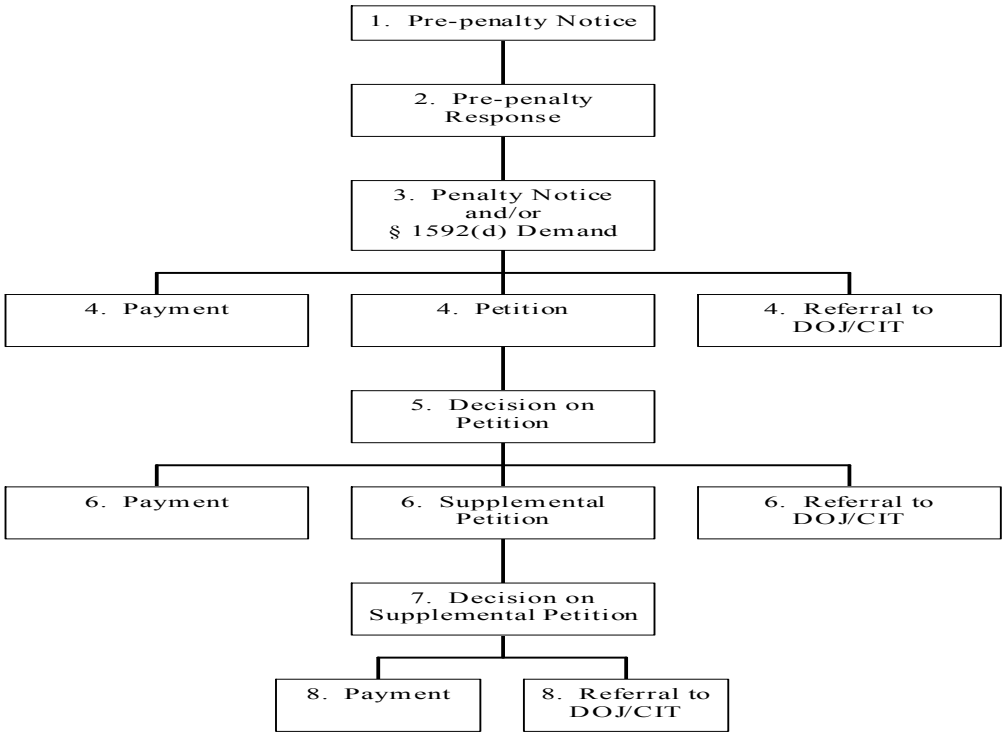
There is no regulatory requirement that a supplemental petition contain new facts or evidence. As a matter of policy, however, generally, no further relief is afforded if no new facts are presented.

If less than one year remains before the statute of limitations expires, a waiver may be requested as a condition to accepting a supplemental petition.[319] If the statute of limitations is expiring, CBP need not issue a decision on the supplemental petition.[320]

8.287 Administrative § 1592 Penalty Process

The following graphic illustrates the various administrative steps that can occur in processing a claim for penalties under § 1592.

317 There is no requirement in 19 U.S.C. 1592 to allow a supplemental petition. See *United States v. Obron Atlantic Corp.* 862 F. Supp. 378 (C.I.T. 1994).
318 19 C.F.R. §§ 171.62 (2001).
319 19 C.F.R. §§ 171.64 and 172.43 (2001).
320 *United States v. Obron Atl. Corp.*, 862 F.Supp. 378, 383 (Ct. Int'l Trade 1994) and *United States v. Modes Inc.*, 723 F.Supp. 811, 816 (Ct. Int'l Trade 1989).



8.290 Administrative Resolution

8.291 Mitigating Factors

The alleged violator bears the burden of providing CBP with sufficient evidence to establish the claimed mitigating factors.

Although these factors were created solely as administrative guidelines for use in the mitigation process, they have gained added significance because the CIT has considered them when setting the penalty in § 1592 litigation.[321]

The following factors will be considered in mitigation of the proposed or assessed penalty claim or final penalty amount, provided that the case record sufficiently establishes their existence. The list is not exclusive.

1. *Contributory Agency Error*

This factor includes misleading or erroneous advice given by a CBP official in writing to the alleged violator, or established by a contemporaneously created written CBP record, only if it appears that the alleged violator reasonably relied

321 *United States v. Golden Ship*, Slip Op. 2001-7 (Ct. Int'l Trade, January 12, 2001); *United States v. Complex Machine Works Co.*, 83 F. Supp.2d 1307 (Ct. Int'l Trade 1999); *United States v. Modes, Inc.*, 826 F.Supp. 504 (Ct. Int'l Trade 1993) and *United States v. Menard, Inc.*, 838 F.Supp. 615 (Ct. Int'l Trade 1993).

upon the information and the alleged violator fully and accurately informed CBP of all relevant facts. The concept of comparative negligence may be utilized in determining the weight to be assigned to this factor. If it is determined that the CBP error was the sole cause of the violation, the proposed or assessed penalty claim shall be canceled. If the CBP error contributed to the violation, but the violator also is culpable, the CBP error will be considered as a mitigating factor.[322]

2. *Cooperation with the Investigation*

To obtain the benefits of this factor, the violator must exhibit extraordinary cooperation beyond that expected from a person under investigation for a CBP violation. Some examples of the cooperation contemplated include assisting CBP officers to an unusual degree in auditing the books and records of the violator (e.g., incurring extraordinary expenses in providing computer runs solely for submission to CBP to assist the agency in cases involving an unusually large number of entries and/or complex issues). Another example consists of assisting CBP in obtaining additional information relating to the subject violation or other violations. Merely providing the books and records of the violator should not be considered cooperation justifying mitigation inasmuch as CBP has the right to examine an importer's books and records pursuant to 19 U.S.C. 1508-1509.[323]

3. *Immediate Remedial Action*

This factor includes the payment of the actual loss of duty prior to the issuance of a penalty notice and within 30 days after CBP notifies the alleged violator of the actual loss of duties attributable to the alleged violation. In appropriate cases, where the violator provides evidence that immediately after learning of the violation, substantial remedial action was taken to correct organizational or procedural defects, immediate remedial action may be granted as a mitigating factor. CBP encourages immediate remedial action to ensure against future incidents of non-compliance.[324]

4. *Inexperience in Importing*

Inexperience is a factor only if it contributes to the violation and the violation is not due to fraud or gross negligence.[325]

322 19 C.F.R. § 171, App. B(G)(1) (2001). The initial failure of CBP to discover the violation is not contributing error. "The burden is on the importer to provide true and accurate information to Customs; the burden is not on Customs to find out non-complying importers." *United States v. Nippon Miniature Bearing Co.*, 155 F. Supp. 2d 701, 707 (C.I.T. 2001).
323 19 C.F.R. § 171, App. B(G)(2) (2001).
324 19 C.F.R. § 171, App. B(G)(3) (2001).
325 19 C.F.R. § 171, App. B(G)(4) (2001).

5. *Prior Good Record*

Prior good record is a factor only if the alleged violator is able to demonstrate a consistent pattern of importations without violation of section 592, or any other statute prohibiting false or fraudulent importation practices. This factor will not be considered in alleged fraudulent violations of section 592.[326]

6. *Inability to Pay the Customs Penalty*

The party claiming the existence of this factor must present documentary evidence in support thereof, including copies of income tax returns for the previous three years, and an audited financial statement for the most recent fiscal quarter. In certain cases, CBP may waive the production of an audited financial statement or may request alternative or additional financial data in order to facilitate an analysis of a claim of inability to pay (e.g., examination of the financial records of a foreign entity related to the U.S. company claiming inability to pay).[327]

7. *CBP Knowledge*

Additional relief in non-fraud cases (which also are not the subject of a criminal investigation) will be granted if it is determined that CBP had actual knowledge of a violation and, without justification, failed to inform the violator so that it could have taken earlier corrective action. In such cases, if a penalty is to be assessed involving repeated violations of the same kind, the maximum penalty amount for violations occurring after the date on which actual knowledge was obtained by CBP will be limited to two times the loss of duty in duty-loss cases or twenty percent of the dutiable value in non-duty-loss cases if the continuing violations were the result of gross negligence, or the lesser of one time the loss of duty in duty- loss cases or ten percent of dutiable value in non-duty-loss cases if the violations were the result of negligence. This factor will not be applicable when a substantial delay in the investigation is attributable to the alleged violator.[328]

8.292 Violations by Small Entities

The small entity importer has the burden of establishing that it qualifies as a small entity as defined by § 221(3) of the *Small Business Regulatory Enforcement Fairness Act of 1996* and that all five of the above circumstances are present.

The issuance of a penalty notice will be waived for businesses qualifying as small business entities provided all the following circumstances are present:

326 19 C.F.R. § 171, App. B(G)(5) (2001).
327 19 C.F.R. § 171, App. B(G)(6) (2001).
328 19 C.F.R. § 171, App. B(G)(7) (2001).

- ✓ The small entity has taken corrective action within a reasonable correction period, including the payment of all duties, fees and taxes owed as a result of the violation within 30 days of the determination of the amount owed;

- ✓ The small entity has not been subject to other enforcement actions by CBP;

- ✓ The violation did not involve criminal or willful conduct, and did not involve fraud or gross negligence;

- ✓ The violation did not pose a serious health, safety or environmental threat, and

- ✓ The violation occurred despite the small entity's good faith effort to comply with the law.

In establishing that it qualifies as a small entity, the small business importer should provide evidence that it is independently owned and operated; that is, there are not related parties (domestic or foreign) as defined in 19 U.S.C. § 1401a(g) that would disqualify the business as a small business entity. Furthermore, it must establish that it is not dominant in its field of operation. Finally, the alleged violator must provide evidence, including tax returns for the previous three years and a current financial statement from an independent auditor, of its annual average gross receipts over the past three years, and its average number of employees over the previous twelve months.[329]

8.293 Aggravating Factors

Certain factors may be determined to be aggravating factors in calculating the amount of the proposed or assessed penalty claim or the amount of the administrative penalty decision. The presence of one or more aggravating factors may not be used to raise the level of culpability attributable to the alleged violations, but may be utilized to offset the presence of mitigating factors. The following factors will be considered "aggravating factors," provided that the case record sufficiently establishes their existence. The list is not exclusive.[330]

- ✓ Obstructing an investigation or audit,

- ✓ Withholding evidence,[331]

329 Treasury Decision 97-46, Policy Statement Regarding Violations of 19 U.S.C. § 1592 by Small Entities located at 62 Fed. Reg. 30378 (1997).
330 19 C.F.R. § 171, App. B(H) (2001).
331 In *United States v. Optrex America, Inc.*, C.I.T. No. 04-79 (2004) the court held that the importer waives its claim of attorney client privilege when the violator raises the affirmative defense of reliance on counsel.

- ✓ Providing misleading information concerning the violation,
- ✓ Prior substantive violations of § 592 for which a final administrative finding of culpability has been made,
- ✓ Textile imports that have been the subject of illegal transshipment, whether or not the merchandise bears false country of origin markings,
- ✓ Evidence of a motive to evade a prohibition or restriction on the admissibility of the merchandise (e.g., evading a quota restriction),
- ✓ Failure to comply with a lawful demand for records or a Customs summons.

8.2100 Circumstances Under Which Seizure May Occur

Unlike most CBP forfeitures, which are *in rem* actions, forfeitures under § 1592 are *in personam* actions.

Under § 1592(c)(6), seizures are allowed only in certain limited situations, i.e., when the CBP officer has:

(1) Reasonable cause (generally understood as probable cause) to believe that § 1592 has been violated; and,

(2) Reasonable cause to believe that one or more of the following criteria are met:

a. The person is insolvent; or

b. The person is beyond the jurisdiction of the United States; or

c. Seizure is otherwise essential to protect the revenue [Mere revenue loss is not sufficient. Loss must be significant and there is too little information on either the legal residence and/or financial condition of violator.]; or

d. Seizure is essential to prevent introduction of prohibited or restricted merchandise.

Seizure is not allowed if there has been a valid prior disclosure.[332]

332 19 U.S.C. § 1592(c)(4).

8.2101 Seizure Notice

After a seizure has been made under § 1592, a seizure notice must be issued to the person concerned and to any other person who has an interest in the merchandise. A § 1592 prepenalty/penalty notice must also be issued to any violators.

The notices inform the person of the alleged violation of law, including specific acts or omissions. The notices will also describe the merchandise involved, each entry involved and describe the loss of revenue if any.

8.2102 Seized Merchandise May Be Released Upon Posting of Security

In cases not involving prohibited merchandise, a person may secure the release of his merchandise upon deposit of security "not to exceed the maximum monetary penalty which could be assessed. . . ."[333]

8.2103 Seized Merchandise Subject to Limited Forfeiture

As noted above, no seizure may take place under § 1592 if the person has met the requirements of prior disclosure. Further, administrative forfeitures under § 1592 are not permissible because of the *in personam* nature of the statute. Property seized under § 1592 can be used to satisfy a judgment on the penalty action and then only to the extent necessary to recover the amount of the penalty.

8.2104 Seizure and Forfeiture May Take Place Under Other Statutory Authority

Seizure may, however, be made under the authority of statutes other than § 1592. For example, an administrative forfeiture of the same merchandise would be permissible under 19 U.S.C. § 1595a(c)(2) if the merchandise is subject to any restriction or prohibition that is imposed by law relating to health, safety, or conservation, and the merchandise is not in compliance with the applicable rule, regulation, or statute.

For complete discussion of CBP seizure and forfeiture policies and procedures, see chapter 14.

8.2110 Litigation of § 1592 Claims

8.2111 Referrals for Litigation

Claims under § 1592 are referred to the Department of Justice, Civil Division, Commercial Litigation Branch, National Courts Section. The Department of Justice has asked CBP to refer cases at least six months before the statute of

[333] 19 U.S.C. § 1592(c)(6).

limitations expires. CBP may not act on an administrative petition once a case has been referred to the Department of Justice. Any new or pending petitions should therefore be forwarded to Justice.[334] For purposes of litigation, the penalty sought will ordinarily be the full penalty demanded in the penalty notice, regardless of whether the claim was mitigated during the administrative petitioning process.[335]

8.2112 Court of International Trade Review

The Court of International Trade (CIT) has exclusive jurisdiction over actions brought by the United States under § 1592.[336]

As a general rule, the CIT will *not* exercise jurisdiction if a party other than the United States brings an action involving issues arising under § 1592, e.g., an action contesting the penalty amount or disputing a prior disclosure decision.[337]

The CIT will conduct a *de novo* review of all issues, not just a review of the agency record.[338] Thus, so long as the defendant was afforded adequate administrative procedures, i.e., no due process rights were violated, the administrative decisions become, for all practical purposes, irrelevant once litigation is commenced.

Mitigation decisions are issued under the authority of § 1618 and decisions under that section are not subject to judicial review.[339]

The burdens and elements of proof vary with the degree of culpability and are set out in § 1592(e). (discussed *supra*.)

334 19 C.F.R. § 171.13(a) (2001).

335 19 C.F.R. § 171.22 (2001). *United States v. Priority Products, Inc.*, 615 F.Supp. 591, 593 (Ct. Int'l Trade 1985); *United States v. Dantzler Lumber & Export Co.*, 810 F.Supp. 1277, 1286 (Ct. Int'l Trade 1992) (CIT not bound by what parties may have agreed to accept administratively.)

336 28 U.S.C. § 1582.

337 *Luigi Bormioli v. United States*, Slip Op. 98-9 (Ct. Int'l Trade 1998); *Playhouse Import & Export, Inc. v. United States*, 843 F.Supp. 716 (Ct. Int'l Trade 1994); *Dennison Manufacturing Co. v. United States Department of the Treasury*, 678 F.Supp. 894 (Ct. Int'l Trade 1988); and *Milin Industries Inc. v. United States*, 691 F.Supp. 1454 (Ct. Int'l Trade 1988); *McCarthy v. Heinrich*, 674 F.Supp. 863 (Ct. Int'l Trade 1987); *Jose G. Flores, Inc. v. United States*, 676 F.Supp. 1232 (Ct. Int'l Trade 1987). But see, *Bridalane Fashions v. United States*, 32 F. Supp.2d 466 (Ct. Int'l Trade 1998); *United States v. Brother Int'l Corp.* C.I.T. Slip. Op. 03-01 (2003).

338 19 U.S.C. § 1592(e)(1).

339 *Kuehne & Nagel, Inc. v. United States*, 17 Cl. Ct. 11, 19 (1989) and *United States v. One 1973 Dodge Maxivan Truck, Etc.*, 365 F.Supp. 833, 835 (N.D. Fla. 1973).

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8.2113 Judicial Penalty Assessments

The court has full discretion to set the penalty amount, limited only by the maximum penalties stated in § 1592. The Court of International Trade (CIT) identified fourteen factors it will take into consideration.[340]
The following judicial penalty assessments illustrate that the CIT has been fully exercising its discretion:

The court made a finding of fraud and assessed a penalty equal to the full domestic value of the merchandise involved (domestic value was only $600).[341]

The government sued to collect $61,301, the full penalty demanded in the penalty notice. Although this claim was mitigated to $16,260 during the petitioning process, the court ultimately imposed a penalty of $30,000.[342]

The domestic value of the merchandise involved was over $2.4 million, but the government only sought $150,000 (which was 20 times the loss of revenue). The court made a finding of fraud and assessed $150,000, the full penalty requested by the government. Interestingly, Customs had previously mitigated the penalty to $58,848.96.[343]

The government sought recovery of the domestic value, over $2.3 million. The court made a finding of fraud, but only assessed a penalty of $50,000, based upon certain "mitigating factors."[344]

The court made a finding of negligence and assessed penalties equal to the loss of revenue, or one-half the maximum penalty.[345] In some cases, the court has found negligence and assessed maximum penalties of two times the loss of revenue.[346] In another case, the maximum penalty (domestic value) was $686,000 and the court made a finding of fraud. The court assessed a penalty of $400,000, stating it would have assessed more but was obligated to take into consideration defendant's inability to pay a higher amount.[347] In a similar case, the court made a finding of fraud and assessed the maximum penalty, which was equal to the full domestic value of the merchandise.[348]

340 *United States v. Complex Machine Works Co.*, 83 F. Supp.2d 1307 (Ct. Int'l Trade 1999).
341 *United States v. Quintin*, 7 Ct. Int'l Trade 153 (1984).
342 *United States v. Priority Products, Inc.*, 793 F.2d 296 (Fed. Cir. 1986).
343 *United States v. Thorson Chem. Corp.*, 795 F.Supp. 1190 (Ct. Int'l Trade 1992).
344 *United States v. Modes Inc.*, 826 F.Supp. 504 (Ct. Int'l Trade 1993).
345 *United States v. Menard, Inc.*, 838 F.Supp. 615 (Ct. Int'l Trade 1993).
346 *United States v. Hitachi*, 74 F. Supp.2d 1349 (Ct. Int'l Trade 1999).
347 *United States v. Complex Machine Works, Co.*, 83 F. Supp.2d 1307 (Ct. Int'l Trade 1999).
348 *United States v. Almany*, 110 F. Supp. 2d 977 (Ct. Int'l Trade 2000). *See also United States v. Ford Motor Co.,* 387 F. Supp. 2d 1305 (Ct. Int'l Trade 2005)

8.2114 Settlement

Once a case has been referred to the Department of Justice, CBP can no longer accept offers in compromise under the procedures in 19 C.F.R. §§ 161.5 and 171.31-171.32.

The authority to compromise/settle civil claims after referral rests with the Attorney General, and appropriate delegates. The Department of Justice must solicit CBP recommendations, but the Attorney General has authority to compromise claims in litigation even if CBP objects.[349]

The DHS General Counsel has delegated to the CBP Chief Counsel the authority to make agency recommendations on settlements in litigation where the settlement does not exceed $1,000,000. This authority has been delegated to the Associate/Assistant Chief Counsels in cases in litigation involving claims less than $2,000,000, when the amount of the settlement or compromise does not exceed $1 million.

8.300 Civil Trade Enforcement - 19 U.S.C. § 1593a

Regulations implementing an administrative penalty scheme for violations of 19 U.S.C. § 1593a, which prohibits the filing of fraudulent or negligent drawback claims, are located at 19 C.F.R. §§ 162.73a and 162.74, and the guidelines are located at 19 C.F.R. Part 171, Appendix D.[350] As in the case of the penalties under § 1592, specific procedures and other requirements are set forth in the statute for prepenalty notices for penalties in excess of $1,000 and penalty claims. CBP headquarters must approve any prepenalty notice alleging fraud. The statute authorizes administrative remission or mitigation of penalties and mandates written decisions setting forth a final determination and findings of fact and conclusions of law upon which a final determination is based.
The statute provides for the assessment of monetary penalties in amounts not to exceed a specific percentage of the actual or potential loss of revenue, with the applicable percentage depending on the level of culpability, whether there have been prior violations involving the same issue, and whether the violator is a participant in the Customs drawback compliance program. For purposes of applying the monetary penalties prescribed in the statute, the regulation defines the loss of revenue with reference to the amount of drawback that is claimed and to which the claimant is not entitled.

and *United States v. Optrex America, Inc.,* 560 F. Supp. 2d 1326 (Ct. Int'l Trade 2008)

349 28 C.F.R. Chapter 1, Part 0, Subpart Y ("Authority to Compromise and Close Civil Claims and Responsibility for Judgments, Fines, Penalties and Forfeitures") and Appendix to Subpart Y ("Redelegations of Authority to Compromise and Close Civil Claims") (2001).

350 See, also 19 C.F.R. § 191.62.

As in § 1592 cases, the statute provides for a limited penalty if there is a prior disclosure of the violation. It would be applicable only in those instances in which the circumstances of the violation are disclosed before, or without knowledge of the commencement of, a formal investigation.

The statute provides for penalties, or notices of violation in lieu of penalties, as set forth below in cases involving negligent violations:

If the violator is not a participant in the drawback compliance program, CBP shall assess monetary penalties in amounts not to exceed the following:

- ✓ 20 percent of the loss of revenue for the first violation;
- ✓ 50 percent of the loss of revenue for the first repetitive violation; and
- ✓ The loss of revenue in the case of a second and each subsequent repetitive violation.

If the violator is a participant in the drawback compliance program and is generally in compliance with its provisions, CBP will take the following actions:

- ✓ For a first violation and for any other violation that is not repetitive or that involves the same issue as a prior violation but does not occur within three years from the date of the prior violation, a notice of violation (warning letter) will be issued;
- ✓ For the first violation that is repetitive and that occurs within three years from the date of the violation of which it is repetitive, a monetary penalty of up to 20 percent of the loss of revenue will be assessed;
- ✓ For the second violation that is repetitive and that occurs within three years from the date of the first two violations of which it is repetitive, a monetary penalty of 50 percent of the loss of revenue will be assessed; and
- ✓ For a third and each subsequent violation that is repetitive and that occurs within three years from the date of the first of three or more violations of which it is repetitive, a monetary penalty not to exceed the loss of revenue will be assessed.

In the case of a fraudulent violation, the statute makes no distinction between drawback compliance program participants and those who do not participate in the program: a fraudulent violation gives rise to a monetary penalty in an amount not exceeding three times the loss of revenue or, if there has been a prior disclosure regarding the fraudulent violation, an amount not exceeding the loss of revenue.

Under the guidelines, the penalty for a fraudulent violation not involving prior disclosure ranges from a minimum of 1.5 times the actual or potential loss of revenue up to a maximum of three times the actual or potential loss of revenue. With prior disclosure, the maximum penalty for a fraudulent violation becomes 100% of the actual or potential loss of revenue. As with the statute, the guidelines make no distinction between drawback compliance program participants and non-participants when it comes to fraud violations.

If there has been a valid prior disclosure regarding a negligent violation, drawback compliance program participants and those who do not participate in the program are also treated the same: the violator is subject to a monetary penalty that may not exceed an amount equal to the interest computed on the basis of the prevailing rate of interest applied under 26 U.S.C. § 6621 on the amount of actual revenue of which the United States is or may be deprived during the period from the date of overpayment of the claim to the date of tender of the overpaid amount.

In order to obtain the benefits of prior disclosure in both fraud and negligence cases, tender of the amount of the overpayment is required either at the time of disclosure, or within 30 days (or such longer period as CBP may provide) after CBP gives notice of its calculation of the amount of the overpayment.

8.400 Civil Trade Enforcement – 19 U.S.C. § 1595a

19 U.S.C. 1595a(a) provides for the forfeiture of personal property used to facilitate the illegal introduction of merchandise into the United States, as well as personal property used in most subsequent activities that are part of a scheme to make use of such merchandise after its illegal introduction.

Specifically, the statute provides for forfeiture of not only items such as vessels, vehicles, aircraft, or other *things* used to aid in, or to facilitate, the illegal *introduction* or attempted introduction of merchandise into the United States, but also of personal property used in most subsequent activities such as harboring and transporting that might reasonably be assumed to be a necessary part of any scheme to make use of such merchandise after its illegal introduction.[351] Under the statutory language, it is not required that the importation or bringing in was upon such vessel, vehicle, etc.[352] Section 1595a(a) excepts conveyances used as common carriers, which are covered by 19 U.S.C. 1594(b) and (c).

351 19 U.S.C. 1595a is the civil counterpart of 18 U.S.C. 545.

352 *U.S. v. Cahill*, 13 F.2d 83 (1st Cir. 1926)(vehicle on which smuggled merchandise is found is subject to forfeiture though not shown to have been used in moving same). Although the statute does not require that the bringing in be upon such vehicle or vessel, courts have required a significant connection between the thing being seized and the violation of law before finding that it has "facilitated" the action.

19 U.S.C. 1595a enables the Government to seize, and under 1595(c) forfeit, merchandise that meets certain conditions; however Congress did not intend a requirement for the property to have been introduced (or attempted to have been introduced) *into the commerce of the United States* for the statute to apply. To establish a violation the government does not have to prove that the merchandise actually entered the stream of commerce.[353]

8.410 Definition of relevant terms in a 1595a case

"Introduction Contrary to Law"

The term "introduction" was defined by the U.S. Supreme Court in several cases involving 18 U.S.C. 545. The rule announced by the Supreme Court is that "introduction" means bringing the goods ashore or landing them in the United States, rather than entering or attempting to enter the goods into the commerce itself. An "introduction" into the United States occurs when the goods are simply landed in the United States. *Keck v. United States*, 172 U.S. 434 (1899).

In *United States v. Ritterman*, 273 U.S. 261 (1927) the U.S. Supreme Court clarified its decision in *Keck*:

> *Keck v. United States* did not decide that a man who wishes to smuggle must wait until he can find a custom house. Rather, its effect is simply that the custom line is not passed by goods at sea when they pass the three-mile limit and have not yet been landed.[354]

The phrase "contrary to law" in 19 U.S.C. 1595a means contrary to any law, including the customs laws. It does not have to relate to or concern a duty loss.[355] The term "law" as used in the phrase "contrary to law," includes administrative regulations.[356] But see *U.S. v. Alghazoulie*, 517 F.3d 1179 (9th Cir. 2008).

353 *U.S. v. Lehman*, 225 F.3d 426 (4th Cir. 2000)(goods were "introduced" when they were moved from the ship that transported them to the warehouse on United States soil).

354 *See United States v. 218 1/2 Carats of Loose Emeralds*, 153 F. 643 (S.D.N.Y. 1907) aff'd 154 F. 838 (8th Cir. 1907).

355 *See*, e.g., *Callahan v. United States*, 285 U.S. 515,516 (1932)(unlicensed liquor prohibited from importation under National Prohibition Act found to be imported contrary to law); see also *United States v. One 1976 Mercedes 450 SLC*, 667 F.2d 1171 (5th Cir. 1982) and *United States v. One Eighteenth Century Colombian Monstrance*, 797 F. 2d 1370 (5th Cir.), reh. denied, 802 F.2d 837 (1986), cert. denied *Newton v. United States*, 481 U.S. 1014 (1987); see also *United States v. Fifty Waltham Watch Movements*, 139 F. 291, 298-99 (N.D. N.Y. 1905)(duty free merchandise found to be imported contrary to law).

356 *United States v. Mitchell*, 39 F.3d 465 (4th Cir. 1994).

"Article"

No definition for the term "article" appears in the statute; however "article" is considered synonymous with "merchandise" as defined in 19 U.S.C. 1401(c). The definition of "merchandise" in 19 U.S.C. 1401(c) includes prohibited merchandise such as controlled substances and also includes monetary instruments.

"Equipment"

The one reported court case interpreting the definition of "equipment" as used in section 1595a accepted the definition set forth in a 1914 Treasury Department decision[357]:

> Portable articles necessary or appropriate for the navigation, operation, or maintenance of a vessel, but not permanently incorporated in or permanently attached to its hull or propelling machinery and not constituting consumable supplies. The term includes, therefore anchors, chains, tackle, boats, repair parts, life-saving apparatus, nautical instruments, signal lights, lamps, furniture, carpets, table linen, table ware, bedding, arms and munitions.

8.420 Real Property in a § 1595a case

While it has been argued that the seizure and forfeiture of real property used to facilitate or conceal unlawful importations is authorized under section 1595a(a), no case has ruled on whether real property is a "thing" within the meaning of 1595a(a), even though 1595a(a) has often been cited in conjunction with 21 U.S.C. 881 to authorize forfeiture of real estate. Whether seizure of real property can be made under 1595a(a) should be discussed in advance with the appropriate U.S. Attorney and Associate/Assistant Chief counsel. Furthermore, judicial process must be used in all real property seizures.[358]

8.430 19 U.S.C. 1595a(b) - Penalties

8.431 Generally

19 U.S.C. 1595a(b) provides for the assessment of a civil penalty against all persons who direct, assist financially *or otherwise*, *or who are in any way concerned in any unlawful activity mentioned in 19 U.S.C. 1595a(a)* regarding the importation or bringing in any article into the United States contrary to law. Every person shall be liable for a penalty equal to the value of the article or

357 26 Treas. Dec. 34150, at 184.

358 *See* Attorney Practice Guide, Section C, Chapter 2, attachments for sample litigation report and forfeiture complaint under 1595a(a).

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articles introduced or attempted to be introduced. Although other Customs statutes like 19 U.S.C. 1481, 1484 and 1485 on their face apply to importers of record, 1595a(b) applies to every person who is "in any way concerned" in any unlawful activity mentioned in 19 U.S.C. 1595a(a), so it is much broader as to who is liable for a penalty. Unlawful "bringing in" of merchandise is one of many acts that can subject an individual to penalties. It is not the single requirement to establish liability for a penalty under section 1595a(b).[359]

19 U.S.C. 1595a(a) specifically mentions the unlawful activities of "the importation, bringing in, unlading, landing, removal, concealing, harboring, or subsequent transportation of any article which is being or has been introduced, or attempted to be introduced into the United States contrary to law".

8.432 Persons Liable

The statute states that *every* person covered by the statute *shall* be liable to the United States for a penalty equal to the value of the merchandise introduced contrary to law. Thus, there can be multiple penalties under 1595a(b) involving one importation or introduction of merchandise. The United States need only establish that the defendants were connected with the scheme to import or introduce merchandise into the United States contrary to law to recover penalties based upon the value of the merchandise.

For example, a person possessing cultural property may not be the smuggler/importer, but rather a buyer, broker or "fence" who is liable under 1595a(b) for a penalty for merchandise brought into the United States unlawfully. The appropriate Associate Chief Counsel or Assistant Chief Counsel's Office should be consulted for additional legal advice on this subject.

There is no express intent requirement set forth in the statute. The burden of proof is by preponderance of the evidence, unlike the clear and convincing standard in fraud cases under 19 U.S.C. 1592. The burden of proof lies with the defendant, provided that the Government demonstrates probable cause for institution of the suit.[360] In cases involving both a penalty and a forfeiture, the penalty action must be brought against the persons, not just the property being forfeited. The penalty must be alleged in the complaint in district court.

8.433 Liquidation of Entries Does Not Preclude Penalty

In a 1595a(b) action the United States is not seeking duties; it is seeking a penalty. 19 U.S.C. 1595a(b) does not provide for the restoration of lawful duties evaded as the result of a person's involvement in a scheme to introduce articles into the United States contrary to law. 1595a(b) provides for a penalty measured by the value of the articles so introduced. While liquidation limits

[359] *See* Attorney Practice Guide, Section C, Chapter 1, Attachments 9 and 10 for example of complaint and referral letters under 1595a(b).
[360] 19 U.S.C. § 1615.

CBP's ability to administratively assess and judicially collect duties on an entry, it does not preclude the United States from seeking a penalty under 1595a(b). For example, liquidation of an entry containing false statements does not preclude the United States from seeking 1595a(b) penalties for aiding unlawful importation by persons connected with schemes employing such false entry declarations. Congress did not provide an exception to 19 U.S.C. 1514 in 1595a(b) because 1595a(b) authorizes the recovery of a penalty against persons concerned in any way with unlawful "introductions" of merchandise, not the recovery of duties.

8.434 Jurisdiction in District Court not the Court of International Trade

Jurisdiction of a 1595a(b) penalty action resides in the district courts pursuant to 28 U.S.C. 1355(a), rather than the Court of International Trade which has exclusive jurisdiction of all 19 U.S.C. 1592 actions pursuant to 19 U.S.C. 1582, including independent actions to restore lawful duties under 19 U.S.C. 1592(d).

"The assessment and collection of duties is an administrative matter." *United States v. Sherman*, 237 U.S. 146, 153 (1915). The statutes imposing penalties for violations of customs laws are entirely separate and distinct from statutes governing the determination of duties. *Border Brokerage Co. v. United States*, 166 F. Supp. 943, 950 (Customs Ct. 1958).

8.435 19 U.S.C. 1514 Does Not Apply to a Penalty Case

The finality of liquidation provision of 19 U.S.C. 1514(a) applies only to the administrative assessment and collection of duties and does not apply to actions seeking to recovery statutory penalties for fraud (1592) or introduction of articles contrary to law (1595a(b)).

Courts have declined to extend the finality of liquidation of 19 U.S.C. 1514(a) to bar criminal or civil penalty actions because 1514(a) applies to administrative matters, not criminal or penalty actions.[361]
19 U.S.C. 1592(d) is the only provision under 19 U.S.C. 1592 that contains an exception to 19 U.S.C. 1514. Under 1592(d), if the United States has been deprived of lawful duties by a person's fraud, gross, negligence, or negligence in entering or introducing merchandise into the commerce of the United States by means of a false document, statement or act, then, notwithstanding the finality provisions of 1514, CBP shall require such person to restore such lawful duties, whether or not a monetary penalty is also assessed under 1592(c). 1592(d) is an exception to the finality provisions of 1514 because it creates an independent

361 *United States v. Godinez*, 922 F. 2d 752, 755 (llth Cir. 1991)(Liquidation statutes not relevant to criminal prosecution under 18 U.S.C. 541 charging false statements regarding classification of foreign goods); *United States v. Dantzler Lumber & Export Co.*, 810 F. Supp. 1277, 1284 (C.I.T. 1992)(Liquidation statutes not a bar to 19 U.SC. 1592(c) civil penalty action for fraud, gross negligence or negligence in entry of merchandise).

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cause of action for duties only. The right to recover lawful duties under 1592(d) is independent of, and in addition to, any penalties that may be imposed under 1592(c). The 1592(d) reference to 1514 is consistent with the finality of liquidation under 1514(a) pertaining solely to CBP's duty assessments and not to penalties. The finality of 1514 applies only to duty assessment and collection, not to the recovery of penalties for wrongful violation of customs laws. 19 U.S.C. 1592(d) references 1514 because it provides a means for CBP independent of the liquidation and reliquidation provisions to recover duties, not a penalty.[362]

8.436 Amount of Penalty is "Domestic Value"

The penalty assessed under 1595a(b) is an amount equal to the value of the article or articles unlawfully introduced. The term "value" under 1595a(b) means "domestic value" pursuant to 19 U.S.C. 1606 and 19 C.F.R. 162.43. Section 1606 is an appraisal statute that applies to merchandise that has been seized and to merchandise that has not been seized but for which a penalty has been assessed.[363]

"Domestic value" is defined as "the price at which such or similar property is freely offered for sale at the time and place of appraisement, in the same quantity or quantities as seized, and in the ordinary course of trade." 19 C.F.R. 162.43(a)(2008). Freight, profit, and duty are therefore included.[364] "Domestic value" is the resale value of the merchandise in the United States and an amount equal to the duties is normally used as part of this calculation whether or not the duties were paid.

8.437 Personal Jurisdiction Over Defendants

Under the federal rules of civil procedure, a federal district court may exercise personal jurisdiction over any defendant "who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located." Fed. R. Civ. P. 4(k)(1)(A). A court may also assert jurisdiction

362 Congress enacted 1592(d) pertaining to duties and 1592(c) pertaining to penalties at the same time. Pub. L. 95-410, 92 Stat. 888, 893-896. The fact that Congress included an exception to 1514 in 1592(d) pertaining to duties when it enacted these provisions demonstrates that such an exception was not needed to assess a penalty.

363 *See United States v. Wing Leong*, 287 F.2d 849 (7th Cir. 1961), in which the United States sought a penalty under 1595a(b) based on the domestic value of the merchandise pursuant to 19 U.S.C. 1606. Although the court found that a dispute existed as to how the domestic value of the merchandise was calculated, the court assumed that the domestic value of the unlawfully imported merchandise was the value for determining the penalty.

364 *See U.S. v. Pan Pacific Textile Group*, 2006 Ct. Intl. Trade LEXIS 17 (CIT 2006)("In contrast, transaction value is the general standard for determining the dutiable value of importer merchandise. 19 U.S.C. @1401(a)(1)(A) (1999)"; *United States v. Quintin*, 7 CIT 153, 158, n.3 (1984).

when a defendant "has purposefully directed its activities at the forum state and the 'litigation results from alleged injuries that arise out of or relate to those activities.'" *Id.* at 215 (quoting *Burger King Corp. v Rudzewicz*, 471 U.S. 462, 472 (1985). A court may also assert general jurisdiction over a nonresident defendant "when that defendant's contacts with the forum state, although not related to the plaintiffs' cause of action, are 'continuous and systematic'".[365]

It is not necessary that the defendant ever physically enter the forum state. *Burger King*, 471 U.S. at 476 (citing *Keeton v. Hustler Magazine*, 465 U.S. 770, 774-75 (1984)). At least in the case of "commercial actor(s)", minimum contacts can be found when that actor purposefully directs his or her conduct at residents of the forum state. *Id.* However, the government's unilateral conduct in relation to a nonresident defendant is not sufficient to establish "minimum contacts" with the forum state.[366] The exact degree and extent of conduct that will qualify as "minimum contacts" will depend on the activity involved.

Once it is found that a nonresident defendant meets the "minimum contacts" requirement, there is a second requirement that the exercise of jurisdiction over that defendant does not offend traditional notions of fair play and substantial justice. It is the defendant's burden to show that personal jurisdiction over him would be unfair. This requires that defendants "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable."[367] The assertion of jurisdiction is "less likely to be considered unfair when the defendants are 'experienced and sophisticated" businessmen."[368]

8.438 Venue

Venue refers to the geographic location where the case can be brought. Under the general venue statute, in a civil action where jurisdiction is not founded on diversity, venue is proper in a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." 28 U.S.C. 1391(b). Under 28 U.S.C. 1395(a), venue for a penalty under 19 U.S.C. 1595a(b) is proper in the district where the defendant is found or where the action accrues for a civil proceeding for recovery of a pecuniary fine.[369] Under 28 U.S.C. 1395(c), prosecution of a civil forfeiture proceeding may be in any judicial district where the property is brought if the property was seized outside any judicial district.[370]

365 *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).
366 Id. At 474-475(citing *Hanson v. Denkla*, 357 U.S. 235, 253 (1958).
367 *Burger King*, 471 U.S. at 484-85.
368 Id.
369 *See United States v. Serfling*, 1997 U.S. Dist. Lexis 10587 (N.D. Ill. 1997).
370 *See* Chapter One, Section 1.800 Jurisdiction and Venue, and Section 1.910 Burdens of Proof . See also Chapter 15, Forfeiture, Section 15.141 on venue.

Venue for In-Bond Merchandise: Based on the venue statutes for penalties and forfeitures, in a case involving the transportation of merchandise in-bond, the venue will depend on the facts of the case. In some cases venue may be appropriate in more than one jurisdiction. If the merchandise itself is violative, the case can be brought where the merchandise was landed. In some cases the actions "contrary to law" do not occur until merchandise otherwise lawfully entered in-bond is diverted. For example, in cases where the only false documents filed with CBP are at the final destination port, then a substantial part of the events giving rise to the penalty occurred there, and did not occur when the merchandise was initially "introduced" or landed.

8.439 Statute of limitations for cases under 19 U.S.C. 1595a

Under 19 U.S.C. 1621, no suit or action to recover any pecuniary penalty accruing under the Customs laws shall be instituted unless it is commenced within five years "after the time the alleged offense was discovered" or in the case of forfeiture, within two years "after the time when the involvement of the property in the alleged offense was discovered, whichever was later". The time of the absence from the United States of the person subject to the penalty or forfeiture, or any concealment or absence of the property, shall not be reckoned within the five year period of limitation. This statute of limitations, and not the 19 U.S.C. 1514 provisions governing the administrative relationship between CBP and importers, applies for penalty actions under 19 U.S.C. 1595a(b). Liquidation of entries does not afford defendants any protection from liability for a penalty under 1595a(b), which concerns their involvement in the unlawful introduction scheme.

In cases not involving the seizure of property, courts have interpreted the relevant discovery language of section 1621 to mean that the statute of limitations begins to run when a party discovers or possesses the means to discover the alleged wrong, whichever occurs first. The determination of when the statute of limitations begins to run is a fact-specific inquiry.[371]

8.440 19 U.S.C. 1595a(c)

If merchandise is introduced or attempted to be introduced into the United States and it is in violation of one of the provisions of law enumerated in 19 U.S.C. 1595a, then it shall or may be forfeited to the United States depending on the nature of that merchandise, as set forth in 19 U.S.C. 1595a(c). 1595a permits the government to forfeit the merchandise and assess a penalty under subsection (b).

[371] *See United States v. Shabahang Persian Carpets, Ltd.*, 926 F. Supp. 123 (E.D. Wis. 1996)(Court granted carpet company's motion for summary judgment and dismissed with prejudice United States' penalty action under 19 U.S.C. 1595a(b) because the statute of limitations had run on the action).

Forfeiture of articles/merchandise under 19 U.S.C. 1595a(c) is discussed in Chapter 15.

It should be noted that because 19 U.S.C. 1595a(c) is a Title 19 statute, 19 U.S.C. 1595a is a "carve-out" to the CAFRA statute, and many provisions of the CAFRA statute and CAFRA regulations do not apply to forfeitures brought under 19 U.S.C. 1595a(c). Again, see chapter 15.

18 U.S.C. 983(i) specifically excludes forfeitures under Title 19[372], such as 19 U.S.C. 1595a(a)-(c) from the definition of "civil forfeiture statute", so that many of the CAFRA provisions do not apply, such as the CAFRA timing for a notice of seizure, how a claim for judicial forfeiture is filed, the lack of a cost bond requirement, the CAFRA timing for filing a claim for judicial forfeiture, and when the government must file a judicial forfeiture complaint.[373]

8.450 Seizure and Forfeiture for Exportations Contrary to Law – 19 U.S.C. 1595a(d) –

In 2006, 19 U.S.C. 1595a was amended to include a new section, 1595a(d), which provides for the seizure and forfeiture of merchandise exported or sent from the United States (or attempted to be exported or sent from the United States) contrary to law, or the proceeds or value thereof, and property used to facilitate the exporting or sending of such merchandise, the attempted exporting or sending of such merchandise, or the receipt, purchase, transportation, concealment, or sale of such merchandise prior to exportation. The new provision states that such merchandise *shall* be seized and forfeited.

However, unlike importations, the statute does not provide for a penalty under 1595a(b) for exportations contrary to law.

8.460 Parallel criminal provision for exportations contrary to law – 18 U.S.C. 554

In 2006, a new criminal provision, 18 U.S.C. 554, which addresses "Smuggling Goods from the United States" and which parallels 19 U.S.C. 1595a(d), was enacted under the "Patriot Reauthorization Act".[374] 18 U.S.C. 554 pertains to exportations contrary to any *law or regulation* of the United States, and includes

372 18 U.S.C. 983(i) also specifically excludes forfeitures under 22 U.S.C. 401, the primary forfeiture provision for exports contrary to law, prior to the enactment of 19 U.S.C. 1595a(d), discussed post.

373 Other provisions of CAFRA apply to all civil forfeitures, such as compensation for damage to seized property; attorney fees, costs, and interest; provisions of the civil forfeiture of real property codified at 18 U.S.C. 985; fugitive disentitlement, codified at 28 U.S.C. 2466; and the criminal forfeiture alternative provision.

374 USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006), Section 311(a) codified at 18 U.S.C. 554.

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fraudulently or knowingly exporting or sending from the United States, or attempting to export or send from the United States, any merchandise, article, or object contrary to *any law or regulation* of the United States, or receiving, concealing, buying, selling, or in any manner facilitating the transportation, concealment, or sale of such merchandise, article or object, prior to exportation, knowing the same to be intended for exportation contrary to any *law or regulation* of the United States.[375]

8.500 Civil Trade Enforcement – Liquidated Damages

Liquidated damages arise from a breach of the terms and conditions of a contract. Liquidated damages are not penalties.[376] They represent an amount, agreed upon in advance, which will be owed by a party who breaches or breaks the contract. Parties agree to liquidated damages in situations where it is difficult to determine the exact damages caused by a breach. In the context of CBP liquidated damages claims, the contract is a customs bond and liquidated damages are assessed for failure to comply with various laws enforced by the Agency.[377]

8.510 Customs Bonds

CBP requires bonds to be filed by parties engaged in various Customs activities. These include importers of record, custodians of merchandise (e.g. warehouseman), as well as in-bond and international carriers of merchandise. These bonds are required to ensure compliance with a variety of obligations, relating to the entry, storage, and transportation of imported goods, into and through, the United States.[378] CBP is authorized by 19 U.S.C. §1623 to require

375 In 2006 another criminal statute numbered 18 U.S.C. 554 was also enacted. Pub.L. 109-295, Title V, Sec. 551(a), 120 Stat. 1389. This second statute establishes a violation for knowingly constructing or financing the construction of a tunnel or subterranean passage across the border, or knowingly or recklessly disregarding the construction or use of a tunnel or passage on land that the person owns or controls, as well as using a tunnel or passage to smuggle aliens, goods, controlled substances, WMD's or a member of a terrorist organization as defined in section 2339B(g)(6).

376 Penalties are assessed for a violation of a statute and in an amount provided for by statute. See also, *Restatement (Second) of Contracts* §356 (1981).

377 19 U.S.C. § 1623(a) authorizes bonds or "other security" (1) to protect the revenue and/or (2) to "assure compliance with any [law that CBP is] or may be authorized to enforce." Duties and taxes are the main types of "revenue." Liquidated damages are not revenue despite the fact that they often feature a revenue component that can range from small to large. The primary purpose of liquidated damages is to "assure compliance" with laws enforced by CBP. See, 19 C.F.R. §§ 113.62-.75.

378 *See*, 19 C.F.R. Part 113, Subpart G and Appendices for a complete list (the subpart contains the terms of each type of bond). It is rare for CBP to find that "other security" is acceptable. *See*, 19 C.F.R. § 113.40 (cash-in-lieu of bond);

an importer to provide a bond or other security as CBP "deem[s] necessary for the protection of the revenue or to assure compliance with any provision of law, regulation, or instruction which [CBP] ... may be authorized to enforce." The bond is a contract between the principal (such as an importer, carrier, warehouseman, etc.) and the surety, with CBP as the third party beneficiary of the bond. If there is a breach of an obligation under a bond, such as a failure of the importer to comply with a proper request to redeliver merchandise to CBP custody, CBP issues a claim for liquidated damages at an amount prescribed under the terms of the bond. As the guaranteeing party, the surety is legally liable, or "stands in the shoes of" the bond principal, if the principal fails to pay the liquidated damages claim.

There are two main types of surety bonds: continuous bonds and single transaction bonds. Single transaction bonds cover a single entry of merchandise or a single arrival of a conveyance. Continuous bonds cover all transactions occurring during a one-year period[379] or, if the bond is terminated early, part of a year. Unless terminated pursuant to 19 C.F.R. §113.27, continuous bonds renew automatically on their anniversary date. This renewal marks the beginning of a new "annual period." Thus, no action is required to make a "continuous bond" renew each year for an additional "annual period." Note that a custodial bond must, pursuant to 19 C.F.R. 113.63, be a continuous bond.

Four common activities secured by Customs bonds are:[380]

1. Basic importation and entry [381] – Parties such as importers and customs brokers file importation and entry bonds with CBP. Basic importation and entry bonds require payment of estimated duties when due, payment of liquidated amounts upon demand, completion of the entry process, production of entry documents as required, redelivery of merchandise on demand, holding merchandise for examination, and so on. The bond specifies the liquidated damages incurred for failure to comply with its requirements.[382]

see also, 19 C.F.R. §§ 113.1 and 113.2.

379 The annual period need not correspond to the calendar year. Thus a continuous bond's annual period might run from June 1 through the following May 31.

380 Some additional types of Customs bonds cover: a) Control of containers and instruments of international traffic – see 19 C.F.R. 113.66; b) Commercial gauger and commercial laboratories – see 19 C.F.R. 113.67; c) Wool and fur products labeling acts and fiber products identification act – see 19 C.F.R. 113.68; d) Production of bills of lading – see 19 C.F.R. 113.69; e) Bond to indemnify U.S. for detention of copyrighted material – see 19 C.F.R. 113.70; f) Bond condition to observe neutrality – see 19 C.F.R. 113.71; and g) Bond condition to pay court costs (claim and cost bond) – see 19 C.F.R. 113.72.

381 19 C.F.R. §113.62.

382 19 C.F.R. § 113.62(l).

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Some examples of the types of infractions that may constitute a breach of an importation (or entry) bond include: 1) late filing or non-filing of entry summaries; 2) late payment or non-payment of estimated duties; 3) temporary importation violations; and 4) failure to redeliver merchandise into customs custody.[383]

2. Custodial [384] – Parties such as the operators of warehouses, container freight stations (CFS), centralized examination stations (CES), and duty free stores are responsible for properly recording and controlling merchandise in their care. They file custodial bonds with CBP. Some examples of the types of infractions that may constitute a breach of a custodial bond include cases where: 1) merchandise cannot be located or accounted for in a duty-free store, or bonded warehouse; 2) merchandise has been removed without permit or inconsistent with regulation; 3) merchandise has been deposited, manipulated, manufactured, or destroyed without permit, or inconsistent with the activity described in the permit; or 4) merchandise that is misdelivered or irregularly delivered by an in-bond carrier.[385]

3. International carrier [386] – Parties such as airlines, cruise lines, cargo vessels, and commercial trucking companies, file international carrier bonds with CBP. International carrier bonds cover duties, fees, and even penalties owed by carriers. Some examples of the types of infractions that may constitute a breach of an international carrier bond are: 1) conveyance arrival or reporting violations, such as failure to immediately report a vessel arrival to CBP; 2) manifest penalties, such as failure to have a manifest, deliver a manifest upon arrival, possess an adequate manifest, or file a manifest discrepancy report to CBP; 3) cargo delivery or unlading violations, such as failure to deliver merchandise to a CES, delivery of merchandise without CBP authorization, unlading without a permit, failure to timely notify CBP of unentered or unclaimed general order merchandise, or coastwise trade violations; and 4) "passenger processing fees," (i.e., user fees per 19 U.S.C. §58c) collected but not paid over to CBP in a timely manner.[387]

4. Drawback [388] – Drawback bonds secure the return of erroneous or fraudulent accelerated drawback payments on demand.

383 *See* 19 CFR 113.62 for basic importation and entry bond conditions.
384 *See,* 19 CFR 113.63, for basic custodial bond conditions and 19 CFR 113.73, for foreign trade zone operator bond conditions.
385 *Id.*
386 19 C.F.R. §113.64.
387 19 C.F.R. §113.64(a). A "user fee" can be used by an agency, unlike virtually all other types of revenue which must be deposited into the Treasury as a miscellaneous receipt. CBP uses section 58c "passenger processing fees" to pay for much of CBP's inspectional services and related operations. Continuous international carrier bonds secure the payment of these fees.
388 19 C.F.R. §113.65.

8.520 Assessing, Issuing, and Processing Claims for Liquidated Damages

When there is a breach of a bond condition CBP issues a liquidated damages claim. The claim is issued by the Fines, Penalties and Forfeiture Office (FP&F). Claims are frequently based upon the entered value of the merchandise or some multiple thereof. However, liquidated damages may also be based upon the domestic value of the merchandise,[389] the duties owed on the merchandise,[390] or various other criteria,[391] depending upon the applicable regulations and Customs bonds involved. Generally, a claim is not assessed for less than $100, except where law or regulation expressly provides that a lesser amount may be assessed.[392] Notice of the claim is issued to the principal, with a courtesy copy provided to the surety. If the principal fails to respond, then demand is made upon the surety.

Because the Customs bond is the basis for recovery of liquidated damages, CBP can only recover up to the limit of the bond (or, for a continuous bond, the bond amount for one "annual period" or part thereof) from the principal and the surety combined. Thus, while CBP may assess multiple liquidated damages claims which cumulatively are greater than the bond limit, the Agency will ultimately have its recoverable damages capped by the face amount of the bond.[393] The liquidated damages in excess of the bond limit are unrecoverable.

A surety may be liable for interest in excess of the bond obligation when the accrual of that interest is caused by the surety's dilatory conduct. However, this may be difficult to prove in circumstances where the surety can assert a colorable defense to liability.[394] As a result, recovery of this type of interest is rare.

389 *See, e.g.*, Liquidated damages in the case of merchandise violative of FDA admission requirements which the importer failed to redeliver as required. 19 C.F.R. §12.3.

390 *See, e.g.*, temporary importation bonds (two times the duties or 110 percent of the duties depending on the HTSUS number, with the term "duties" including the merchandise processing fee), ATA Carnets (110 percent of the duty), late payment of estimated duties (double the unpaid duties or $1,000, whichever is greater), and late payment of duties paid with a reconciliation entry (double the unpaid duties or $1,000, whichever is higher).

391 *See, e.g.*, late SED violations or late filing of outbound bills of lading ($50/day for the first three days late, $100/day for each succeeding day late, up to a maximum of $1,000 per default), non-merchandise custodial bond or FTZ bond violations ($1,000 per default), airport security violations ($1,000 per default), and failure to notify CBP and/or bonded warehouse of GO eligible merchandise ($1,000 per bill of lading).

392 *See, e.g.*, a claim for late filing of SED or export documents necessary to complete outward manifest that is one day late. Assessment of $50 is mandated by regulation. Also, carnet violations may be issued for less than $100.

393 Insofar as some of the claims might ultimately be dismissed or mitigated, it can still be beneficial to issue claims which, in total, exceed the bond amount.

394 *See, e.g.*, *United States v. Washington Int'l Ins. Co.*, 177 F.Supp.2d 1313 (Ct.

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The continuous bond in effect at the time a transaction is commenced is the one which covers the liquidated damages claim arising out of the transaction. The key date for determining which continuous bond secures a liquidated damages case is the date of entry.[395] Thus the bond under which liquidated damages are claimed may not necessarily be the one in effect at the time the violation of the bond conditions is discovered. For example, the international carrier bond presented for the arrival and clearance of a particular conveyance covers all obligations concerning the reporting of that arrival and clearance (including manifesting of cargo, unlading of merchandise, etc.). If a violation is discovered in a subsequent audit, the bond which was presented for the arrival at issue would be charged, even if another bond had subsequently been obtained by the carrier in the interim.

Superseding bonds are treated similarly. A superseding bond filed in the name of another party (usually the actual owner or consignee) at the time of filing the entry summary will shift liability for any subsequent obligations (e.g., increased duties, redelivery notices issued after presentation of the superseding bond). However, it will not make the party named in the superseding bond liable for previously vested obligations such as payment of estimated duties.[396]

8.530 Mitigation & Cancellation

Once a claim for liquidated damages has been issued, the principal or surety may file an administrative petition for cancellation or mitigation pursuant to 19 C.F.R. Part 172. Pursuant to 19 U.S.C. 1623(c), CBP may cancel claims for liquidated damages made against a bond, upon payment of a lesser amount or penalty, or upon such other terms and conditions as CBP deems sufficient.[397] Such relief is voluntary and permissive on the part of the Agency and is granted at its discretion. However, this discretionary mitigation is frequently afforded by the Agency pursuant to guidelines authorized by 19 U.S.C. §1623(c). Such guidelines are intended to ensure that CBP exercises its discretion in a consistent and non-arbitrary manner.

Int'l Trade 2001).

395 Other dates, such as the release date, arrival date, violation date, breach date, may be significant in other contexts, but do not affect which bond applies to the transaction.

396 Thus, the importer of record on a CF-3461 who uses his bond to effect release of goods is responsible for the payment of estimated duties even if a superseding bond was ultimately filed on the entry.

397 19 U.S.C. §1623(c) and CBP's related regulations use the word "cancellation" and forms thereof. *See*, 19 C.F.R. §113.51. The use of that word in this context can be somewhat confusing. When CBP resolves a liquidated damages case by full payment, partial payment (a mitigated amount or an offer-in-compromise), or otherwise, there is not a cancellation of the underlying bond. When CBP "cancels" a liquidated damages case per 19 C.F.R. §172.11, it is simply canceling a single, specific claim. The bond, whether continuous or single transaction, remains valid and in effect.

Guidelines for liquidated damages mitigation are published and can be found in the various Treasury Decisions, including:

• Treasury Decision (T.D.) 99-29, covering claims relating to General Order notification, misdelivery of in-bond cargo and delivery of merchandise from Container Freight Stations or Centralized Examination Stations without Customs authorization;

• T.D. 94-38, covering claims relating to late filing of entry summaries, TIBs, failure to redeliver merchandise to Customs custody, bonded warehouses, foreign trade zones, Shipper's Export Declaration (SED) and outbound (export) violations, and airport security;

• T.D. 01-41, covering claims arising from violation of foreign trade zone regulations; and

• T.D. 02-20, covering claims relating to failure to redeliver merchandise, failure or late filing of NAFTA duty deferral entries, failure to comply with trade fair regulations, and breach of ATA or TECRO/AIT carnets.

Petitions are filed with the FP&F office designated on the claim.[398] FP&F officers have authority to mitigate and cancel liquidated damages claims up to $200,000.[399] Claims exceeding $200,000 are referred to the Chief, Penalties Branch, Regulations and Rulings (R&R, Office of International Trade).[400]

Generally, the petition must be filed within 60 days of the liquidated damages notice.[401] If the principal fails to file a petition within 60 days, CBP will make demand upon the surety.[402] The surety stands in the shoes of the principal and may raise any defense that the principal could raise. The surety can also petition for relief. The principal or surety may file a supplemental petition if they are not satisfied with CBP's decision on their original petition.[403] These supplemental petitions are usually reviewed by R&R.[404]

8.540 Termination of Continuous Bonds

Mitigation and cancellation is distinct from termination of bonds. A bond can only be terminated by the principal or surety, not by CBP.[405]

398 19 C.F.R. §172.2.
399 19 C.F.R. §172.11 and T.D. 00-58, 34 Cust. B. & Dec. No. 407 (July 25, 2000).
400 19 C.F.R. §172.12 and T.D. 00-58, 34 Cust. B. & Dec. No. 407 (July 25, 2000).
401 19 C.F.R. § 172.3.
402 19 C.F.R. §172.4.
403 19 C.F.R. §172.41.
404 19 C.F.R. §172.42.
405 19 C.F.R. §113.27.

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A request by a principal to terminate a bond shall be made in writing to the port director and shall take effect on the date requested, if the date is at least 10 business days after the date of receipt of the request. [406] Otherwise the termination is effective on the close of business 10 business days after the request is received by the port.

A surety may, with or without the consent of the bond principal, terminate a Customs bond on which it is obligated.[407] The surety shall provide reasonable written notice of termination to the port director and the principal, via certified mail. Thirty days is usually required unless the surety can show, to the satisfaction of the port director, that a lesser time is reasonable under the circumstances.

Although CBP does not terminate bonds, CBP can require additional bonding from a principal and surety if it believes that acceptance of a transaction secured by a continuous bond would place the revenue in jeopardy or otherwise hamper the enforcement of Customs laws or regulations.[408]

Termination of a bond does not extinguish any obligations under the bond that were undertaken while the bond was in force, nor does it cancel any claims for liquidated damages assessed against a bond for violations arising while it was in force.[409]

8.550 Offers in Compromise

The decision by FP&F to mitigate a liquidated damages claim is effective for a limited period of time, 60 days from the date of the notice to mitigate.[410] If either payment of the mitigated amount is not timely made (or a supplemental petition, if applicable, is not timely filed), the full amount of liquidated damages is deemed due. FP&F may still accept the late payment of a mitigated claim so long as some additional amount is offered. This is accomplished by treating the late payment of the mitigated claim as an offer in compromise (OIC) pursuant to 19 U.S.C. §1617. The main administrative difference between treating such a payment as an OIC rather than as a payment of the mitigated amount is that FP&F must refer an OIC to the Assistant Chief Counsel, Indianapolis for a recommendation on acceptance.[411]

After Counsel makes its recommendation, authority to accept the OIC rests with the entity which had authority to resolve the petition (either FP&F or OR&R).[412] An OIC is accepted only when the offeror (i.e. the principal or surety) has first

406 19 C.F.R. §113.27(a).
407 19 C.F.R. §113.27(b).
408 19 C.F.R. §113.13.
409 19 C.F.R. §113.3.
410 19 C.F.R. §172.21.
411 19 C.F.R. §172.32.
412 *Id.*

tendered payment along with its offer and has been notified of acceptance in writing.[413]

8.560 Protests and Liquidated Damages Claims

In and of themselves, claims for liquidated damages are not protestable pursuant to 19 U.S.C. §1514.[414] However, the CBP action forming the basis of the liquidated damages claim may itself be the subject of a protest. This can arise regarding protestable underlying decisions such as those involving classification or admissibility (e.g. an importer who received a notice of redelivery but failed to redeliver the merchandise could be subject to a liquidated damages claims for the failure to redeliver. While the importer could not file a protest as to the liquidated damages claim, it could protest the underlying notice of redelivery.).

Due to the fact that most types of liquidated damages regularly receive substantial mitigation, it is unusual for a principal or surety to choose to challenge an assessment of liquidated damages by means of a protest of the underlying CBP action even where they could do so. However, these situations sometimes arise when the liquidated damages are of a type for which the mitigation guidelines either do not allow for substantial mitigation, or where even substantial mitigation would still leave the violator and surety liable for a significant amount of money.

In such circumstances, CBP should not cancel the liquidated damages claims and may proceed with the case. The Agency can, if it wishes, suspend collection of the liquidated damages pending a decision on the protest. However, if the Agency does so, careful attention should be paid to ensure that the statute of limitations for the liquidated damages claim does not expire while the protest is pending.[415] Because of the complexities which can arise in such situations, it is advisable to confer with Chief Counsel when you discover that related protest and liquidated damages claims are pending.

8.570 Litigation

In most cases, FP&F issues the liquidated damages claim, and the bond principal or surety pays the claim without the involvement of counsel. However, this is not always the case, and where a liquidated damages claim is not resolved through mitigation or payment of an OIC, the case is referred to the Assistant Chief Counsel, Indianapolis for the initiation of a collection action.

413 19 C.F.R. §161.5(b) and §172.33.

414 *See*, *United States v. Toshoku America, Inc.*, 879 F.2d 815, 818 (Fed. Cir. 1989).

415 As is discussed more fully below, when the statute of limitation has only 12 to 24 months remaining, the matter should be referred to the Assistant Chief Counsel, Indianapolis, unless both the principal and surety provide satisfactory waivers of the statute of limitations.

They in turn refer the matter to the Department of Justice for commencement of litigation. There is a six-year statute of limitations for collection of liquidated damages, pursuant to 28 U.S.C. § 2415(a), against either the principal or the surety, because a bond is a contract and section 2415(a) provides the statute of limitations for contracts.

The fact of a pending related protest or petition does not toll the running of the statute of limitations and litigation may be initiated while such related proceedings are still pending.[416] If the statute of limitations compels the United States to file a collection action for liquidated damages, while an underlying protest is still pending, the parties usually agree to a stay of the collection action until the protest is resolved.

8.600 Civil Trade Enforcement – False Claims Act, 31 U.S.C. § 3729 and "reverse" false claims.

8.610 The False Claims Act

Congress passed the original False Claims Act (FCA) in 1863 as a result of investigations into the fraudulent use of government funds during the Civil War. The law was intended to reach all types of fraud that might result in financial loss to the government.[417] It does so by creating a cause of action (initiated by either the government or a private party) if a person or business attempts to collect money from the government on the basis of false information (i.e. a "false claim" for payment).

In 1986, the FCA was amended to add provisions regarding "reverse" false claims. A "reverse" false claim describes an attempt by a person or business to avoid paying money owed to the government on the basis of false information, rather than an attempt to receive payment from the government. Both forms of fraud are now covered by the FCA. A "reverse" false claim, however, can only be initiated by the government, not by a private party.

The FCA, found at 31 U.S.C. § 3729, enumerates seven distinct offenses: the first six deal with false claims filed with the government to obtain payment or the fraudulent use of government property, the seventh deals with reverse false claims, i.e. false records or statements made to decrease an obligation to pay or transmit money or property to the United States.

Liability for a reverse false claim is a civil penalty of at least $5,000 and no more than $10,000, plus three times the amount of damages that the government sustains because of the wrongful act.[418]

416 *See*, *U.S. v. Canex Int'l. Lumber Sales*, No. 06-00141, slip op. 2008-46 (CIT May 1, 2008); *U.S. v. Ataka America, Inc.*, 826 F. Supp. 495 (CIT 1993).
417 *United States v. Neifert-White Co.,* 390 U.S. 228, 232-33 (1968).
418 31 U.S.C. § 3729(a)(7).

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The elements of a reverse false claim are:

- records or statements
- knowingly [419]
- made, used, or caused to made or used
- to conceal, avoid or decrease an obligation to pay money to the U.S. government (thus, the government must prove that the U.S. was owed a specific, legal obligation at the time that the false record or statement was made or used) [420]

The statute also includes a materiality requirement.[421] The burden of proof in a FCA case is preponderance of the evidence.[422] The statute of limitations for a FCA case is six years from the date the violation was committed, or three years from the date when a responsible official of the United States knew or should have known of the violation, but in no case more than ten years from the date of the violation.[423]

8.620 Prior Disclosure

If a FCA defendant furnishes all known information regarding the false information within 30 days after receipt of payment, fully cooperates, and no criminal, civil or administrative action is pending at the time of disclosure, then the government's recovery will be limited to twice the amount of actual damages sustained by the government, assuming that the defendant had no knowledge of the investigation into the violation.[424]

419 *United States v. Bourseau*, 2008 U.S. App. LEXIS 14891 (9th Cir. 2008).

420 *American Textile Mfrs. Inst. v. The Ltd., Inc.*, 190 F.3d 729, 735 (6th Cir. 1999).

421 Courts were previously split on how to interpret the materiality requirement in FCA cases (compare *United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.,* 400 F.3d 428 (6th Cir. 2005) (adopting a "natural tendency test") with *Costner v. URS Consultants*, 153 F.3d 667 (8th Cir. 1998) (adopting a "outcome materiality test"). In 2009, however, the "Fraud Enforcement and Recovery Act of 2009" imposed an explicit materiality requirement in FCA cases adopting the "natural tendency" test. See P.L. 111-21, section 4.

422 31 U.S.C. § 3731(c).

423 31 U.S.C. § 3731(b).

424 31 U.S.C. § 3729(a).

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8.630 *Qui Tam* Actions

A FCA action may be brought by the government itself or by a private person (called a "relator") on behalf of the government. An action brought by a relator it is technically known as a "*qui tam"* action. The government has the right to intervene in a *qui tam* action, but a successful relator receives a share of any proceeds recovered in the action, whether or not the government intervenes.[425] If the government intervenes, however, it may dismiss or settle the case over the objections of the relator.[426] The relator is entitled to a hearing regarding these matters.

8.640 Jurisdiction and Venue

Generally, U.S. District Courts have jurisdiction to hear FCA cases, which may be brought in any federal district in which the defendant can be found, or in which a proscribed act occurred.[427] When, however, the FCA case is based on a theory that the defendant sought to avoid or reduce the amount of duty paid on imported merchandise by relying on a false statement or claim, the question of jurisdiction is more complicated. While U.S. District Courts have jurisdiction over FCA actions, the U.S. Court of International Trade (CIT) has exclusive jurisdiction over all actions to collect customs duties. U.S. District Courts have no jurisdiction over cases involving collection of customs duties and the Court of International Trade has no jurisdiction over FCA claims. This appears to create a jurisdictional conundrum for reverse False Claims cases involving customs duties: .there is arguably no court that has jurisdiction over the matter.[428] In the Ninth Circuit in particular, jurisdiction for reverse FCA cases involving duty payments is questionable.[429]

8.650 Advantages and Disadvantages of FCA actions

There are several advantages to using the FCA when the agency is deprived of revenue because of false information. In a FCA case, the government is only required to prove reckless disregard, rather than fraud.[430] Damages can be

425 31 U.S.C. § 3730(d)(1)-(2).

426 31 U.S.C. § 3730(c)(2).

427 31 U.S.C. § 3732(a). Although the statute uses the term "jurisdiction" it clearly governs the appropriate *venue* for such actions. See *United States ex rel. Thistlethwaite v Dowty Woodville Polymer, Ltd.* 110 F.3d 861 (2d Cir. 1997) (criticized in *United States ex rel. Felton v Allflex USA* 989 F Supp 259 (Ct. Int'l Trade 1997)).

428 *See United States v. Universal Fruits and Vegetables Corp.*, 362 F.3d 551 (9th Cir. 2004) and *United States v. Universal Fruits and Vegetables Corp.*, 433 F. Supp. 2d 1351 (Ct. Int'l Trade 2006).

429 *See* also *LeBlanc v. United States*, 50 F.3d 1025 (Fed. Cir. 1995).

430 31 U.S.C. § 3729(b); *United States v. Kirzek*, 111 F.3d 934 (D.C. Cir. 1997).

proven by a "just and reasonable estimate."[431] A claim exists when a debtor transfers assets to avoid payment and unfilled claims survive the death of the debtor. Finally, a pre-judgment attachment order may be obtained to protect government interests.

There are some disadvantages to an FCA claim as well. The scope of the parties may be narrower, excluding, for example, aiders and abettors. And there is no penalty available for acts of simple negligence.

8.660 Program Fraud Civil Remedies Act (the "mini false claims act")

As an alternative, the agency may also pursue relief under 31 U.S.C. §§ 3801-3802, the so-called "mini false claims act." This statute allows for recovery of damages through an administrative adjudication in cases involving less than $150,000.[432] Recovery is limited to twice the false claim plus a penalty not to exceed $5,000. Attorney General approval is required to initiate such a claim.

8.700 Civil and Criminal Trade Enforcement under NAFTA

The North American Free Trade Agreement ("NAFTA") is a trilateral treaty between the United States, Canada, and Mexico. It took effect on January 1, 1994. The terms of the treaty were implemented in the U.S. via the NAFTA Implementation Act, P.L. 103-182. CBP's implementing regulations are found at 19 C.F.R. Part 181.

NAFTA's primary purpose is to create a system of tariff preference rules that permit favorable tariff treatment of goods that "originate" in a NAFTA country. The treaty provided for a phased-in elimination of tariffs on originating goods that was completed as of 2008. Although NAFTA creates a regime of free trade for originating goods among the three signatory nations, NAFTA trade is, nonetheless, regulated trade. The English-language website of the NAFTA Secretariat, the entity responsible for resolving trade disputes among the signatories, includes the full text of the agreement and can be found at http://www.nafta-sec-alena.org/DefaultSite/ index_e.aspx.

8.710 The certificate of origin requirement

To claim preferential treatment under NAFTA, a party importing merchandise into the United States must make a formal declaration that the merchandise qualifies for such treatment. Most commonly, an importer makes that declaration by indicating on the entry summary that the merchandise is a good of Canada or Mexico. The declaration must be based on a complete and properly executed Certificate of Origin ("CO").[433] The CO is the fundamental document

[431] *United States v. Killough*, 848 F.2d 1523, 1531 (11th Cir. 1998).
[432] 31 C.F.R. 16 and 28 C.F.R. 71.
[433] 19 C.F.R. § 181.21(a)

required to support a claim for preferential treatment under NAFTA.[434] Completion of a CO is an affirmation that the party signing the document has researched the terms of NAFTA and has determined that the goods covered by the CO are originating goods as defined by NAFTA.

Only an importer with the CO in his possession can claim a NAFTA preference.[435] The CO must be completed and signed by the exporter of goods prior to importation. Where the exporter is not the producer of the goods, the exporter may complete the CO on the basis of (1) knowledge that goods originate, or (2) reasonable reliance on producers' written representation that goods originate, or (3) a completed and signed CO voluntarily provided to the exporter by the producer.[436]

No CO is required for imports valued at less than $2,500, "provided importation does not form part of a series of imports that may reasonably be considered to have been undertaken or arranged for the purpose of avoiding the certification requirements."[437]

8.720 "Originating" Goods

Central to the question of whether merchandise is eligible for preferential treatment under NAFTA is whether the item is "originating" under Article 401 of the Agreement, which defines "originating" in four ways: goods wholly obtained or produced in the NAFTA region;[438] goods produced in the NAFTA region wholly

434 9 C.F.R. § 181.11.
435 Article 502(1)(b) of NAFTA; 19 C.F.R. § 181.23(a).
436 Article 501(3)(b) of NAFTA; 19 C.F.R. § 181.11(b).
437 19 C.F.R. § 181.22(d)(iii).
438 Article 415 defines "goods wholly obtained or produced entirely in the territory of one or more of the Parties" as
a) mineral goods extracted in the territory of one or more of the Parties;
b) vegetable goods, as such goods are defined in the Harmonized System, harvested in the territory of one or more of the Parties;
c) live animals born and raised in the territory of one or more of the Parties;
d) goods obtained from hunting, trapping or fishing in the territory of one or more of the Parties;
e) goods (fish, shellfish and other marine life) taken from the sea by vessels registered or recorded with a Party and flying its flag;
f) goods produced on board factory ships from the goods referred to in subparagraph (e) provided such factory ships are registered or recorded with that Party and fly its flag;
g) goods taken by a Party or a person of a Party from the seabed or beneath the seabed outside territorial waters, provided that a Party has rights to exploit such seabed;
h) goods taken from outer space, provided they are obtained by a Party or a person of a Party and not processed in a nonParty;
(i) waste and scrap derived from

from originating materials; goods meeting the Annex 401 origin rule; and unassembled goods and goods classified with their parts which do not meet the Annex 401 rule of origin but contain 60 percent regional value content using the transaction method.[439]

The Annex 401 rules of origin are based on a change in tariff classification, a regional value content requirement, or both. In order to determine the specific rule of origin that applies to a particular good, an importer must properly classify the merchandise and follow the interpretive rules contained in Annex 401. When production of the good results in a change in tariff classification, each of the non-originating materials used in the production of the good must undergo a change as a result of production occurring entirely in the NAFTA area.

Some specific rules of origin under Annex 401 require that a good have a minimum regional value content. In other words, a certain percentage of the value of the goods must be from Canada, Mexico, and/or the United States. In such cases, Article 402 provides two formulas that may be used to determine regional value content, the "transaction value" method or the "net cost" method. In most cases a producer may choose to use either method for calculating regional value content.

Article 412(b) provides that goods will not be considered to originate if it can be established, by a preponderance of the evidence, that any production or pricing practice has been used to circumvent the intent of the origin rules.

8.730 NAFTA Penalties

Article 504(2)(a) of NAFTA requires each party to NAFTA to make it an offense of that country's customs laws to provide false certification of the origin of goods to another party to NAFTA. It also requires that such misrepresentation by the exporter will have the same legal consequences as a misrepresentation by an importer under the exporter's country's own customs laws. Pursuant to 19 C.F.R. § 181.81, in general the same civil, criminal, and administrative penalties applicable to violations of the Customs laws are equally applicable to persons violating NAFTA requirements.

There are several different ways that a party may become subject to a civil penalty under 19 U.S.C. § 1592 by violating a NAFTA requirement. For instance, a U.S. exporter or producer who falsifies a CO may be penalized under

(i) production in the territory of one or more of the Parties, or
(ii) used goods collected in the territory of one or more of the Parties, provided such goods are fit only for the recovery of raw materials; and
(j) goods produced in the territory of one or more of the Parties exclusively from goods referred to in subparagraphs (a) through (i), or from their derivatives, at any stage of production.

439 19 U.S.C. § 3332, 19 C.F.R. Part 181, App.

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19 U.S.C. § 1592(f) and 19 C.F.R. § 181.81.

Likewise, importers may be penalized under 19 U.S.C. § 1592(a) for making a false claim for preferential NAFTA treatment on Customs import documentation. NAFTA violations that give rise to penalties under section 1592 often accompany other, non-NAFTA violations, such as marking violations, or false statements concerning country of origin on entry papers, or other violations such as misclassification or misdescription.

It is important to be aware of NAFTA verification procedures in investigating whether a CO is false, as NAFTA creates a complex scheme governing such determinations. For guidance regarding these procedures, see 19 C.F.R. 181.72 *et seq.* and CBP Directive No. 3810-008B.

Finally, exporters and importers may avoid civil penalties for submitting a false CO if they promptly (within 30 days) and voluntarily advise CBP of the incorrect information on the CO.[440] Importers, to avoid penalty, must submit a correct CO and pays any duties due.[441] However, no importer who acted by means of fraud in making a false CO may make a voluntary correction.[442]

8.731 NAFTA Recordkeeping Penalties

Exporters have an obligation to keep records relating to NAFTA claims, including, specifically, the CO. Persons completing and signing a NAFTA Certificate of Origin "for which preferential treatment...is claimed shall make, keep and render for examination and inspection all records relating to the origin of the good (including the Certificate or copies thereof) and the associated records."[443] The penalty for failure to retain a NAFTA Certificate of Origin under subsection (b)(2)(A) is "(A) a civil penalty not to exceed $10,000; or (B) the general recordkeeping penalty that applies under the customs laws; whichever is higher." 19 U.S.C. § 1508(e)(1)(B).

Importers must retain CO's for a period of 5 years. An importer must provide a CO at the request of the Port Director when the CO was used to support a claim for preferential treatment for merchandise.[444] Accordingly, an importer who fails to provide the CO when demanded may be subject to penalties under 19 U.S.C. § 1509(g).[445]

440 19 U.S.C. § 1592(f)(3)(B) (exporters); 19 U.S.C. § 1592(c)(5)(B) and 19 C.F.R. § 181.82 (importers).
441 19 C.F.R. §§ 181.82(a), 181.82(b)(5).
442 19 C.F.R. § 181.82(b)(2).
443 19 U.S.C. § 1508(b)(2)(A). *See also* 19 C.F.R. §§ 181.12 and 181.13.
444 19 C.F.R. § 181.22(a).
445 *United States v. Ford Motor Co.*, 516 F. Supp. 2d 770 (W.D. Tex. 2007)

8.732 False NAFTA Drawback Claims

Article 303 of NAFTA provides a drawback and duty deferral program for entered merchandise.[446] Persons who file false NAFTA drawback claims are subject to penalty under 19 U.S.C. § 1593a.

8.733 Criminal Sanctions for NAFTA Violations

Title 18, United States Code sections 542 and 545 are available as sanctions against U.S. importers for violations associated with a false certification of origin related to NAFTA preference claims. The government may also consider the use of 18 U.S.C. § 1001 (false statements) or the mail/wire fraud statutes (18 U.S.C. §§ 1341, 1343) as possible criminal sanctions against U.S exporters or producers who falsify CO's.

8.800 Obtaining Information in Trade Enforcement Cases

Obtaining accurate information about trade activities is a crucial component of successful trade enforcement. The following sections discuss the record keeping requirements under Title 19 of the U.S. Code, the penalties associated with the failure to keep required records, and the available methods (both administrative and judicial) for obtaining such records.

8.810 Record Keeping Requirements and Enforcement

8.811 19 U.S.C. § 1508 "Business Records"

Title 19, Section 1508 requires that certain persons identified in the statute "make, keep and render" for examination and inspection by CBP, "certain records." Those persons are any:

(1) Owner;
(2) Importer;
(3) Consignee;
(4) Importer of Record;
(5) Entry filer; or
(6) Other person;

who imports merchandise, files a drawback claim, or transports or stores merchandise carried or held under bond, or knowingly causes any of the foregoing, or any agent of any of the foregoing, as well as any person whose activities require the filing of a declaration or entry, or both.[447] An example of this last category of recordkeepers would be a bonded carrier.
Also required to "make, keep and render" records is any person who completes and signs a NAFTA Certificate of Origin for a good for which preferential

446 19 C.F.R. Part 181, Subpart E
447 19 C.F.R. § 163.2 (2001).

treatment under NAFTA is claimed. Records of exports to Canada during such time that the U.S.-Canada Free Trade Agreement is in force may also be examined.

A person knowingly "causes [items] to be imported" when he places an order that controls the terms or conditions of the importation or when he furnishes technical data, molds, equipment, parts or production assistance knowing that they will be used to manufacture or produce the imported merchandise.
A person who merely orders merchandise from an importer in a domestic transaction, however, does not "cause" merchandise to be imported.

For example, Smith goes to an importer and says he wants to buy 5,000 widgets that the importer has obtained from Holland. In such a case, Smith is not required to maintain records under 19 U.S.C. § 1508 because he did not "knowingly cause to be imported" the widgets, since he did not control the terms or conditions of the importation nor did he furnish materials or assistance to produce the merchandise.

The "records" that must be made and kept under 19 U.S.C. § 1508 include documentation of any information normally kept in the ordinary course of business that pertains to an importation, including any of the following activities[448]:

- ✓ Any importation, declaration or entry;
- ✓ The transportation or storage of merchandise carried or held under bond into or from the Customs territory of the United States;
- ✓ The filing of a drawback claim;
- ✓ The completion and signature of a NAFTA Certificate of Origin;
- ✓ The collection or payment to CBP of duties, fees and taxes; or
- ✓ Any other activity required to be undertaken pursuant to the laws or regulations administered by CBP.

The term includes, among other things: statements; declarations; documents; electronically generated or machine readable data; electronically stored or transmitted information or data; books; papers; correspondence; accounts; financial accounting data; technical data; computer programs necessary to retrieve information in a usable form, and entry records contained in the so-called "(a)(1)(A) list."[449]

448 See *United States v. Rainbow Rugs,* 838 F. Supp. 11 (INSERT); *United States v. Ford Motor Co.,* 516 F. Supp. 2d 770 (W.D. Tex. 2007).
449 19 C.F.R. § 163.1(a) (2001) and 19 C.F.R. Pt. 163, Appendix (which includes

Records must be kept for five years from the date of entry, if the record relates to an entry, or five years from the date of the activity that required creation of the record. Any record relating to a drawback claim must be kept until the third anniversary of the date of payment of the claim. Packing lists must be retained for a period of 60 calendar days from the end of the release or conditional release period, whichever is later. If a demand for return to CBP custody has been issued, then any related records must be kept for a period of 60 calendar days either from the date the goods are redelivered or from the date specified in the demand as the latest redelivery date, if redelivery has not taken place.

A consignee who is not the owner or purchaser and who appoints a customs broker must keep a record pertaining to covered merchandise for an informal entry for two years from the date of the informal entry.[450]

The time limitation, however, relates only to the period for which records must be maintained, and does not operate to limit the authority of CBP to summon or examine records retained beyond the time required by law, if relevant to a purpose for which the power to examine or summon may be exercised. For example, if records in the possession of an importer are six years old, but relevant to a legitimate inquiry for which the summons authority may be used, CBP may obtain these records.[451]

A final exception exists if a different regulation sets forth a difference retention period for a specific type of record. In that case, the specific retention period controls.[452]

8.812 19 U.S.C. § 1509 – "Entry Records"

Title 19, section 1509, deals with entry records and confers two distinct authorities on CBP officials: the authority to examine and the authority to summon.

CBP may initiate an investigation, compliance assessment, audit or other inquiry for the purpose of:

1) Ascertaining the correctness of any entry, determining the liability of any person for duties, taxes and fees due or duties, taxes or fees which may be due, or determining the liability of any person for fines, penalties and forfeitures; or

2) Ensuring compliance with the laws and regulations administered or enforced by the agency.[453]

the (a)(1)(A) list).

450 19 C.F.R. § 163.4 (2001).

451 *United States v. F.A.G. Bearings Corp.*, 727 F.2d 227 (2d Cir. 1984).

452 19 C.F.R. § 163.4(b)(5).

453 19 C.F.R. § 163.6(c)(1) (2001).

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This last phrase provides CBP officials with broad authority under § 1509(a) to insure compliance not only with import and export laws but certain Department of Commerce Regulations, passport, neutrality and other laws, as long as they are "administered" by CBP.

It must be stressed that this broad authority to examine or summon is limited somewhat by whether it is "records" or "persons" which are examined or summoned. Any *record* may be *examined* and any *person* may be *examined* or *summoned* for any of the purposes described above (i.e., to insure compliance with laws administered by CBP, etc.). However, with one exception discussed below, records may be *summoned* only if the records are those required to be kept under § 1508.[454] In other words, the authority to summon records is limited to those records relating to importations, entries, transportation or storage in bond, drawback claims and certain NAFTA exportations and which are kept in the ordinary course of business.

"Entry records," as the term is used in 19 U.S.C. § 1509(a)(1)(A), are defined as "records required by law or regulation for the entry of merchandise (whether or not Customs required their presentation at the time of entry)."[455]

By statute, 19 U.S.C. § 1509(a)(1)(A), "records required by law or regulation for entry," ("(a)(1)(A) records" or "entry records") must be provided to CBP upon demand. The list of records so required is found in an appendix to 19 C.F.R. Part 163.[456] Pursuant to written, oral, or electronic notice, any CBP officer may require the production of these "entry records" or "(a)(1)(A) records" by any person who is required to maintain such records, even if the records were produced at the time of entry. Any oral demand for entry records must be followed by a written or electronic demand. The entry records are required to be produced within 30 days of receipt of the demand or within any shorter period as CBP may prescribe when the entry records are required in connection with a determination regarding the admissibility or release of merchandise. Under certain circumstances CBP can grant extensions of the period of time in which to produce the record.[457]

8.813 Other Records

During the course of any investigation or compliance assessment, audit or other inquiry, any CBP officer, during normal business hours and to the extent possible at a time mutually convenient to the parties, may examine any relevant entry or other records by providing the person responsible for such records with reasonable written, oral or electronic notice that describes the records with reasonable specificity.[458]

454 *United States v. Rubin*, 2 F.3d 974 (9th Cir. 1993).
455 19 C.F.R. § 163.1(f).
456 19 C.F.R. § 163.1(f) (2001).
457 19 C.F.R. § 163.6(a) (2001).
458 19 C.F.R. § 163.6(c)(2) (2001).

The foregoing notice requirement does not foreclose an officer from making an unannounced visit and simply asking to examine the documents at that time. If refused, the notice procedures outlined above must be followed.

If, after notice, a "mutually convenient" time cannot be agreed upon for the examination, or the person refuses entirely to permit examination, the officer may have recourse to the Customs summons, as discussed below in section 8.820.

8.814 Recordkeeping Penalties

General Requirements

The Mod Act amended various provisions of the Customs laws to grant Customs authority to waive presentation of certain documentation or information at the time of entry. These amendments were intended to permit a reduction of the documentation and information required to be presented to Customs at the time of entry, thereby facilitating the entry process. However, to prevent degradation of the agency's ability to investigate, section 1508 was amended to require that the documentation or information be maintained, whether or not the agency required that it be presented at the time of entry. Section 1509 was also amended to, among other things, provide for the imposition of substantial administrative penalties for the failure of a party required to keep records to comply, within a reasonable time, with a demand by CBP for production of such specific entry records.[459]

If a recordkeeper fails to produce the requested entry documents, the agency may impose any of the following penalties as per 19 U.S.C. § 1509(g).[460] In addition to any penalty that may be imposed, if the requested records relate to the eligibility of merchandise for a special rate of duty, the entry covering the merchandise will be liquidated or reliquidated under the column 1 (general) rate of duty or at the column 2 rate of duty, if deemed appropriate.[461] The assessment of a penalty for the failure to produce records for CBP inspection shall not limit or preclude CBP from issuing, or seeking the enforcement of, a Customs' summons.[462] Except as provided in 19 U.S.C. §1509(g)(4), the assessment of recordkeeping penalties is not the exclusive remedy with two exceptions:

(a) A penalty imposed under 19 U.S.C. §1592 for a material omission of any information contained in the record,

or

[459] T.D. 00-63.
[460] *See* also, T.D. 00-63 and 19 C.F.R. § 163.6.
[461] 19 C.F.R. §§163.6 (b)(2)(A) and (B). The agency must demonstrate the merchandise should be dutiable at column 2 rates. 19 C.F.R. §163.6 (b)(2)(B)(ii).
[462] 19 C.F.R. §163.6 (b)(6).

CBP ROVING PATROL 00000112a - 0683

(b) A disciplinary action taken under 19 U.S.C. §1641.[463]

Since 19 U.S.C. § 1592 carries more stringent penalties it may be better to explore whether the non-compliance should be addressed under 19 U.S.C. §1592, if penalty litigation appears likely. The advantage, however, to assessing a penalty under the authority of 19 U.S.C. §1509 is that we do not need the assistance of the courts to assess the penalty. We may, however, need the court's assistance in collecting the penalty. The assessment of an agency administrative penalty does not in any way affect the authority of the U.S. District Court of the United States to impose monetary penalties and sanctions for the failure to produce records summoned by CBP.[464]

Forum

Should litigation over penalties take place, the appropriate forum is a U.S. District Court with jurisdiction over the defendant. The agency, as the party harmed by the non-compliance or failure to production of records required to be kept under 19 U.S.C.§ 1508 or 19 U.S.C. §1509, is the appropriate party to initiate litigation. An attempt to preempt agency action in a less sympathetic forum by filing for a declarative action is inappropriate.[465]
Degrees of Culpability

A penalty may be imposed pursuant to 19 U.S.C. §1509(g) if a person fails to comply with a lawful demand for the production of an entry record contained in the "(a)(1)(A) list" and is not excused from a penalty pursuant to one of the exceptions set forth in 19 U.S.C. § 1509(g)(3) and 19 C.F.R. §163.6(b)(3). There are two degrees of culpability for penalties under 19 U.S.C. §1509(g).[466]

a. Negligence

A violation 19 U.S.C. §1509 is deemed to be negligent if it results from an act or acts (of commission or omission) done through either the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances. Negligent violations will be assessed a penalty of 40% of the value of the

463 19 C.F.R. §163.6 (b)(4).
464 19 U.S.C. §1610; 19 C.F.R. §163.10.
465 Ford sought to attempt to get a transfer the record keeping penalty case to a more hospitable venue Ford challenged the agency's authority to seek records under 19 U.S.C. 1509. The Eastern District of Michigan dismissed the case without addressing the merits holding that "[u]nder longstanding authority, "when a putative tortfeasor sues an injured party for a declaration of nonliability, courts will decline to hear the action in favor of a subsequently-filed coercive action by the 'natural plaintiff'"." *Ford Motor Co. v. United States*, 2006 U.S. Dist Lexis 59465, 21 (E.D. Mich. 2006).
466 19 C.F.R. §163.6 (b)(1).

merchandise or $10,000 dollars whichever is less.[467]

b. Willful Conduct

A violation is deemed to be willful under 19 U.S.C. §1509 if the failure to comply with a lawful demand for the production of an entry record was committed (or omitted) knowingly, i.e., was it done voluntarily and intentionally, as established by a preponderance of the evidence. Willful violations are subject to a penalty of the lesser of $100,000 or 75% of the value of the merchandise.

Exceptions

There are exceptions to the agency's authority to impose penalties. No penalties may be assessed under 19 C.F.R. § 163.6 (b)(1) if the person failing to comply with the demand for records can show that the records were lost as a result of an "Act of God," natural disaster or natural casualty such as a fire that was not the fault of that person or the person's agent.[468] A second avenue to avoid the penalty includes demonstrating to the agency's satisfaction that the demand was substantially complied with or that CBP maintained the records at the time of entry or in response to an earlier demand.[469] If the recipient of the penalty can show that he has been certified as a participant in the Certified Recordkeeping Compliance Program, and that he is generally in compliance then the procedures and requirements of the program, he is entitled to certain other options discussed below.

Commencement of Recordkeeping Penalty Actions

Penalties for the failure to comply with a lawful demand for the production of entry records may be assessed by the appropriate CBP field officer for any violation which occurs on or after July 15, 1996, the date the "(a)(1)(A) list" was published in the Federal Register. To the extent practical, if the agency has reasonable cause to believe that a violation of 19 U.S.C. §1509 has occurred, it will follow the same penalty procedures set forth for violations of 19 U.S.C. §1592.[470] Any penalty imposed under 19 U.S.C.§1509 may be remitted or mitigated under 19 U.S.C. §1618.[471] Penalty remission and mitigation guidelines are found in 19 C.F.R. Part 171 which sets forth the general procedures involved in filing a petition for remission or mitigation of a fine, penalty, or forfeiture incurred under any law administered by CBP.

Administrative Penalty Dispositions

467 19 C.F.R. §163.6 (b)(1)(ii).
468 19 C.F.R. §163.6 (b)(3)(i).
469 19 C.F.R. §163.6 (b)(3)(ii) and (iii).
470 Specific requirements for issuing a penalty under 19 U.S.C. §1592 are located at 19 C.F.R. §§162.77-79, 19 C.F.R. §§171.11-33.
471 19 C.F.R. §163.6 (b) (4)(ii).

Mitigation Guidelines

Administrative penalty dispositions under 19 U.S.C. §1509, are governed by T.D. 00-63 which is reproduced in the relevant section of the FP&F Handbook. When evaluating the case, the appropriate CBP field officer (FP&F Officer) must consider the entire case record, taking into account the presence of any mitigating or aggravating factors. In addition, in deciding whether or not to issue a penalty, the officer may take into account the age and nature of the documents, the overall number of documents requested versus the number of documents produced, and the overall recordkeeping performance of the person. All such factors are to be set forth in the written administrative penalty decision.

In addition to administrative penalties, the Mod Act recognized the authority of courts to impose monetary penalties pursuant to 19 U.S.C. §1510(a) for the failure to produce records summoned by CBP pursuant to 19 U.S.C. §1509. In addition to issuing administrative penalties under 19 U.S.C. §1509 (g), the agency may also issue or seek judicial enforcement of an administrative summons.

Dispositions

Disposition of a record keeping penalty case will depend on whether the violator is a participant in the Recordkeeping Compliance Program (RCP). Title 19 C.F.R. §§ 163.12 and 163.13 contain details about how an importer may voluntarily enter the Recordkeeping Compliance Program and the benefits for doing so.

Non-Participants in the RCP - Negligent Violations: If the violation is a result of the negligence of the person in maintaining, storing, or retrieving the demanded information, such person shall be subject to a penalty, for each release of merchandise, not to exceed an amount ranging from a minimum of $5,000 to a maximum of $10,000 or an amount ranging from a minimum of 20 percent of the appraised value of the merchandise to a maximum of 40 percent of the appraised value of the merchandise, whichever amount is less.

Non-Participants in the RCP - Willful Violations: If the violation results from the willful failure to maintain, store or retrieve records, the penalty for each release will be an amount ranging from a minimum of $50,000 to a maximum of $100,000 or an amount ranging from a minimum of 45 percent of the appraised value of the merchandise to a maximum of 75 percent of the appraised value of the merchandise, whichever amount is less.

Participants in the RCP – Generally: A participant in the Recordkeeping Compliance Program[472] may be entitled to alternatives to any recordkeeping

[472] Certified Recordkeepers are those persons required to maintain records according to 19 U.S.C. §1508(a) and supporting regulations, and who have recordkeeping systems certified by Customs under a Recordkeeping Compliance

penalty that may be assessed should the party be unable to produce a requested record.[473] Where a certified participant in the Recordkeeping Compliance Program does not produce a demanded entry record for a specific release or provide the information contained in the demanded entry record by acceptable alternate means, CBP shall, in lieu of a monetary penalty issue a written notice of violation to the person, provided that the certified participant is generally in compliance with the procedures and requirements of the program, and provided that the violation was not a willful violation or a repetitive negligent violation. However, even where a certified recordkeeper is eligible for an alternative to a penalty, participation in the Recordkeeping Compliance Program has no limiting effect on the authority of CBP to use a summons, court order or other legal process to compel the production of records by the certified recordkeeper.

Procedures for Participants in the RCP:

First Time Violations: First-time negligent violations made by participants in the Recordkeeping Compliance Program, who are generally in compliance with the procedures and requirements of the program, are issued a written notice (warning letter) of violation in lieu of a monetary penalty where there is no evidence that the violations were willful. [474]

Repeat Negligent Violators. A repetitive negligent violation involves any failure to comply with a lawful demand for the production of an entry record contained in the (a)(1)(A) list which occurs within three years from the date of the violation of initial violation.

Obligations of the Certified Recordkeeper to Correct the Violation: Within a reasonable time after receiving written notice of a recordkeeping violation, the recordkeeper shall notify the CBP of the steps it has taken to prevent a recurrence of the violation.[475]

Removal From the Program: A certified recordkeeper may be removed from the program for the following actions:

(a) The certification was obtained by mistake or fraud,

(b) The participant's bond is no longer valid,

(c) The participant fails on a recurring basis to provide demanded documents,

Program. A recordkeeper may be certified as a participant in the Recordkeeping Compliance Program after meeting the general recordkeeping requirements established under 19 C.F.R. §163.12(b)(3) and 19 U.S.C. §1509(f).

473 19 C.F.R. §163.12 and 19 U.S.C. §1509(g).

474 19 U.S.C. §1509(g) and 19 C.F.R. §163.12(d).

475 19 C.F.R. §163.12(d)(3).

(d) The participant willfully refuses to produce a demanded record,

(e) The participant is no longer in compliance with customs laws and regulations, or

(f) The participant is convicted of a felony, or any offense involving smuggling or theft or an offense related to theft.[476]

Procedures for removal and appeal of removal are found at 19 C.F.R. §163.13 (d).[477]

Additional Penalties: In addition to removal from the program, in cases where the recordkeeper has committed repetitive negligent violations or a willful violation, the issuance of monetary penalties may be imposed using the same standards as those for a non-participant.

Aggravating and Mitigating Factors

The following are mitigating and aggravating factors, for both participants and non-participants in the recordkeeping compliance program, regarding penalties assessed under 19 U.S.C. § 1509(g) and 19 C.F.R. § 163.6.

Mitigating Factors:

(a) Communications were impaired because of a language barrier or because of the mental condition or a physical ailment of the violator;

(b) Extra-ordinary cooperation with CBP officers;
(c) Immediate remedial action;

(d) Prior good record;

(e) Inability to pay the CBP penalty;
(f) Contributory CBP error including misleading or erroneous advice given by a CBP official given in writing (where it

476 19 C.F.R. §163.13 (c).

477 Removal is effective immediately in cases of willfulness on the part of the program participant or when required by public health, interest, or safety. In all other cases, the removal is effective when the participant receives the removal notice and either no timely appeal has been filed or all appeal procedures have been concluded by a decision upholding the removal action. An appeal must be received by the Director, Regulatory Audit Division, Office of Strategic Trade, U.S. Customs and Border Protection, Washington, DC 20229, within 30 calendar days after issuance of the notice of removal. A decision on the appeal will generally be issued within 30 calendar days after receipt of the appeal. 19 C.F.R. §163.13 (d).

appears that the violator appears to have relied on that advice);

(g) The recordkeeper is inexperienced in the customs transactions to which the records relate; or

(h) The violator substantially complies with the demand for the production of records in comparison to the total number of importations for which records are requested.[478]

Aggravating Factors:

Aggravating factors may only be used to offset the mitigating factors.[479] They are not to be used to raise the culpability level of the penalty.[480] The following list of aggravating factors is not all-inclusive:

(a) The recordkeeper is experienced in the customs transactions to which the records relate;

(b) The records are concealed, destroyed or withheld to evade U.S. law;

(c) The importer or other party exhibits an extreme lack of cooperation, verbal or physical abuse, or attempted destruction of records;

(d) The importer or other party has a prior recordkeeping violation for which a final administrative finding of culpability has been made;

(e) The importer or other party has provided misleading information concerning the violation;

(f) The importer or other party has obstructed an investigation or audit;

(g) The importer or other party has demonstrated evidence of a motive to evade the production of entry records or information requested by CBP.[481]

Penalty Example

[478] T.D. 00-63.
[479] T.D. 00-63.
[480] T.D. 00-63.
[481] T.D. 00-63.

In a case where the importer was importing duty free jewelry subject to a double invoicing scheme not disclosed to Customs, penalties were appropriate even thought there was no loss of revenue.[482] The court reasoned that undervaluation of duty free goods subject to the Generalized System of Preferences ("GSP") cannot result in the underpayment of duty, but to the extent that it was used in calculating the total value of imports of the particular merchandise in a given year it is relevant. GSP eligibility must be withdrawn when total annual sales exceed the competitive need limit, undervaluation would tend to extend GSP eligibility beyond the point where it would ordinarily obtain. Thus, defendants' false invoicing had the potential to taint statistical calculation and deprive the Government of future revenues.[483] In addition to the statistical distortion, the court found that the "[t]he harm to the Government extended beyond mere statistical distortion" and includes "[t]he cost of investigating and prosecuting [the] action… and should be considered in the selection of a penalty.[484] "Defendant's ability to pay need not necessarily constitute a ceiling of liability," if the government can present facts to that the court that justify a penalty in excess of that amount.[485]

8.820 Summons Authority - 19 U.S.C. § 1509

A summons may be issued either for (1) any person deemed proper by CBP for the purpose of giving testimony under oath to insure compliance with any law administered by CBP or (2) to produce certain records.

No person below the rank of port director, regulatory audit field director or special agent in charge may issue a Customs summons.[486] In issuing the summons it would be legally permissible to use a stamp as a signature although policy considerations might dictate otherwise.[487]

Whether summoned to produce records or to give testimony, a person may not be required to appear at a place more than 100 miles from the place where the summons is served.[488]

The summons must identify the name, title and telephone number of the officer before whom the appearance is to occur, the address where the person is to appear, time of appearance and the telephone number of the issuing CBP officer. If the summons is for records, the summons shall also describe the records sought with "reasonable specificity."[489]

482 *United States v. Modes, Inc.*, 826 F. Supp. 504, 507 (C.I.T. 1993).
483 *United States v. Modes, Inc.*, 826 F. Supp. 504, 507 (C.I.T. 1993).
484 *United States v. Modes, Inc.*, 826 F. Supp. 504, 514 (C.I.T. 1993).
485 *United States v. Modes, Inc.*, 826 F. Supp. 504, 514 (C.I.T. 1993).
486 19 C.F.R. § 163.7(a) (2001).
487 Chief Counsel opinion EN-97-0445, dated 1997.
488 19 C.F.R. § 163.7(b)(ii) (2001).
489 19 C.F.R. § 163.7(b) (2001).

Any CBP employee is authorized to serve the summons. Service of individuals is accomplished by personal delivery. In the case of a corporation, partnership or association, service is accomplished by delivery to an officer, managing or general partner or other agent authorized to accept service of process.[490]

If the importer is foreign and has no agents in this country, service may be made on the person designated in the importer's bond application.[491]

The officer serving the summons should complete the original certificate of service. The information contained therein is then *prima facie* evidence of the facts stated.[492] This means that unless the person who is certified as having been served disproves the certification by evidence to the contrary, it is presumed to be true.

Testimony taken pursuant to a summons may be taken under oath and when so taken should be transcribed or otherwise recorded. When testimony is transcribed or otherwise recorded, a copy must be made available on request to the witness unless, for good cause shown, the issuing officer determines that under 5 U.S.C. § 555 a copy should not be provided.[493]

8.821 Meaning of "Records" Subject to Summons under § 1509(d)

The "records" that can be summoned under § 1509(d) is a broader category of than the records required to be kept by § 1508.
Under § 1509(d) the term "records" includes those:

- ✓ Required to be kept under § 1508; or
- ✓ Regarding which there is probable cause to believe that the records pertain to merchandise the importation of which into the United States is prohibited.

Probable cause as used here is not probable cause to believe that the records are themselves evidence of a crime, but merely probable cause to believe that the records pertain to prohibited merchandise.

The prohibited merchandise at issue must be something *other* than illegal narcotics, since CBP policy prohibits the use of the § 1509 Customs summons in drug smuggling investigations and requires, instead, the use of the Customs Title 21 subpoena.[494] Thus, the § 1509 Customs summons is available for records other than 1508 records, but only if there is probable cause to believe such records relate to prohibited merchandise other than drugs (such as

490 19 C.F.R. § 163.7(c) (2001).
491 19 C.F.R. §§ 141.82, 141.36 (2001).
492 19 C.F.R. § 163.7(c)(3) (2001).
493 19 C.F.R. § 163.7(d) (2001).
494 CUSTOMS DIRECTIVE, 4210-13A, Dated December 12, 2001.

intellectual property, improperly marked property, pornography or stolen property). As an example, the § 1509 Customs summons might be used to obtain records from a museum if there is probable cause to believe the records pertain to imported pre-Colombian artifacts (the importation of which into the United States is prohibited).

8.822 Third-Party Summons

CBP may have occasion to seek testimony or records from third parties, i.e. people or entities not directly involved in an importation or transaction under investigation. Section 1509(d) addresses the authority of CBP to summon certain third parties to produce or testify about the records that they possess.
Third-Party Recordkeeper defined:

- ✓ A Customs broker;
- ✓ An attorney; or
- ✓ An accountant.

Note that where the Customs broker is the importer of record on an entry, the following third-party recordkeeper rules do not apply to him, since he is deemed to be the importer and not a third-party recordkeeper.[495]

When a CBP officer serves a summons upon a third-party recordkeeper for the production of records or to give testimony "relating to records pertaining to transactions of any person, other than the person summoned" then notice of the summons must be given to the person whose records are sought.[496]

Notice must be given "immediately after" service of the summons is made upon the third-party recordkeeper and not less than ten business days before the date set in the summons for the production of records or giving of testimony.[497]

The issuing officer must ensure that any notice issued under this section includes a copy of the summons and provides the following information:

1) That compliance with the summons may be stayed if written direction not to comply with the summons is given by the person receiving notice to the person summoned;

2) That a copy of any such direction not to comply and a copy of the summons must be sent by registered or certified mail to the person summoned and to the CBP officer who issued the summons; and

495 19 C.F.R. §§ 163.1(l) and 163.8 (2001).
496 19 C.F.R. § 163.8(a) (2001).
497 19 C.F.R. § 163.8(b) (2001).

3) That the foregoing actions must be accomplished not later than the day before the day fixed in the summons as the day upon which the records are to be examined or the testimony is to be given.[498]

Service of notice upon the person whose records are sought may be accomplished by personal service or by certified or registered mail to the person's last known address.[499]

If notice to the third-party recordkeeper is required, no record may be examined before the date fixed in the summons as the date to produce the records. If the person entitled to notice issues a stay of compliance with the summons, no examination of records can take place except with the consent of the person staying compliance or pursuant to an order by a district court.[500]

The notice provisions do not apply to any summons served on the person, or on any officer or employee of the person, with respect to whose liability for duties, fees or taxes the summons is issued.

The notice provisions do not apply to any summons issued to determine whether or not records of transactions of an identified person have been made or kept.

The notice provisions and the stay of compliance provisions do not apply with respect to a summons if a district court determines, upon petition by the issuing CBP officer, that reasonable cause exists to believe that the giving of notice may lead to an attempt:

(i) To conceal, destroy, or alter relevant records;

(ii) To prevent the communication of information from other persons through intimidation, bribery, or collusion; or

(iii) To flee to avoid prosecution, testifying, or production of records.

8.823 Enforcement of Summons

If a person refuses to comply with a summons, then the U.S. attorney may seek enforcement of the summons in the district court. After notice to the person and a hearing, the court may order compliance with the summons.[501] In order to enforce the summons, the government must establish four elements: (1) There must be a legitimate purpose for the investigation; (2) the specific inquiry must be relevant to that purpose; (3) the information sought must not already

498 19 C.F.R. § 163.8(c) (2001).
499 19 C.F.R. § 163.8(d) (2001).
500 19 C.F.R. § 163.8(e) (2001).
501 19 C.F.R. § 163.9 (2001).

be in the government's possession; and (4) all internal administrative procedures must have been followed.[502]

Refusal to comply with a court order constitutes contempt and may be prosecuted accordingly and the court may assess a monetary penalty.[503]

If a person fails to honor a court order to comply with a Customs summons and is adjudged guilty of contempt, the Commissioner of CBP, with the approval of the Secretary of the Treasury, for so long as that person remains in contempt:

1) May prohibit importation of merchandise by that person, directly or indirectly, or for that person's account; and

2) May withhold delivery of merchandise imported by that person, directly or indirectly, or for that person's account.[504]

If any person remains in contempt for more than one year after the Commissioner issues instructions to withhold delivery, the merchandise is considered abandoned and will be sold at public auction or otherwise disposed of in accordance with subpart E of 19 C.F.R. Part 162.[505]

8.830 Compliance Assessment and Other Audit Procedures

In conducting a compliance assessment or other audit, with certain exceptions set out in 19 U.S.C. § 1509(b), the CBP auditors are required to:

(1) Provide notice, telephonically and in writing, to the person who is the subject of the compliance assessment or other audit, in advance of the compliance assessment or other audit and with a reasonable estimate of the time to be required for the compliance assessment or other audit;

(2) Inform the person who is the subject of the compliance assessment or other audit, in writing and before commencing the compliance assessment or other audit, of his right to an entry conference at which time the objectives and records requirements of the compliance assessment or other audit will be explained and the estimated termination date will be set;

(3) Provide a further estimate of any additional time for the compliance

502 *United States v. Powell*, 379 U.S. 48 (1964); *United States v. Frowein*, 727 F.2d 227 (2d Cir. 1984) (applying *Powell*); *United States v. Hayden*, 358 F.Supp.2d 951 (S.D. Cal 2004) (enforcement of IRS subpoena warranted; no bad faith, government did not already have information, administrative procedures followed, and case had not been referred criminally to DOJ).
503 19 U.S.C. § 1510(a); 19 C.F.R. § 163.10(a) (2001).
504 19 U.S.C. § 1510(b)(1); 19 C.F.R. § 163.10(b) (2001).
505 19 U.S.C. § 1510(b)(2).

assessment or other audit if, in the course of the compliance assessment or other audit, it becomes apparent that additional time will be required;

(4) Schedule a closing conference upon completion of the compliance assessment or other audit on-site work to explain the preliminary results of the compliance assessment or other audit;

In addition, unless a formal investigation has commenced:

(5) Complete a formal written compliance assessment or other audit report within 90 calendar days following the closing conference unless the Director, Regulatory Audit Division, at CBP Headquarters provides written notice to the subject of the compliance assessment or other audit of the reason for any delay and the anticipated completion date; and

(6) After application of any exemption contained in *The Freedom of Information Act*, send a copy of the formal written compliance assessment or other audit report to the subject of the compliance assessment or other audit within 30 calendar days following completion of the report.[506]

If the estimated or actual termination date for a compliance assessment or other audit passes without a CBP auditor providing a closing conference to explain the results of the compliance assessment or other audit, the subject of the compliance assessment or other audit may petition in writing for such a conference to the Director, Regulatory Audit Division, unless a formal investigation has commenced.[507]

8.840 Criminal Search Warrant - Rule 41

Evidence obtained by use of a search warrant issued under Rule 41 of the Federal Rules of Criminal Procedure may be used in both criminal and civil proceedings.

The Rule 41 criminal search warrant will authorize a search for business records and other evidence, including information contained in computerized records systems, provided there is probable cause to believe evidence of a crime will be found. See Chapter Two for an extended discussion of the Rule 41 Search Warrant, including the procedures to be followed in obtaining a warrant, its execution and return. Unlike the examination or summons authority, when a criminal search warrant is issued, the target of the investigation is given no advance warning of the objective of the search. Also, there are no grand jury secrecy problems where no grand jury investigation is under way.

506 19 U.S.C. § 1509(b); 19 C.F.R. § 163.11(a) (2001).
507 19 C.F.R. § 163.11(b) (2001).

A criminal search warrant may be used to search for and seize: (1) evidence of the commission of a criminal offense; (2) contraband, the fruits of a crime, or things otherwise criminally possessed; (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) a person for whose arrest there is probable cause or who is unlawfully restrained.[508]

Provision is also made for securing a warrant upon oral testimony (popularly called a "telephonic warrant") if the circumstances make it reasonable to dispense with a written affidavit (e.g., the defendant is making preparations to abscond with records or other evidence, but circumstances are not sufficiently exigent to permit entry without warrant).

8.850 Customs Civil Search Warrant Under 19 U.S.C. § 1595(a)

Although a § 1595(a) warrant may be utilized to obtain evidence of a violation of § 1592 only if the violation results from fraud, this determination generally is not made before the investigation begins. As a practical matter, where there is a potential for violation of 18 U.S.C. §§ 542, 545 and 19 U.S.C. § 1592, the § 1595(a) warrant may be used. Evidence obtained pursuant to this warrant may be used in both civil and criminal proceedings even if the decision is ultimately made to proceed on a negligence theory in the civil case.

The same constitutional requirements (probable cause and particularity in the description of the place to be searched and the things to be seized) applicable to Rule 41 search warrants apply as well to civil search warrants under 19 U.S.C. § 1595(a).

The § 1595(a) civil search warrant may be obtained to search for and seize:

- ✓ Merchandise upon which duties have not been paid or which were brought into the United States unlawfully;
- ✓ Any property which is subject to forfeiture under any provision of law enforced or administered by CBP; or
- ✓ Any document, container, wrapping, or other article which is evidence of a violation of 19 U.S.C. § 1592 involving fraud or of any other law enforced or administered by CBP.

Currently, there is no form for the § 1595(a) civil warrant, but the Rule 41 criminal warrant can be carefully amended to conform to the requirements of 19 U.S.C. § 1595(a). Be sure to seek assistance from an Associate/Assistant Chief Counsel in amending the Rule 41 application and warrant for this purpose.

508 FED. R. CRIM. P. 41(b).

To secure issuance of the warrant, the officer may make application on oath to any justice of the peace, municipal, county, state or federal judge, or to any federal magistrate judge.

8.860 The Grand Jury Subpoena

The principle functions of the grand jury are to investigate suspected criminal activity and to determine whether probable cause exists to believe that a crime has been committed and by whom.

To assist in these functions, the grand jury has the power to subpoena persons to appear before it to provide testimony and/or produce documents and things. The grand jury subpoena, therefore, is a potent instrument in the conduct of criminal investigations. As noted, CBP officers may utilize the subpoena to obtain testimony as well as documents and other tangible materials. In fact, under the *Fair Credit Reporting Act*, the grand jury subpoena is the *only* means available to obtain a credit report absent written instructions of the consumer.[509] For a general discussion of the composition and functions of the grand jury, see Chapter One.

8.861 Grand Jury Secrecy

Of particular concern to CBP officials using a grand jury to investigate a case that has both civil and criminal dimensions, is the issue of grand jury secrecy. Under Rule 6(e) of the Federal Rules of Criminal Procedure, matters occurring before a grand jury are cloaked with secrecy and may not be disclosed except as provided by law.[510]

There are five reasons recognized by the Supreme Court for the grand jury secrecy rule: to prevent the escape of those whose indictment is contemplated; to ensure freedom of the grand jurors from intimidation or importuning by persons subject to indictment or their friends; to prevent subornation or tampering with witnesses who may testify and later testify at trial; to encourage free and untrammeled disclosure by persons with information about crimes; and to protect persons who may be exonerated against disclosure of the fact that they have been under investigation.[511]

8.862 Persons Bound by the Grand Jury Secrecy Rule

Although a witness is not subject to nor bound by the secrecy rule, courts have, at times, issued orders to witnesses to not disclose to a target the fact that a

509 15 U.S.C. §§ 1681(a)(1) and (a)(2); Chief Counsel Opinion EN-98-0254 dated August 12, 1998.

510 FED. R. CRIM. P. 6(e).

511 *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1978); *United States v. Proctor and Gamble Co.*, 356 U.S. 677 (1958).

subpoena *duces tecum* has been issued.[512] Although a CBP officer appearing before the grand jury is a witness, he is also a member of one of the classes bound by the secrecy rule (i.e., governmental personnel assisting an attorney for the government) and, therefore may not disclose the fact of his appearance.[513]

All persons, then, other than a witness, who become privy to "matters occurring before" a grand jury are prohibited from disclosing such matters to anyone other than an assistant United States attorney or those assisting him in enforcing federal criminal law, unless a court order has been obtained authorizing the particular disclosure.

As a consequence, absent a disclosure order, information obtained through the grand jury may be unavailable in a civil proceeding under 19 U.S.C. § 1592 to recover a civil penalty. A narrow exception exists, however, with respect to disclosure for use in a civil forfeiture action. Pursuant to 18 U.S.C. § 3322, persons privy to grand jury information may disclose that information to an AUSA for use in a civil forfeiture proceeding without the need for a disclosure order.

8.863 Matters Occurring Before the Grand Jury

Only "matters occurring before the grand jury" are cloaked with 6(e) secrecy. Disclosures that reveal the identities of witnesses or jurors, the substance of testimony, the strategy, focus or direction of the investigation, deliberations, scope, the identity of documents or persons whose records were subpoenaed and any criminal violation under consideration would all be covered by the rule.[514]

Generally, information obtained without the use of the grand jury, though later presented to the grand jury, is not a matter occurring before the grand jury. For example, if CBP officers obtain evidence from interviews by use of the Customs summons, search warrant or other means, even if later these matters are communicated to the grand jury, the material is not covered by the rule.[515] Although witness interviews conducted prior to grand jury proceedings are not subject to the rule,[516] statements prepared expressly for presentation to the grand jury and read in lieu of appearance before the grand jury have been held

512 *In re Grand Jury Subpoena Duces Tecum Dated January 15, 1986*, 797 F.2d 676 (8th Cir. 1986).

513 *United States v. Sells Engineering*, 463 U.S. 418 (1983).

514 *Iglesias v. Central Intelligence Agency*, 525 F. Supp. 547 (D. D.C. 1981); *SEC v. Dresser Industries*, 628 F.2d 1368 (D.C. Cir. 1980); See also *In re Grand Jury Investigation of Ven-Fuel*, 441 F. Supp. 1299 (M.D. Fla. 1977).

515 *In re Grand Jury Matters (Catonia)*, 682 F.2d 61 (3rd Cir. 1982); *In re Grand Jury Investigation*, 610 F.2d 202 (5th Cir. 1980).

516 *In re Search Warrant For Second Floor Bedroom*, 489 F. Supp. 207 (D. R.I. 1980).

to be subject to the rule.[517] Also, the Fourth Circuit has suggested that material obtained during and as part of a grand jury proceeding, although not pursuant to grand jury subpoena, may nonetheless be matters "occurring before the grand jury" and thus cloaked with grand jury secrecy.[518] Similarly, interviews conducted by an officer after the initiation of grand jury proceedings, but before the return of an indictment, have been held to be matters occurring before the grand jury because they were "closely related to the grand jury" investigations.[519]

Witness interviews conducted after indictment are, in general, not matters occurring before the grand jury except to the extent that the interview refers to any witness or testimony occurring before the grand jury.

The application of grand jury secrecy to documents generated by processes independent of the grand jury proceeding is a matter of dispute. Various tests have been utilized by the circuit courts. The most commonly used test focuses on whether revealing such documents will reveal anything about the nature of the grand jury's inquiries. This approach has been adopted by the Third,[520] Fourth,[521] Seventh,[522] Eighth,[523] Ninth,[524] Tenth,[525] and D.C.[526] Circuits.

517 *In re Special February, 1975 Grand Jury*, 612 F.2d 1232 (7th Cir. 1981). See also *In re Grand Jury Matter (Garden Court Nursing Home)*, 696 F.2d 511 (3rd Cir. 1982); *In re Grand Jury Proceedings (Daewoo)*, 613 F. Supp. 672 (D. Or. 1985).

518 *In Re: Grand Jury Subpoena*, 920 F.2d 235 (4th Cir. 1990).

519 *In re Grand Jury Proceedings (Daewoo)*, 613 F. Supp. 672 (D. Or. 1985).

520 *See, In re Grand Jury Matter (Catania)*, 682 F.2d 61, 63 (3rd Cir. 1982) ("Rule 6(e) applies . . . to anything which may reveal what occurred before the grand jury").

521 See, *In re Grand Jury Subpoena (United States v. Under Seal)*, 920 F.2d 235, 241 (4th Cir. 1990) ("The substantive content of 'matters occurring before the grand jury' can be anything that may reveal what has transpired before the grand jury.").

522 *See*, *Almond Pharmacy*, 753 F.2d at 575 (7th Cir. 1985) ("if a document is sought for its own sake rather than to learn what took place before the grand jury, and if its release will not seriously compromise the secrecy of the grand jury's deliberations, Rule 6(e) does not forbid its release").

523 *See*, *In re Grand Jury Proceeding Relative to Perl*, 838 F.2d 304, 306 (8th Cir. 1988) ("unless a document reveals something about the intricate workings of the grand jury itself, the documents are not intrinsically secret just because they were examined by a grand jury").

524 *See*, *United States v. Dynavac, Inc.*, 6 F.3d 1407 (9th Cir. 1993).

525 *See*, *Anaya v. United States*, 815 F.2d 1373, 1379 (10th Cir. 1987) ("the test of whether disclosure of information will violate Rule 6(e) depends upon 'whether revelation in the particular context would in fact reveal what was before the grand jury'").

526 *See*, *Senate of Puerto Rico v. United States Dept. of Justice*, 262 U.S. App. D.C. 166, 823 F.2d 574, 582 (D.C. Cir. 1987) ("there is no per se rule against

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The *per se* approach, which never classifies pre-existing documents as "matters occurring before the grand jury," is followed by the Second Circuit.[527] And the opposite *per se* approach, which treats pre-existing documents as always protected from disclosure under Rule 6(e), is followed by the Fifth Circuit.[528]

Finally, there is the Sixth Circuit's rebuttable presumption approach, which presumes that pre-existing documents are "matters occurring before the grand jury," but permits the moving party to rebut that presumption by showing that "the information is public or was not obtained through coercive means or that disclosure would be otherwise available by civil discovery and would not reveal the nature, scope, or direction of the grand jury inquiry."[529]

Documents subpoenaed by the grand jury and transcripts of testimony before the grand jury which have become matters of public record such as testimony, exhibits introduced at trial, a defendant's guilty plea or any other matter that has become public would not be covered by the rule.

8.864 Requirements for a Grand Jury Disclosure Order

Even though material sought may qualify as "matters occurring before the grand jury," it may nonetheless be disclosed pursuant to court order if it is to be used "preliminarily to or in connection with a judicial proceeding." The use must be "related fairly directly to some identifiable litigation, pending or anticipated" and the primary purpose of the disclosure must be to prepare or conduct a judicial proceeding. It is not enough that the material merely relates to the matter.[530]

Whether material that has been presented to a grand jury will be available, and when, for other uses in a civil proceeding depends on the answers to two questions: First, what are "matters occurring before the grand jury"? As noted above, if the material sought is not a "matter occurring before the grand jury" then the secrecy rule does not apply. If it is, however, the second is whether a court order can be obtained because its use is "preliminary to or in connection with a judicial proceeding." It seems clear that disclosures for the activities which follow the issuance of a penalty notice are "preliminary to . . . a judicial proceeding."[531] Although orders for disclosures prior to this point have been obtained without challenge in various jurisdictions, the Supreme Court's opinion

disclosure of any and all information which has reached the grand jury chambers . . . the touchstone is whether disclosure would 'tend to reveal some secret aspect of the grand jury's investigation'").

527 *See*, *United States v. Weinstein*, 511 F.2d 622, 627 n.5 (2d Cir. 1975) ("in any event it is questionable whether Rule 6(e) applies to documents").

528 *See*, *Texas v. United States Steel*, 546 F.2d 626 (5th Cir. 1977).

529 *In re Grand Jury Proceedings*, 851 F.2d at 860 (6th Cir. 1988).

530 *United States v. Baggot*, 463 U.S. 476 (1983).

531 *Id.*; *In re: Grand Jury Proceedings (Miller Brewing Co.)*, 687 F.2d 1079 (7th Cir. 1982); *In re: Grand Jury Proceedings (Daewoo)*, 613 F.Supp. 672 (D. Or. 1985).

in *Baggot* makes it arguable whether the prior administrative purposes are "Preliminary to . . . a judicial proceeding."[532]

8.865 Particularized Need

Even if material is sought "preliminarily to or in connection with a judicial proceeding," that alone will not justify a disclosure. There must be a "particularized need" for the disclosure.[533]

In *United States v. Sells Engineering,* the Supreme Court established a three-prong test to establish a particularized need. The *Sells* test requires the party seeking disclosure to show the following:

(1) Materials sought are needed to avoid a possible injustice in another proceeding; and

(2) The need for disclosure is greater than the need for continued secrecy; and

(3) The party seeking disclosure has structured the request to cover only material actually needed.[534]

A court deciding whether or not a particularized need has been shown must balance the interest served by grand jury secrecy against the need for disclosure.

Illustrative of the application of the *Sells* three-prong test for determining particularized need is the *Daewoo* case.[535] In *Daewoo*, disclosure was sought for a civil proceeding under 19 U.S.C. § 1592. The government initially sought disclosure based in part on the running of the statute of limitations. Daewoo then waived the limitation period and the court concluded that the government could not then show a particularized need because alternate means were now available to obtain the desired information, i.e., Customs authority to summon and examine. The waiver had, in the court's view, made the risk of any injustice slight. The court was not impressed by the fact that these alternate means would be more costly.

Also, balancing the need for disclosure against the need for continued secrecy, the *Daewoo* court noted that the balancing must take into account not only the need for continued secrecy in the present case, but also the effect disclosure might have upon the functioning of future grand juries. Since one of the purposes of grand jury secrecy is to foster the cooperation of witnesses, the

532 *United States v. Baggot*, 463 U.S. 476 (1983).
533 *United States v. Sells Engineering*, 463 U.S. 418 (1983).
534 *Id.* Note that the test established in *Sells* was subsequently incorporated into the Federal Rules of Crimnal Procedure – Rule 6(e)(3)(C).
535 *In re Grand Jury Subpoena (Daewoo)*, 613 F.Supp. 672 (D. Or. 1985).

court must be mindful of whether disclosure might operate to discourage cooperation in unrelated future cases.

In *Daewoo* the court further insisted that the government "structure its request to cover only needed material," and required the government to identify the specific grand jury testimony that it needed. The government had requested the testimony (with associated exhibits) of current and former employees and American customers of Daewoo and two transcripts of testimony of a Customs special agent. The government maintained that the information was needed to show which ledgers had been altered and who was involved in the alteration. The court said that the government must identify the particular testimony or parts thereof that would show which entries or ledgers were falsified.

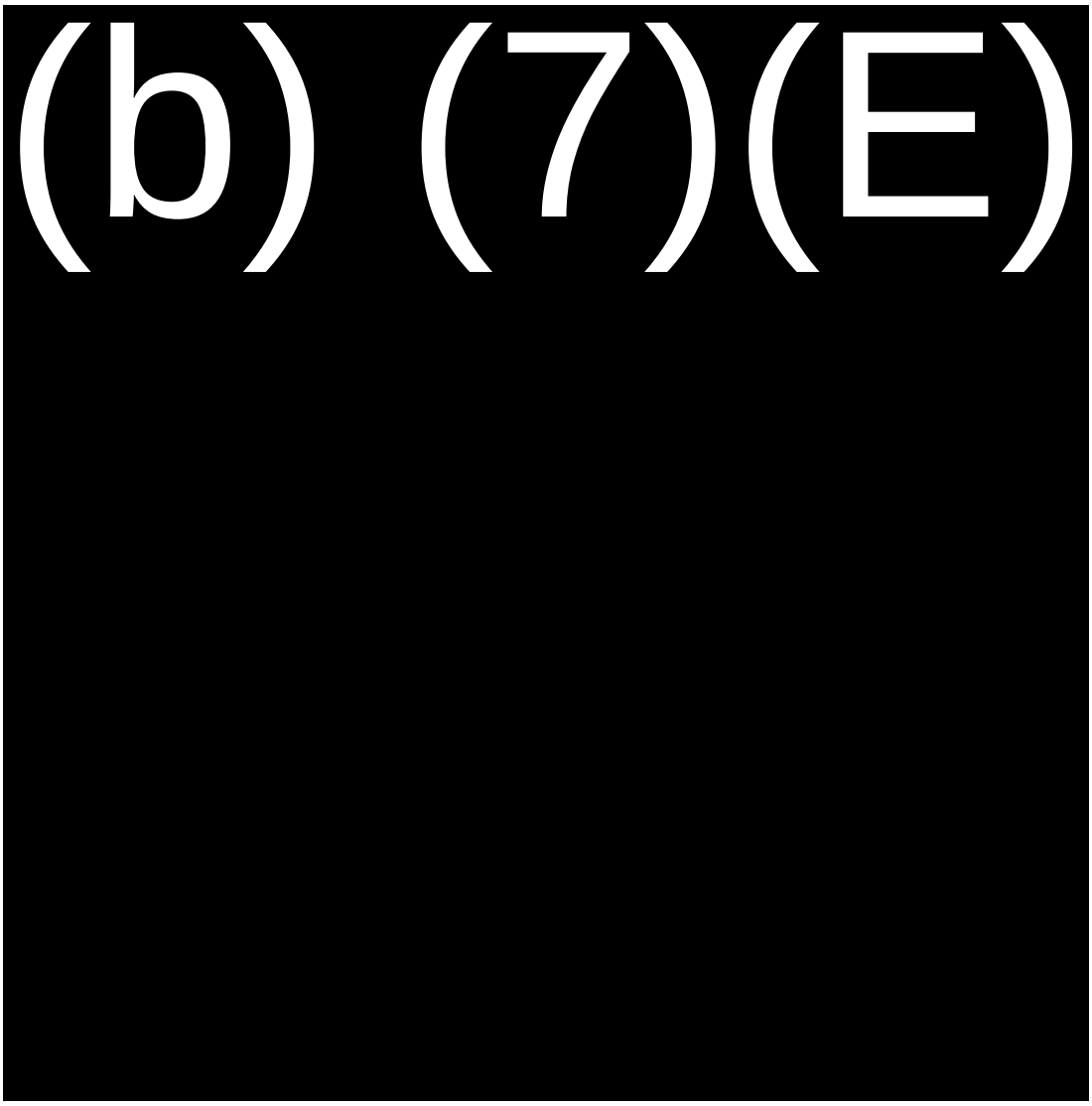
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8.910 Legal Review Required for Referrals to FP&F in Significant Cases

Prior to referring a case to FP&F, CBP officers are required to forward the case to the appropriate Associate/Assistant Chief Counsel for early legal review. A significant § 1592 case involves a penalty in excess of $50,000 or a case that management determines is significant for other reasons. Legal review by the Associate/Assistant Chief Counsel will focus on issues such as statute of limitations, the adequacy of the evidence establishing the violation, the level of culpability of the violator(s) and any alternative authorities under which CBP may pursue a penalty, if applicable. Associate/Assistant Chief Counsels will complete the legal review in accordance with the Early Legal Review Directive.

8.920 Legal Review Required for All Other Referrals to FP&F

Auditors, import specialists and other CBP personnel are encouraged to consult with the appropriate Associate/Assistant Chief Counsel for legal advice at the start of an inquiry in cases involving more than $50,000 in penalties. All CBP personnel are required to forward all documentation relevant to establishing a § 1592 penalty case to the appropriate Associate/Assistant Chief Counsel for legal review prior to referral of the matter to the FP&F.

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Chapter Nine

Money Laundering

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9.000 Introduction

The "money laundering" statutes embodied in Title 18, Sections 1956, 1957, and 1960 are powerful weapons in the government's arsenal for use against persons who knowingly engage in transactions involving the proceeds of unlawful activities. Significantly, the *Money Laundering Control Act* (MLCA) does not punish conduct in the same sense as other criminal statutes do, but makes conduct, which is otherwise lawful, criminal only if done with illicit money and for an illicit purpose. The heart of the MCLA, then, is the source of the funds and the intent and knowledge possessed by the actor, rather than the act itself. This shift in focus has severe implications for law enforcement officers who would seek to establish a violation of either of these statutes.

In most cases not involving an actual movement or attempted movement of funds across the border, successful proof of a violation requires proof that the funds involved were actually proceeds of certain, specifically defined, criminal activity. This means that a money laundering investigation in these circumstances must be coincidental with the investigation of the underlying "specified unlawful activity." An analysis of the statutes, in light of the legislative history accompanying their passage, will highlight the investigative requirements and pitfalls involved.

9.100 Scope of Application

Not all criminal activity can result in the generation of a money laundering case, but most criminal violations that fall within Customs and Border Protection's jurisdiction will. Generally, the statute is addressed only to "specified unlawful activity," (SUA), a concept reminiscent of RICO "racketeering activity," or the "predicate acts" for a wiretap ("Title III") order, or "unlawful activity" under the *Travel Act*.

Criminal activities which may form the basis of a money laundering violation are those violations, other than Title 31 reporting requirement violations, which are listed in 18 U.S.C. § 1961(1) (RICO), as well as those specifically listed in 18 U.S.C. § 1956. Reporting violations are excluded because otherwise a simple failure to report would constitute "money laundering" as well, even where the money was wholly unrelated to any other unlawful act.

In enacting the MLCA, Congress communicated its intent to reach the broad spectrum of economic crimes by designating a variety of offenses as Specified Unlawful Activities (SUAs), amenable to the MLCA provisions. The SUAs within Customs and Border Protection's jurisdiction are as follows:

1. Certain violations forming predicate acts under 18 U.S.C. § 1961(1) [RICO] except Title 31 report violations.

 8 U.S.C. § 1324 - Bringing In and Harboring Certain Aliens [if committed for financial gain];

8 U.S.C. § 1327 - Aiding or Assisting Certain Aliens to Enter [if committed for financial gain];
8 U.S.C. § 1328 - Importation of an Alien for Immoral Purpose [if committed for financial gain];
18 U.S.C. § 201 - Bribery;
18 U.S.C. § 659 - Felony Theft from Interstate Shipment;
18 U.S.C. § 1028 - Fraud and Related Activity in Connection with Identification Documents, Authentication Features, and Information;
18 U.S.C. §§ 1426, 1427 - Reproduction and Sale of Naturalization or Citizenship Papers;
18 U.S.C. §§ 1543, 1544 - Forgery or False Use of a Passport and Misuse of a Passport;
18 U.S.C. §§ 2251, 2252 - Sexual Exploitation of Children;
18 U.S.C. §§ 2312, 2321 - Stolen Vehicles;
21 U.S.C. Drug Importation Offenses, including § 848 – Continuing Criminal Enterprise (CCE);

2. Offenses particularly specified in 18 U.S.C. § 1956:

18 U.S.C. § 541 - Entry of Goods Falsely Classified;
18 U.S.C. § 542 - False Statements;
18 U.S.C. § 545 - Smuggling;
18 U.S.C. § 549 - Removing Goods from Customs Custody;
18 U.S.C. § 554 - Smuggling Goods from the United States;
18 U.S.C. § 922(l) - Unlawful Importation of Firearms;
18 U.S.C. § 2319 - Criminal Copyright Infringement;
19 U.S.C. § 1590 - Aviation Smuggling;
21 U.S.C. § 863 - *Mail Order Drug Paraphernalia Control Act*;
22 U.S.C. § 2778 - *Arms Export Control Act*;
50 U.S.C. § 1702 - *International Emergency Economic Powers Act*;
50 U.S.C. App. § 3 - *Trading With the Enemy Act*;

Offenses against nations which involve smuggling or an export control violation related to an item controlled by the United States Munitions List (22 U.S.C. § 2278), or the Export Administration Regulations (15 C.F.R. §§ 730-744), if there is a financial transaction which occurs in whole or in part in the United States.

3. Violations not otherwise specified:

Violations not otherwise specified or within Customs and Border Protection's jurisdiction may nonetheless be reached under the Money Laundering provisions to the extent they involve "importations contrary to law" under 18 U.S.C. § 545, e.g., 18 U.S.C. § 2320 - Counterfeit

Goods or Services; 16 U.S.C. §§ 701, 3371-3378 - *Lacey Act*;[1] and 18 U.S.C. § 2314 - Interstate Transportation of Stolen Property

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9.210 General

The activities within the reach of 18 U.S.C. §§ 1956, 1957 and 1960 can be cataloged under five major groupings plus conspiracy per § 1956(h).

- Domestic transactions
- The movement of funds into or out of the United States
- Government "sting" operations
- Transactions at financial institutions
- Unlicensed money transmitting businesses

The conspiracy section, § 1956(h), makes it a crime to conspire to commit either a § 1956 or § 1957 offense and imposes a penalty equivalent to the particular violation of either section that is sought to be violated. A conspiracy under this section follows the common law pattern, found also in the drug conspiracies, in that an overt act is not required for the crime to be committed. Proof of the agreement alone is sufficient.[2] A given case may require proof of overt acts as circumstantial evidence of the agreement, of course, but the point here is that unlike 18 U.S.C. § 371 conspiracies, no overt act need be alleged in the indictment and proven to establish the crime in the first instance. See Chapter 11, Conspiracy, for a full discussion of this issue.

9.220 Elements

9.221 Financial Transaction Affecting Interstate or Foreign Commerce
9.222 Proceeds of Specified Unlawful Activity

[1] See, e.g., *United States v. Lee*, 937 F.2d 1388 (9th Cir. 1991).

[2] *Whitfield v. United States*, 544 U.S. 209 (2005), *rehearing denied*, 544 U.S. 913 (2005).

9.223 Knowledge (Belief) That the Funds Are Proceeds of Some State, Federal or Foreign Felony
9.224 Prohibited Intent or Purpose in Conducting Transaction

Unlike the violations under § 1957, a violation of § 1956 requires proof of a particular criminal purpose in conducting a transaction, and the maximum sentence for such a violation reflects that purpose. Under § 1956, a defendant can be sentenced to a term of imprisonment not to exceed 20 years and can be fined the greater of $500,000 or twice the value of the property involved. In addition, in respect to (a)(1) and (a)(2) violations, a civil penalty can be imposed in an amount of $10,000 or the value of the property involved, whichever is greater.

The elements necessary for a particular violation are different for each grouping. Moreover, the elements within each group vary depending on what the suspect intends to do and what he knows about the transaction. In a real sense, 18 U.S.C. §§ 1956 and 1957 encompass some eleven separate crimes; that is, eleven different circumstances, each with a different element present, can constitute a money laundering violation.

There are several elements with which one must be concerned to understand this statutory scheme. Since the distinction between crimes both across and within the major groups rests solely with the particular combination of elements involved, a firm grasp of the underlying concepts is essential.

The potential for confusion is further increased by the fact that some of the stated elements do not carry the meaning commonly associated with the terms used. Congress, in the legislative history accompanying the passage of these laws, stated that many of the concepts developed by the courts in interpreting the *Hobbs Act*[3] and the *Travel Act*[4] are intended to apply to similar terms in the money laundering statutes. For example, where the statute on its face requires intent to promote the carrying on of a specified unlawful activity or intent to conceal some aspect of the proceeds of a specified unlawful activity, all that the Government must prove as to the actor is that he intended to promote or conceal some aspect with respect to a state, federal or foreign felony. While the Government need not impute knowledge of the specified unlawful activity to the person being charged in order to obtain a conviction, it still must prove that the actor's conduct did, in fact, promote, or conceal some aspect of the proceeds of, a specified unlawful activity.

The knowledge element, however, does make this a specific intent crime. A principle of law has developed with respect to specific intent crimes where participants have actively insulated themselves from acquiring the specific knowledge otherwise necessary for conviction. Where one deliberately insulates himself from obtaining critical knowledge, "legal policy" comes in to prevent the

[3] 18 U.S.C. § 1951.
[4] 18 U.S.C. § 1952.

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reward for deliberately making oneself "ignorant" of the critical facts. In such a case, if a jury can find to a substantial likelihood that, under the circumstances, a defendant would have known but for the "deliberate ignorance," then the critical knowledge will be imputed.[5]

With respect to the knowledge requirements of 18 U.S.C. §§ 1956, 1957, Congress stated its intent in the legislative history for the "willful blindness," i.e., deliberate ignorance, of a transactor to be sufficient proof of knowledge. Under principles announced by the "deliberate ignorance" cases, it will be incumbent upon the government to prove sufficient circumstances for a jury to find a "substantial likelihood" that but for the deliberate attempts to avoid it, the pertinent knowledge would have been acquired.[6] The concept of "deliberate ignorance" is to be distinguished from circumstantial evidence of knowledge in fact.[7]

The definitions of the various elements are as follows:

9.221 Financial Transaction Affecting Interstate or Foreign Commerce

A "financial transaction" is required. Virtually any activity in which funds or monetary instruments move from one person or entity to another, or is transferred by some means into or out of the United States, is a transaction potentially within the reach of these statutes.

The statute defines "financial transaction" as being any

- Disposition which affects interstate or foreign commerce, and involves:
- The movement of funds by any means; or
- Monetary instruments; or
- A transfer of title to real property or conveyances; or
- The use of a financial institution which is engaged in or the activities of which affect interstate or foreign commerce; or
- Use of a safe deposit box at a financial institution

[5] *United States v. Edwards*, 602 F.2d 458 (1st Cir. 1979); *United States v. Contreras*, 602 F.2d 1237 (5th Cir. 1979); *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976).

[6] *United States v. Hatcher,* 132 Fed. Appx. 468 (4th Cir. 2005); *United States v. Lara-Velasquez*, 919 F.2d 946 (5th Cir. 1990); *United States v. Farfan-Carreon*, 935 F.2d 678 (5th Cir. 1991)*; United States v. Chen*, 913 F.2d 183 (5th Cir. 1990); *United States v. Restrepo-Granda*, 575 F.2d. 524 (5th Cir. 1978); *United States v. Breque*, 964 F.2d 381 (5th Cir. 1992).

[7] *See*, e.g. *United States v. Campbell*, 977 F.2d 854 (4th Cir. 1992).

Although the term "funds" has not been defined, and therefore takes its common meaning, the term "monetary instruments" has. Coin, currency, money orders, personal checks and bank checks, as distinguished from cashier's checks, are "monetary instruments" irrespective of form. (Note that this definition of monetary instruments is broader than that term's meaning under the *Bank Secrecy Act* as applied to Currency and Monetary Instrument Reports.) Other instruments, including cashiers checks, must be in bearer form to be included within the definition.[8] Further, the term "financial institution" means any person or entity defined as such in either 31 U.S.C. § 5312 or the regulations promulgated there under. The statutory and regulatory definitions are reproduced at § 9.500.

That the statute specifies a financial institution which is either engaged in, or the activities of which affect commerce may require a commerce connection beyond the mere conduct of the transaction. For example, some "financial institutions" may not, themselves, be engaged in interstate or foreign commerce (as is the case with federally regulated or insured bank-type institutions). In such a case, the particular transaction itself must be an activity that somehow affects commerce.

To illustrate: Henry hands $150,000 cash to a lawyer closing a real estate purchase, gives $300,000 in cash to an employee to be deposited into a bank account, buys an airplane for $200,000, and wire transfers $75,000 to Paris, France. Each of these acts are certainly "financial transactions" involving "financial institutions," but, in order for a given transaction to fall within the reach of the statutory scheme, the transaction must have some effect on interstate or foreign commerce. For example, Henry's transfer to the lawyer could be a prohibited financial transaction only if some part of the closing process involved interstate commerce. There is no minimum degree of effect necessary; any affect, no matter how slight, is enough, but there must be some. Insofar as Henry's next two transactions are concerned, the impact on commerce may be seen from the fact that banks are engaged in interstate or foreign commerce by virtue of their federal regulation, and the manufacture and sale of aircraft necessarily involve commerce. Finally, any movement of funds into or out of the United States necessarily affects foreign commerce.

Additionally, the reach of the statute extends to anyone who initiates or concludes any of the above transactions or participates in the initiation or conclusion of such. Thus, the lawyer, employee, bank, airplane salesman or wire transfer agent all may be violators, depending on what they knew and what the money represented.

As noted previously, and as is clear from the examples herein, a financial transaction that might be the basis of a violation is operationally indistinct from any similar "lawful" transaction. Although a "financial transaction" is required,

[8] *See United States v. Arditti*, 955 F.2d 331 (5th Cir. 1992).

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its "criminality" depends on the nature of the funds involved and the purpose for the transaction.

9.222 Proceeds of Specified Unlawful Activity

Most of the various ways in which the money laundering statutes can be violated require that the funds be, or represent, the proceeds of particular criminal activity denominated as "specified unlawful activity." In *United States v. Santos,* 553 U.S. 507 (2008), a divided Court, in a 4-1-4 decision, held that "proceeds" meant "net profits" where the underlying money laundering theory was promotion under 18 U.S.C. § 1956(a)(1)(A)(i) and the proscribed conduct involved making an essential payment to keep the SUA, an illegal gambling operation, in business. The Court's divided opinion in *Santos* created uncertainty regarding what would be considered "proceeds" in future cases, particularly in non-gambling cases. To eliminate that uncertainty, the Congress amended 18 U.S.C. § 1956— "the term 'proceeds' means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity."[9]

When it is required by the underlying money laundering theory, proof of proceeds of a SUA will often be the critical element in the Government's case as it is often the most difficult to prove. A mere belief or suspicion that the money involved in a particular transaction is from specified unlawful activity (SUA) will not be sufficient to prove that the money is, in fact, proceeds of SUA. Being told by the transactor that the money is drug money, for example, will certainly satisfy the "knowledge" requirements of the statute, as will be seen below, but will do nothing, without more, for the proof that the money is actually drug money. It is for this reason that a successful money laundering investigation must operate in tandem with an investigation of the underlying SUA. Absent such an alignment, as a practical matter, proof of the source of particular funds would be most difficult, if not impossible, to achieve.

Although it is not necessary to trace each dollar to a particular SUA, it is necessary to have some evidence of the origins of the proceeds involved.[10] It is important to recognize that, on its face, the conduct involved in money laundering is indistinguishable from legitimate commerce. It is only that the funds involved are illicitly obtained, and the transactor has certain guilty knowledge, that the activity becomes illegal as "money laundering." It follows, then, that the status of the funds involved is a critical element of the crime. For this reason, a jury is authorized to find the forbidden origins only upon evidence of something more than a naked confession or admission.[11] Where the admissions are made during course of conduct, such as to an undercover agent,

9 18 U.S.C. §§ 1956(c)(9) and 1957(f)(3).

10 *See*, *United States v. Baker*, 985 F.2d 1248 (4th Cir. 1993); *United States v. Blackman*, 897 F.2d 309 (8th Cir. 1990); *United States v. Massac*, 867 F.2d 174 (3rd Cir. 1989).

11 *See*, e.g., *Opper v. United States*, 348 U.S. 84 (1954).

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some of the concern is removed, but since the issue is one of reliability, the question is whether there are other factors proved from which a reasonable jury could find the admissions credible, and from all the evidence, find beyond a reasonable doubt the funds derived from a forbidden source.[12]

In Customs fraud cases the problem seems to be rather moot in that any money laundering violation is necessarily tied to the merchandise that is the object of the fraudulent activity and the proof that such was unlawfully imported. Put another way, there can be no property which "represents the proceeds of some" SUA in this context unless there is first merchandise obtained in violation of 18 U.S.C. §§ 541, 542, or 545. Thus, establishment of the violation is indispensable to the creation of SUA proceeds, and of which the merchandise itself is the prototype. Once unlawfully imported, any subsequent transaction (e.g., purchase, sale, gift, transfer, delivery, etc.) involving such merchandise and a monetary instrument or the movement of funds is, by definition, a "financial transaction."[13] Recognition of this fact precludes the argument raised in *United States v. Johnson*,[14] which held that money obtained by fraud (mail or wire) is not such until it is in fact "obtained," i.e., in the possession of the defrauder. In such a case the transaction by which the funds were reduced to possession does not involve "proceeds" of the fraudulent scheme, the funds only becoming such once the transaction is consummated. For the reasons noted above, however, a *Johnson* argument should not arise in a Customs fraud case.[15]

9.223 Knowledge (Belief) That the Funds Are Proceeds of Some State, Federal or Foreign Felony

As we have seen, the heart of these statutes is not the particular conduct or acts involved, since the conduct, by itself, is fully lawful. At any given moment in time, thousands upon thousands, indeed millions of people are engaging in financial transactions that affect interstate commerce and doing so lawfully. The issue, however, is whether a given transaction involves the wrong "stuff" (SUA proceeds) and is for the wrong reason. Critical to any violation, therefore, is the government's ability to prove what level of knowledge a transactor had with respect to the funds involved and, too, what intent or purpose he had in conducting the transaction.

The statute makes it plain that it is never necessary to prove that the transactor knew or believed the funds were in fact proceeds of SUA. The government must prove that fact independently, of course, in most cases, but once proving that the funds actually derived from SUA, it is enough for the government to prove only that the transactor knew or believed that the funds were proceeds from some state, federal or foreign felony, whether such is SUA or not. For example,

12 *See id.*
13 8 U.S.C. §§ 1956(c)(3), (4).
14 *United States v. Johnson*, 971 F.2d 562 (10th Cir. 1992).
15 *United States v. Khanani*, 502 F.3d 1281 (11th Cir. 2007).

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in a case involving proceeds from Customs fraud, which is SUA, it is not necessary to prove that the launderer knew that the proceeds were from violations of 18 U.S.C. § 542; only that he knew they were derived from some type of unlawful activity. Moreover, as noted above, where there is evidence that one lacks such knowledge because one has taken specific steps to be "deliberately ignorant" or "willfully blind," then knowledge is imputed nonetheless.

9.224 Prohibited Intent or Purpose in Conducting Transaction
9.224a Promote SUA
9.224b Conceal/Disguise Nature
9.224c Avoid Report

Insofar as § 1956 violations are concerned, not only must the transactor engage in a financial transaction involving proceeds of SUA, knowing at least that the funds are proceeds of some felony, but the transaction must be accomplished or undertaken by him for a particular purpose.

That purpose must be to accomplish one of the following:

- Promote some violation (which is SUA, in fact); or
- Conceal some aspect (the nature, the location, the source, the ownership or the control) of proceeds (which derive from SUA, in fact); or
- Avoid a reporting requirement; or
- Engage in conduct prohibited by 26 U.S.C. §§ 7201, 7206 relating to income tax.

The burden here is to show that the defendant participated in the transaction for the purpose, or knowing that the transaction was designed or intended, to accomplish any of the four prohibited purposes. A failure to prove a prohibited purpose on the part of the transactor is fatal to the prosecution.[16]

For example, Henry takes $300,000 cash, which he had been saving in a box in his garage and which he obtained from drug deals two years ago, and buys an airplane from a friend in another state. Such a transaction would be a financial transaction affecting interstate commerce that involved proceeds of SUA and which Henry at least knew were proceeds from some felony. Unless there were facts present, however, which could be proven by the government to show that Henry's intent or purpose was to accomplish one of the four prohibited purposes, no violation of § 1956 would have occurred.

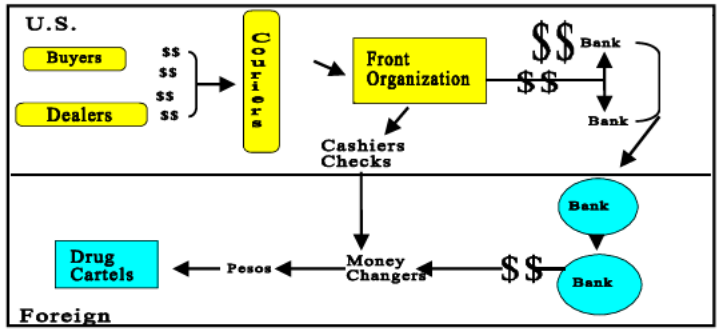
16 *See*, *United States v. Sanders*, 928 F.2d 940 (10th Cir. 1991); *United States v. Baker*, 985 F.2d 1248 (4th Cir. 1993).

9.224a Promote SUA

In this regard, "promote the carrying on of specified unlawful activity" connotes a transaction whereby particular criminal activity, denoted as SUA, is intended to be advanced or protected. For example, withdrawing funds from a bank account for the purpose of purchasing illicit drugs is a prohibited purpose. Similarly, giving money to a go-between for the purchase of military armaments pursuant to a scheme to export these in violation of the *Arms Export Control Act* is also a prohibited purpose. Of course, the individual conducting the transaction need not know the precise nature of the activity involved, as long as he at least knows he is promoting some state, federal or foreign felony. The government, on the other hand, must be able to show that the activity actually being promoted was SUA, in fact.

This idea of "promotion," however, may be quite difficult to prove in some circumstances. Certainly, if Henry bought the airplane for the purpose of flying drugs into the United States, that purpose would be to promote SUA and, therefore, would be a violation. Similarly, if Henry takes even honestly produced funds to Jamaica to buy cocaine, the movement of the money out of the United States would be for the purpose of promoting SUA, and thus a violation as well. In the more significant of cases, however, the proof may not be so simple, keeping in mind that we must prove the transactor's state of mind; i.e., his purpose in moving the funds or conducting the transaction.

Take, for example, the situation involving a typical "laundry" of drug money that is described in Figure 1.



In such a situation, the "front" organization and the moneychanger in the network are "funnels" through whom the bulk of the drug money flows. Typically, the "front" charges a percentage of each dollar handled, and the moneychangers, for their part, make their money on the exchange rate. Because the flow is "channeled" at these two points, the "front" and moneychangers are strategically more significant targets than any of the other players, save the drug producers and cartels at the end of the chain.

Although the "front" and moneychangers certainly know that the funds they handle are drug proceeds, the question here is whether it matters to them what the source of the funds might be. Stated another way, one would be hard-pressed to prove, or even suggest, that their purpose in conducting these transactions was to promote the drug trade. That it does so is unarguable, but the statute does not require proof of the effect of the transactions. It requires proof of the transactor's intent, which, at best in this case, is to make money.

To reach participants in the money flow such as these, one must look to one of the other prohibited purposes (e.g., concealing or disguising, or avoidance of transaction reports), given that the funds moved into or out of the United States.

9.224b Conceal/Disguise Nature

Similarly, if the purpose of the transaction is to conceal or disguise the nature, location, source, ownership or control over the proceeds involved in the transaction, and the transactor believes that the proceeds are proceeds of some felony, then proof of such is sufficient as to his purpose. As seen previously, the funds to be concealed must nonetheless be independently proven to be proceeds of SUA, in fact.

Using the same structure as depicted in Figure 1, it would seem obvious that the very reason why the front organization came into existence would be to profit from the desire and need of individuals to move money without their identity being connected with it. This is the service that the "front" sells; it goes "up front" in the transactions with the bank, substituting its identity for that of the real party in interest. This being so, the very existence of the organization, coupled with the fact that it engages in the transactions depicted in the illustration, should well prove the intent or purpose behind the transactions; that is, to conceal or disguise the owner, etc., of the funds involved.

Conducting transactions or moving money into or out of the United States for this purpose, however, requires other elements of proof before a violation is established. Specifically, the government must prove, in addition to the movement and purpose, that the funds being disguised were, in fact, proceeds of specified unlawful activity. In other words, there must be specific proof that the money being disguised or concealed came from a particular criminal act denoted as SUA, and this proof must be independent of the transactor's "say-so." This same problem has been experienced with prosecutions under the *Travel Act*, prior to enactment of these statutes. The government had little problem proving that money-movers "knew" that the money being distributed was drug money, and with respect to which they traveled in, or used facilities in, interstate or foreign commerce. The difficulty came in proving that the money so distributed was in fact proceeds of an unlawful business activity and as a result, some of these prosecutions faltered.

It is interesting to note that the statutory provision respecting movement of funds into or out of the United States, unlike domestic transactions, does not require that the specific funds directly involved in the transfer be proceeds of SUA. The effect in the conceal/disguise context is that although the concealment, etc., must be with respect to proceeds of SUA, those proceeds do not have to be the funds being transported. Put another way, one ordinarily would not expect to prove a violation where the funds transported were not proceeds of SUA. Where, however, facts exist such that the movement of the funds was intended by the transporter to conceal or disguise some aspect of other funds that are proceeds of SUA, a violation may nonetheless be proved. It is important to keep in mind in this "conceal/disguise" context, therefore, that

regardless of the approach taken, the object of the concealment must, in all events, be proceeds of SUA. Moreover, the transporter must also believe that the funds he is actually transporting are proceeds from some felony.

9.224c Avoid Report

This "prohibited purpose," unlike the "promote" and "conceal" purposes, imposes no additional requirements with respect to the nature of the funds involved. Once having established that a domestic transaction involves SUA proceeds in fact, or that movement of funds of any source across the border has occurred, it remains to be proved that the transactor believed that the funds derived from some state, federal or foreign felony, and that his purpose in moving the funds or conducting the transaction was to avoid a state or federal reporting requirement (e.g., CTR, CMIR, 8300, etc.).

Again using Figure 1, we note that the couriers who pick up the cashiers' checks from the "front" organization and transport them out of the United States do not necessarily violate any reporting requirement. If, as is usually the case, the checks are made payable to a named person, then there is generally no requirement to report the transportation, regardless of amount. This being so, it would seem that this "avoid" theory would not be available where the funds were in such form that their transportation would not require a report.

On the other hand, if it can be shown that the couriers' purpose in bringing the money to the "front" and receiving the check in the first place was to avoid (or participate in the avoidance of) the reporting requirement either at the bank (CTR) or at the border (CMIR), a prosecution may still lie. Stated another way, if the purpose in getting the cashiers' check from the "front" was to avoid a report otherwise necessary at the bank or in transporting the money, then it can be said that his intent or purpose in getting and transporting the check was to avoid a reporting requirement.

To be sure, in the border crossing context, this argument could be made in any case in which one transports funds in a non-reportable form, but no violation will occur unless it is also shown that the courier knew or believed the funds involved represented proceeds from some state, federal or foreign felony.

With this background, then, we can look at the various combinations of these elements that make up the specific violations of the money laundering statutes.

9.230 Domestic Transactions

All four of the elements discussed above are required to constitute a money laundering violation in this group. The "intent or purpose" element can exist in four discrete ways, and varies according to what the purpose of the transaction is shown to be.

These elements are:

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- Financial transaction affecting interstate or foreign commerce;
- Involving proceeds of an SUA;
- Knowledge or belief by transactor that the proceeds are from some state, federal or foreign felony; and
- Intent or purpose to:
- Promote some criminal activity (which is SUA, in fact); or
- Conceal or disguise some aspect of the proceeds (from an SUA in fact); or
- Avoid a state or federal reporting requirement; or
- Engage in conduct that is prohibited by 26 U.S.C. §§ 7201, 7206 relating to income tax.

9.240 Movement of Funds Into or out of United States

9.241 Promote SUA
9.242 Conceal/Disguise Nature
9.243 Avoid Report

The MLCA in this particular extends to any "monetary instrument" or "funds" which are transported, transmitted or transferred into or out of the United States. Although "monetary instrument" is defined, the term "funds" is not defined at all. The effect of this departure will not be seen until the courts interpret the term, indeed if at all. The term "funds" generally refers to pecuniary resources of any description that consist of, or are measured in, money. The term "monetary instrument," however, is defined as coin, currency, traveler's checks, personal checks, bank checks, money orders, bearer form investment securities and any other negotiable instrument in bearer form. This definition is much broader than that in 31 U.S.C. § 5311 (*Bank Secrecy Act*), in that checks and money orders of all kinds, other than cashiers checks, are included, whether in bearer form or otherwise. Cashiers checks however, as distinguished from bank checks (drafts), still must be in bearer form to be regarded as a monetary instrument for MLCA purposes.[17]

This aspect of § 1956 (the so-called "(a)(2)" violations) addresses the international transfer or transportation of funds. There are three variants of import/export violations under this provision and the particular elements to be proven in a given case depend upon the particular purpose that is shown for the movement of the funds into or out of the United States.

17 *See United States v. Arditti*, 955 F.2d 331 (5th Cir. 1992).

9.241 Promote SUA

If the purpose in the movement of funds is to promote a felonious activity, which is SUA in fact, then the crime is complete with the movement or the attempted movement of the funds in or out of the United States. In this case, the source of the funds is immaterial. Moreover, movement can be accomplished by any means, electronic or physical.

A violation, then, exists if one:

- Exports/imports funds or monetary instruments (or attempts to);
- For purposes of promoting SUA.

As noted, in the circumstance where one intends to promote some felony that is SUA, in fact, the particular source or origin of the funds is immaterial.

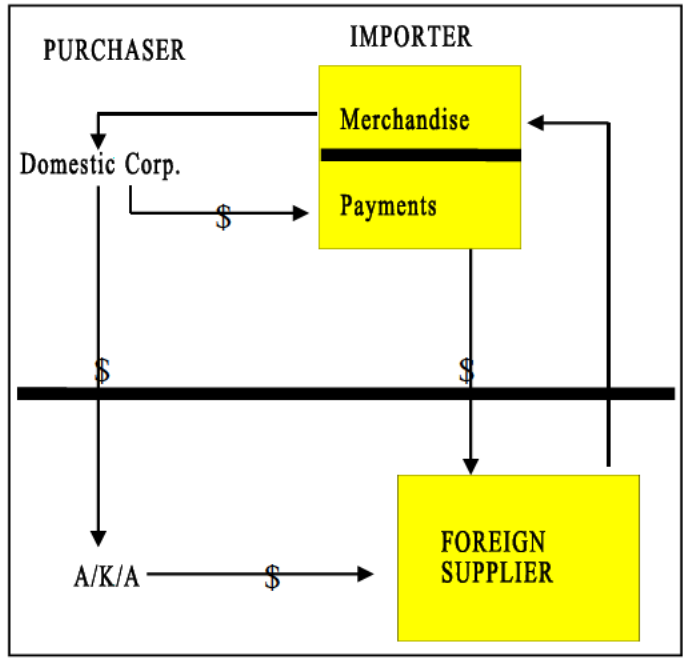


Figure 2

Thus, as exemplified in figure 2, an importer who intends to defraud Customs and Border Protection by failing to declare assists with respect to particular merchandise or by undervaluing merchandise, and then sends or transmits the subsidiary payments off-shore, does so to "promote" the SUA of Customs fraud. That the money may have been legitimately derived is inconsequential. To the same point, funds from past fraudulent activity, e.g., proceeds from the sale of merchandise previously entered or introduced contrary to law might be used to purchase additional merchandise to be fraudulently entered. In such a case it would not be necessary to trace or otherwise prove the illicit source since the prohibited purpose of promoting SUA (Customs fraud) is sufficient for the violation.

9.242 Conceal/Disguise Nature

Where the "intent or purpose" of the movement is to conceal or disguise some aspect of the proceeds, the elements to be proven are:

- Import or Export funds (or attempt to);
- Proceeds of SUA (See proof requirements under § 1956(a)(1), above);
- Knowledge (belief) proceeds are from some state, federal, or foreign felony; (See proof requirements under § 1956(a)(1), above. In addition, a "sting" representation will satisfy. See discussion under § 1956(a)(3), following, for the definition of "represented.");
- The prohibited intent or purpose to conceal or disguise some aspect of the proceeds.

In *Cuellar v. United States*,[18] the Supreme Court had to determine the meaning of the phrase, "knowing that the transportation, transmission, or transfer is designed in whole or in part– to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity" from 18 U.S.C. § 1956(a)(2)(B)(i). The Court noted that "[t]here is a difference between concealing something to transport it, and transporting something to conceal it; that is, *how* one moves the money is distinct from *why* one moves the money. Evidence of the former, standing alone, is not sufficient to prove the latter."[19] Ultimately, the Court held "that the evidence introduced by the Government was not sufficient to permit a reasonable jury to conclude beyond a reasonable doubt that petitioner's transportation was "designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds."[20]

Justice Alito, in a concurrence joined by Chief Justice Roberts and Justice Kennedy, described how the government could have shown that Cuellar's attempted transportation of funds across the Mexican border was designed at least in part to "conceal or disguise the nature, the location, the source, the ownership, or the control" of the funds.

> Transporting the funds across the border would have had the *effect* of achieving this objective if, once the funds made it into Mexico, it would have been harder for law enforcement authorities in this country (1) to ascertain that the funds were drug proceeds

18 Cuellar v. United States, 170 L. Ed. 2d 942 (2008).

19 *Id.* at 956.

20 *Id.* at 958. *See United States v. Ness*, 565 F.3d 73, 78 (2nd Cir. 2009); *United States v. Johnson*, 440 F.3d 1286 (11th Cir. 2006); *United States v. Simon*, 2008 U.S. Dist. LEXIS 94978 (E.D. Wash. 2008).

("nature"), (2) to find the funds ("location"), (3) to determine where they came from ("source"), (4) to ascertain who owned them ("ownership"), or (5) to find out who controlled them ("control"). But as the Court notes … the prosecution had to prove, not simply that the transportation of the funds from the United States to Mexico would have had one of these *effects, ibid.*, but that petitioner *knew* that achieving one of these effects was a *design* (*i.e.,* purpose) of the transportation.

As the Court also notes … a criminal defendant's intent is often inferred. Here, proof of petitioner's knowledge and of the intent of the person or persons who "designed" the transportation would have been sufficient if the prosecution had introduced evidence showing, not only that taking "dirty" money across the border has one or more of the effects noted above, but that it is commonly known in the relevant circles (that is, among those who design and carry out "such transportation," *§ 1956(a)(2)(B)*) that taking "dirty" money to Mexico has one of the effects noted above. Such evidence would permit a trier of fact to infer (1) that the person or persons who "designed" the plan to have the funds taken to Mexico intended to achieve the effect in question and (2) that a person like petitioner (that is, a person who is recruited to transport the funds) knew that this was the design.[21]

Several lower courts have sustained convictions where the Government has followed Justice Alito's advice and introduced evidence as to the purpose behind the international transportation of funds.[22]

9.243 Avoid Report

The third variant involving the movement of funds into or out of the United States, as with "promote," does not require proof that the proceeds involved actually were from SUA. It does, however, require proof that the transactor knew or believed the funds derived from some state, federal or foreign felony. Moreover, the government must prove that the transactor not only took funds across the border which he believed to be feloniously derived, but that his purpose in doing so was to avoid or assist in avoiding some reporting requirement.

Where the intent or purpose for the international transportation is to avoid some state or federal reporting requirement, the elements to be proven are:

- An export/import of funds (or attempt to);

21 *Cuellar* at 958 – 959.

22 *See United States v. Mercedes*, 283 Fed. Appx. 862 (2nd Cir. 2008); United States v. All Funds…Held in the Name of Kobi Alexander, 2008 U.S. Dist. LEXIS 59469 (E.D.N.Y. 2008)

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- Knowledge (belief) proceeds are from some state, federal, or foreign felony;

- The prohibited intent or purpose.

The proof requirements for knowledge noted under § 1956(a)(1), above, apply. In addition, as with the case of promoting SUA, since it is unnecessary to prove the source of the funds given this prohibited purpose, an undercover representation that the money is feloniously derived is sufficient to instill the requisite knowledge.

9.250 Government "Sting" Operations

It should be clear that the MLCA reaches intent and state of mind rather than a particular act. The concern is not so much what one does, but what one does it with and for what purpose. Essential to successful prosecution, in all but the two import/export situations noted above, is the requirement to prove that the monies involved in any particular transaction are actually proceeds of specific, defined SUA.

A third scenario exists, however, as with the two import/export circumstances discussed above, where it is not necessary for the financial transaction to involve proceeds derived from SUA. This violation, § 1956(a)(3), can occur involving property of two distinct natures and it is incumbent upon the government to prove the nature of the property so involved.

The property may be any property that is represented to be either derived from SUA or used to conduct or facilitate SUA. The term "represented" is defined in the statute as "any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a federal official authorized to investigate or prosecute violations of this section."[23] This definition is inherently ambiguous and since it affects an essential element of this offense, the question of whether an offense even occurs in a given circumstance depends upon its interpretation.

Interpreted according to its plain language, as the rules of construction require, the statute, oddly, permits a prosecution based upon a representation flowing directly from the lips of any law enforcement officer, state or federal, but not if directed through a third party unless the directing officer is not only a federal officer, but one authorized to investigate § 1956 violations. The language to this point may be strange, but it is clear. The oddity, however, may motivate some court to interpret the statute so as to remove the oddity by requiring that a representation by either a law enforcement officer or other person be made at the direction of a federal official.

[23] 18 U.S.C. § 1956(a)(3).

A second ambiguity rests in the phrase "authorized to investigate....violations of this second ambiguity rests in the phrase "authorized to investigate . . . violations of this section." The statute itself restricts the authority to investigate such violations to "such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate, and, with respect to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may direct with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury, the Secretary of Homeland Security, and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Secretary of Homeland Security, the Postal Service, and the Attorney General.[24]

Although the question may seem academic on the surface, it goes to the very question of whether a criminal offense has occurred in the first place, and thus the point may become very pragmatic. Consider, for example, the case where an undercover IRS agent represents to a suspected launderer that he has drug money to move, and the launderer is thereupon prosecuted under § 1956(a)(3) for doing so. The question of whether a crime has been committed depends upon how a court treats this question. Given the fact that Congress saw fit to preempt the investigative authority arena in the first instance, and further defined the word "represented" in terms of such specific authority, and given further that no need exists to define the term unless such a limitation was intended, a strong argument exists that since the IRS agent is not authorized to investigate a drug SUA, no "representation" occurred, thus no violation. The question was ripe for litigation in an early case, but, fortunately, was not raised.[25] At least one district court has opted for the broader interpretation, i.e., "authorized to investigate any money laundering violation."[26]

The "sting" provision can be useful when all investigative attempts to establish a § 1956(a)(1) or (a)(2) violation have been frustrated. In such a circumstance, where the "laundry" has been identified, but all attempts to go "downstream" to the underlying criminal

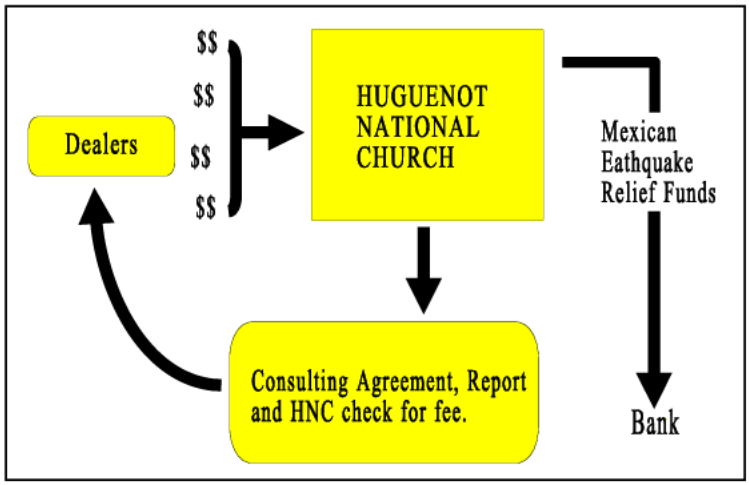


Figure 3 – *United States v. Bucey*, 876 F 2d 1297 (7th Cir 1989)

[24] 18 U.S.C. § 1956(e)

[25] *United States v. Arditti*, 955 F.2d 331 (5th Cir. 1992).

[26] *United States v. Marbelt*, 129 F.Supp.2d 49 (D. Mass. 2000).

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activity have failed, § 1956(a)(3) can be used at least to take out the "laundry." Using Figure 3, suppose that one of the "dealers" in the illustration is an undercover agent or cooperating individual acting at the direction of an ICE special agent and brings money to the "front" organization representing it to be "drug" money (or proceeds from any other SUA). The "front," in conducting the transactions to deposit the money into the bank, for example, violates the statute. The purpose of the "front" in conducting the necessary transactions is, at least, to conceal some factual aspect of the funds involved and disguise them, ultimately, as earned consulting fees.

A violation of this provision, therefore, exists whenever one conducts a:

- Financial transaction, involving;
- Property represented directly or indirectly by a federal law enforcement officer to be either proceeds of SUA or property used to conduct or facilitate SUA; and,
- Does so with intent to:
- Promote the represented SUA; or
- Conceal or disguise some aspect of the funds believed to be SUA; or
- Avoid a transaction reporting requirement.

In regard to a "sting," it would seem that since the funds involved would invariably be "official government funds" that any transaction (e.g., transfer, gift or other disposition) would "affect interstate or foreign commerce" sufficiently to establish the first element. Thus, the simple transfer of the funds to a potential "launderer" in the "sting" context would require only the additional elements to complete the violation. Where, however, tactical and strategic considerations warrant the movement of the funds out of or into the United States by "launderers," a violation for the movement will not occur unless it can be established that the purpose of the "launderer" was to promote some SUA. The reason, as discussed previously, is that any other prohibited purpose would require the funds to actually be SUA proceeds, which, of course, would not be the case with government funds.

Finally, the representation need not be explicit. For example, in one case an undercover IRS agent never explicitly told the defendant that the money he was laundering through his currency exchange business was drug money. However, based on the defendant's responses to the agent's veiled references to drug dealing, including a suggestion to his co-conspirator that they charge a higher commission because of the dangers involved in dealing with drug traffickers, the court held that a jury could infer that the defendant knew that the money had

been represented as drug money.[27] Similarly, a government agent buying a Porsche automobile from the defendant never explicitly stated that the $40,000 in cash he was using was drug proceeds. The court held that the government need not prove that the agent expressly indicated the source of the cash to the defendant, but rather "[i]t is enough that the government prove that an enforcement officer or authorized person made the defendant aware of circumstances from which a reasonable person would infer that the property was drug proceeds."[28]

9.260 Transactions at Financial Institutions

This group of violations is contained in 18 U.S.C. § 1957. Limited to transactions exceeding $10,000 at "financial institutions," this statute, unlike § 1956, does not require proof of any particular purpose or intent in conducting the transaction. Consequently, the maximum sentence is half that of § 1956, and there is no civil penalty provision.

While "Congress' primary concern in enacting [18 U.S.C. 1957] was with "third persons--bankers, brokers, real estate agents, auto dealers and others--who have aided drug dealers by allowing them to dispose of the profits of drug activity, … the statute also reaches the conduct of wrong-doers … who use financial institutions in transactions with the fruits of their own criminal activity."[29] The statute also reaches financial transactions conducted beyond the strict territorial boundaries of the United by a "United States person." A "United States person" is defined as a national or permanent resident alien of the United States, or a legal entity principally composed of such persons, or a United States corporation.

As is generally the case under 18 U.S.C. § 1956, the government must here also prove that the funds involved in a particular transaction are actually proceeds from SUA. As also with § 1956 violations, it is not necessary to prove that level of knowledge on the part of the transactor; that he knew it was "criminally derived" is sufficient proof of his knowledge. Although the § 1956 violations require proof of knowledge (or belief) that the funds were at least feloniously derived, such is not the case here. Belief that the funds are proceeds from misdemeanors would seem to satisfy the "criminally derived" requirement.

A difference in the nature of the transaction is also stipulated. Where any financial transaction is sufficient under § 1956 so long as interstate or foreign commerce is affected, § 1957 reaches only those "monetary transactions" which involve property in excess of $10,000.00. Further, the term "monetary transaction" is defined as a deposit, withdrawal, transfer, or exchange, which affects commerce, involving funds or monetary instruments, at, by or through a financial institution, whether or not such institution is itself engaged in or the

27 *United States v. Breque*, 964 F.2d 381 (5th Cir. 1992).
28 *United States v. Kaufmann*, 885 F.2d 884 (7th Cir. 1993).
29 *United States v. Allen*, 129 F.3d 1159, 1167 n.3 (10th Cir. 1997)

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activities of which affect commerce. It also includes these or any other disposition, including the use of a safe deposit box, at any financial institution engaged in or the activities of which affect commerce.

A notable exception to the definition of "monetary transaction" is any transaction "necessary" to preserve the Sixth Amendment right to counsel.[30] Since the right to counsel only attaches to criminal cases, and at that, only after indictment or a Rule 5a, Fed. R. Crim. P. initial appearance, this exception would not apply to transactions with attorneys for other purposes. The United States Attorneys' Manual (USAM) must be consulted, along with pertinent policy transmittal memos, for the latest DOJ guidance concerning the application of these statutes to attorney transactions.

A violation under this section, then, requires a:

- Financial institution transaction involving funds or monetary instruments of more than $10,000.00 (which affects Interstate or Foreign Commerce);
- Proceeds of SUA;
- Knowledge or belief funds criminally derived; and
- U.S. person, if done outside territory of U.S.

As with violations under § 1956, Figures 1-3 illustrate the reach of § 1957. First, it is necessary to see that the definition of "financial institution" for purposes of § 1957 is the same as that under § 1956 -- a financial institution as defined in either the statute or regulations there under.

9.270 Extraterritorial Application

We can also see that the moneychangers in Figure 1 are "financial institutions," such that transactions with them are "financial transactions" within the meaning of the statute. If a "United States person," with the requisite degree of knowledge, conducts any of the bank transactions contemplated in Figure 1, a violation occurs so long as the transaction exceeds $10,000.00. Thus, if the check couriers in Figure 1 are U.S. nationals or resident aliens their transactions with the moneychangers are prosecutable violations, subject only to proof that they knew the checks represented criminally derived property, and which were, in fact, proceeds of SUA.

That Customs fraud cases normally involve imported merchandise, the value of the extraterritorial application of the money laundering statutes should be self-evident. It should be noted that the provision for extraterritorial application of § 1956 differs from that in § 1957.

[30] 18 U.S.C. § 1957(f)(1).

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If a transaction otherwise within the purview of § 1956 takes place outside the United States, it is nonetheless prosecutable if the prohibited transaction is conducted by a citizen of the United States, or takes place in part in the United States, and involves funds or monetary instruments exceeding $10,000 in value. Under § 1957, a prohibited transaction occurring beyond the special maritime or territorial jurisdiction of the United States is nonetheless prosecutable if the defendant is a "United States person," defined as an U.S. national, permanent resident alien, any person within the U.S., any entity principally composed of U.S. nationals or resident aliens, or any corporation of the U.S. or its territories, or any foreign subsidiary of such a corporation.

The USAM and Criminal Resource Manual must be consulted regarding the need to seek prior approval from the DOJ Criminal Division before seeking any indictment or arrest under these extraterritorial provisions.

9.280 Venue

A venue provision, 18 U.S.C. § 1956(i), was added to the MLCA in 2001.[31] A prosecution for money laundering, or a monetary transaction involving criminally-derived property, may be brought in any district where a financial or monetary transaction was conducted, or in any district where a prosecution for the underlying SUA could be brought, if the defendant participated in the transfer of SUA proceeds from that district to another district where a MLCA offense occurred. In the case of an attempt or a conspiracy to commit a violation of 18 U.S.C. §§ 1956 or 1957, the prosecution may be brought in any district where venue would lie for the completed offense, or any district where an act in furtherance of the conspiracy or attempt occurred. Finally, a transfer of funds from one place to another by any means constitutes a single, continuing transaction. Any person who conducts any portion of the transaction may be charged in any district in which the transaction takes place.

9.290 Unlicensed Money Transmitting Businesses

Anyone who knowingly conducts, controls, manages, supervises, directs, or owns all or part of a money transmitting business affecting interstate or foreign commerce – without a State license where unlicensed operation is a crime under State law; or without complying with the Federal registration requirements for money transmitting businesses found in 31 U.S.C. § 5330, or the regulations promulgated there under, or involving the transportation or transmission of funds that are known to have been derived from a criminal offense or intended to be used to promote or support unlawful activity, shall be imprisoned for not more than five years and/or a $250,000 fine.[32]

[31] Section 1004, Pub. L. 107-56, 115 Stat. 272 (eff. October 26, 2001), Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism of 2001, hereafter USA PATRIOT Act.
[32] 18 U.S.C. § 1960

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The elements of a § 1960 violation are:

- A business engaged in transferring funds;
- By any means;
- Affecting commerce;
- Without a State license where unlicensed operation is a crime under State law;

 or

- Without complying with the Federal registration requirements for a money transmitting business set forth in 31 U.S.C. § 5330 or the regulations promulgated there under;

 or

- Involving the transportation or transmission of funds that the defendant knows were derived from a criminal offense or intended to be used to promote or support unlawful activity.

Sample violations of 18 U.S.C. § 1960:

Example 1: Bill and Pete receive monies from various clients and deposit the funds into an account. They thereafter wire transfer the monies to other accounts as directed by the clients without a license in a State where such unlicensed conduct is a crime.

Example 2: Bill and Pete are licensed in Florida as money transmitters and are actually engaged in that business; however, their business is not registered in accordance with 31 U.S.C. § 5330.

Example 3: Bill and Pete are licensed in Florida as money transmitters and registered as required by 31 U.S.C. § 5330. Bill accepts money from Sam knowing that it was criminally derived and transmits the money to another person in accordance with Sam's instructions.

The legislative history accompanying the 2001 amendments to 18 U.S.C. § 1960 provides valuable guidance to law enforcement officers investigating alleged unlawful money transmitting businesses, which was transformed from a specific intent crime to a general intent crime by the "Patriot Act" amendments.[33]

[33] Section 1004, Pub. L. 107-56, 115 Stat. 272 (eff. October 26, 2001), Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism of 2001, hereafter USA PATRIOT Act. As to the transformation of 18 U.S.C. § 1960 from a specific intent crime to a general

> [A]n offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. § 5330 applied to the business.
>
> **.....**[T]he definition of an unlicensed money transmitting business [includes] a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would be unnecessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

9.300 Civil Penalties

A civil penalty in the amount of $10,000 or the value of the property involved, whichever is greater, is authorized for violations of 18 U.S.C. § 1956.

9.400 Money Laundering Forfeitures

In addition to penalizing the knowing participation in financial transactions involving criminally derived money, Congress has provided a means to seize and forfeit the funds and other property used in such transactions. The civil forfeiture provisions are found in 18 U.S.C. § 981 and the criminal provisions are in § 982 of that title. These statutes are discussed in Chapter Fifteen, Forfeiture.

9.500 Relevant Definitions - 31 U.S.C. § 5312; 31 C.F.R. § 1010.100 (2011)

9.510 Statutory Definitions and Application - 31 U.S.C. § 5312
9.520 Regulatory Definitions - 31 C.F.R. § 1010.100 (2011)

intent crime and the subsequent constitutional challenges regarding that change s*ee United States v. Elfgeeh*, 515 F.3d 100 (2nd Cir. 2008), *cert. denied*, 2008 U.S. LEXIS 5734 (2008); *United States v. Dimitrov*, 546 F.3d 409 (7th Cir. 2008); *United States v. Talebnejad*, 460 F.3d 563 (4th Cir. 2006); *United States v. E-Gold, Ltd.*, 550 F. Supp. 2d 82 (D.D.C. 2008); *United States v. Keleta,* 441 F. Supp. 2d 1 (D.D.C. 2006); *United States v. Rahman*, 417 F. Supp. 2d 725 (E.D.N.C. 2006); *United States v. Uddin*, 365 F. Supp. 2d 825 (E.D. Mich. 2005) and *United States v. Barre*, 324 F. Supp. 2d 1173 (D. Col. 2004).

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9.510 Statutory Definitions and Application - 31 U.S.C. § 5312

(a) In this subchapter

....

(2) "Financial institution" means-

(A) An insured bank (as defined in section 3(h) of the *Federal Deposit Insurance Act* (12 U.S.C. § 1813(h)));

(B) A commercial bank or trust company;

(C) A private banker;

(D) An agency or branch of a foreign bank in the United States;

(E) Any credit union;

(F) A thrift institution;

(G) A broker or dealer registered with the Securities and Exchange Commission under the *Securities Exchange Act of 1934* (15 U.S.C. §§ 78a *et seq.*);

(H) A broker or dealer in securities or commodities;

(I) An investment banker or investment company;

(J) A currency exchange;

(K) An issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments;

(L) An operator of a credit card system;

(M) An insurance company;

(N) A dealer in precious metals, stones, or jewels;

(O) A pawnbroker;

(P) A loan or finance company;

(Q) A travel agency;

(R) A licensed sender of money or any other person who engages as a business in the transmission of funds, including any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the

transfer of money domestically or internationally outside of the conventional financial institutions system;[34]

(S) A telegraph company;

(T) A business engaged in vehicle sales, including automobile, airplane, and boat sales;

(U) Persons involved in real estate closings and settlements;

(V) The United States Postal Service;

(W) An agency of the United States Government or of a State or local government carrying out a duty or power of a business described in this paragraph;

(X) A casino, gambling casino, or gaming establishment with an annual gaming revenue of more than $ 1,000,000 which-

(i) Is licensed as a casino, gambling casino, or gaming establishment under the laws of any State or any political subdivision of any State; or

(ii) Is an Indian gaming operation conducted under or pursuant to the *Indian Gaming Regulatory Act* other than an operation which is limited to class I gaming (as defined in section 4(6) of such Act [25 U.S.C. § 2703(6)]);

(Y) Any business or agency which engages in any activity which the Secretary of the Treasury determines, by regulation, to be an activity which is similar to, related to, or a substitute for any activity in which any business described in this paragraph is authorized to engage; or

(Z) Any other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.

....

(c) Additional definitions -

(1) Certain institutions included in definition – the term "financial institution" (as defined in subsection (a)) includes the following:

[34] Section 359(A), USA PATRIOT Act.

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(A) Any futures commission merchant, commodity trading advisor, or commodity pool operator registered, or required to register, under the *Commodity Exchange Act*.

9.520 Regulatory Definitions - 31 C.F.R. § 1010.100 (2011)

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

....

(d) Bank. Each agent, agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) A commercial bank or trust company organized under the laws of any State or of the United States;

(2) A private bank;

(3) A savings and loan association or a building and loan association organized under the laws of any State or of the United States;

(4) An insured institution as defined in section 401 of the National Housing Act;

(5) A savings bank, industrial bank or other thrift institution;

(6) A credit union organized under the law of any State or of the United States;

(7) Any other organization (except a money services business) chartered under the banking laws of any state and subject to the supervision of the bank supervisory authorities of a State;

(8) A bank organized under foreign law;

(9) Any national banking association or corporation acting under the provisions of section 25(a) of the Act of Dec. 23, 1913, as added by the Act of Dec. 24, 1919, ch. 18, 41 Stat. 378, as amended (12 U.S.C. 611–32).

....

(h) Broker or dealer in securities. A broker or dealer in securities, registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934, except persons who register pursuant to section 15(b)(11) of the Securities Exchange Act of 1934.

....

(t) Financial institution. Each agent, agency, branch, or office within the United States of any person doing business, whether or not on a regular basis or as an organized business concern, in one or more of the capacities listed below:

(1) A bank (except bank credit card systems);

(2) A broker or dealer in securities;

(3) A money services business as defined in paragraph (ff) of this section;

(4) A telegraph company;

(5)(i) Casino. A casino or gambling casino that: Is duly licensed or authorized to do business as such in the United States, whether under the laws of a State or of a Territory or Insular Possession of the United States, or under the Indian Gaming Regulatory Act or other Federal, State, or tribal law or arrangement affecting Indian lands (including, without limitation, a casino operating on the assumption or under the view that no such authorization is required for casino operation on Indian lands); and has gross annual gaming revenue in excess of $1 million. The term includes the principal headquarters and every domestic branch or place of business of the casino.

(ii) For purposes of this paragraph (t)(5), "gross annual gaming revenue" means the gross gaming revenue received by a casino, during either the previous business year or the current business year of the casino. A casino or gambling casino which is a casino for purposes of this chapter solely because its gross annual gaming revenue exceeds $1,000,000 during its current business year, shall not be considered a casino for purposes of this chapter prior to the time in its current business year that its gross annual gaming revenue exceeds $1,000,000.

(iii) Any reference in this chapter, other than in this paragraph (t)(5) and in paragraph (t)(6) of this section, to a casino shall also include a reference to a card club, unless the provision in question contains specific language varying its application to card clubs or excluding card clubs from its application;

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(6)(i) Card club. A card club, gaming club, card room, gaming room, or similar gaming establishment that is duly licensed or authorized to do business as such in the United States, whether under the laws of a State, of a Territory or Insular Possession of the United States, or of a political subdivision of any of the foregoing, or under the Indian Gaming Regulatory Act or other Federal, State, or tribal law or arrangement affecting Indian lands (including, without limitation, an establishment operating on the assumption or under the view that no such authorization is required for operation on Indian lands for an establishment of such type), and that has gross annual gaming revenue in excess of $1,000,000. The term includes the principal headquarters and every domestic branch or place of business of the establishment. The term "casino," as used in this chapter shall include a reference to "card club" to the extent provided in paragraph (t)(5)(iii) of this section.

(ii) For purposes of this paragraph (t)(6), "gross annual gaming revenue" means the gross revenue derived from or generated by customer gaming activity (whether in the form of per-game or per-table fees, however computed, rentals, or otherwise) and received by an establishment, during either the establishment's previous business year or its current business year. A card club that is a financial institution for purposes of this chapter solely because its gross annual revenue exceeds $1,000,000 during its current business year, shall not be considered a financial institution for purposes of this chapter prior to the time in its current business year when its gross annual revenue exceeds $1,000,000;

(7) A person subject to supervision by any state or Federal bank supervisory authority;

(8) A futures commission merchant;

(9) An introducing broker in commodities; or

(10) A mutual fund.

(u) Foreign bank. A bank organized under foreign law, or an agency, branch or office located outside the United States of a bank. The term does not include an agent, agency, branch or office within the United States of a bank organized under foreign law.

(v) Foreign financial agency. A person acting outside the United States for a person (except for a country, a monetary or financial authority acting as a monetary or financial authority, or an international financial institution of which the United States Government is a member) as a

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financial institution, bailee, depository trustee, or agent, or acting in a similar way related to money, credit, securities, gold, or a transaction in money, credit, securities, or gold.

....

(ff) Money services business. Each agent, agency, branch, or office within the United States of any person doing business, whether or not on a regular basis or as an organized business concern, in one or more of the capacities listed in paragraphs (ff)(1) through (ff)(6) of this section. Notwithstanding the preceding sentence, the term "money services business" shall not include a bank, nor shall it include a person registered with, and regulated or examined by, the Securities and Exchange Commission or the Commodity Futures Trading Commission.

(1) Currency dealer or exchanger. A currency dealer or exchanger (other than a person who does not exchange currency in an amount greater than $1,000 in currency or monetary or other instruments for any person on any day in one or more transactions).

(2) Check casher. A person engaged in the business of a check casher (other than a person who does not cash checks in an amount greater than $1,000 in currency or monetary or other instruments for any person on any day in one or more transactions).

(3) Issuer of traveler's checks, money orders, or stored value. An issuer of traveler's checks, money orders, or, stored value (other than a person who does not issue such checks or money orders or stored value in an amount greater than $1,000 in currency or monetary or other instruments to any person on any day in one or more transactions).

(4) Seller or redeemer of traveler's checks, money orders, or stored value. A seller or redeemer of traveler's checks, money orders, or stored value (other than a person who does not sell such checks or money orders or stored value in an amount greater than $1,000 in currency or monetary or other instruments to or redeem such instruments for an amount greater than $1,000 in currency or monetary or other instruments from, any person on any day in one or more transactions).

(5) Money transmitter —(i) In general. Money transmitter:

(A) Any person, whether or not licensed or required to be licensed, who engages as a business in accepting currency, or funds denominated in currency, and transmits the currency or funds, or the value of the currency or funds, by any means through a financial agency or institution, a Federal Reserve Bank or other facility of one or more Federal Reserve Banks, the Board of Governors of the Federal

Reserve System, or both, or an electronic funds transfer network; or

(B) Any other person engaged as a business in the transfer of funds.

(ii) Facts and circumstance: Limitation. Whether a person "engages as a business" in the activities described in paragraph (ff)(5)(i) of this section is a matter of facts and circumstances. Generally, the acceptance and transmission of funds as an integral part of the execution and settlement of a transaction other than the funds transmission itself (for example, in connection with a bona fide sale of securities or other property), will not cause a person to be a money transmitter within the meaning of paragraph (ff)(5)(i) of this section.

(6) U.S. Postal Service. The United States Postal Service, except with respect to the sale of postage or philatelic products.

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Money Laundering Violations Summary Chart 18 U.S.C. §§ 1956, 1957

Act (What the Actor Did)	**[1956(a)(1)]** **(Domestic)** A Financial Transaction = a Disposition, i.e., (1) Movement of Funds, or (2) Monetary Instruments, or (3) Title Transfer, or (4) Use of a Financial Institution, or (5) Use of a Safety Deposit Box That Affects Interstate or Foreign Commerce	**[1956(a)(2)]** **(International Promotion)** Importation or Exportation of Monetary Instruments or Funds	**[1956(a)(2)]** **(International Concealment)** Importation or Exportation of Monetary Instruments or Funds	**[1956(a)(2)]** **(International Report Avoidance)** Importation or Exportation of Monetary Instruments or Funds	**[1956(a)(3)]** **(Government Sting)** Any Financial Transaction (See Act under 1956(a)(1))	**[1957]** Monetary Transaction at a Financial Institution Exceeding $10,000 that affects Interstate or Foreign Commerce
Proceeds (Source of the Funds)	SUA (Specified Unlawful Activity)	ANY Source	SUA	ANY Source	Gov Rep-SUA	SUA
Knowledge (What the Actor Knew Regarding the Source of the Funds)	Feloniously Derived	Not Applicable	Feloniously Derived	Feloniously Derived	Not Applicable	Criminally Derived
Intent (With Promotion or Concealment, the Gov't Must Prove That the Actor Intended to Promote or Conceal Some Felonious Activity **AND** That His Conduct in Fact Promoted or Concealed a SUA)		Promote Felony (SUA in fact)	Conceal Felony (SUA in fact)	Avoid Reporting Requirement (CTR/ 8300/ SAR)	Promote Felony (SUA in fact) Conceal Felony (SUA in fact) Avoid Reporting Requirement	Not Applicable

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Specified Unlawful Activities (SUAs) That Are Within CBP's Enforcement Jurisdiction and ICE's Investigative Jurisdiction:

- Violations of 8 U.S.C. §§ 1324, 1327 and 1328 (Alien Smuggling, etc.)
- Violations of 18 U.S.C. § 541 (Entry of Goods Falsely Classified)
- Violations of 18 U.S.C. § 542 (False Statements)
- Violations of 18 U.S.C. § 545 (Smuggling)
- Violations of 18 U.S.C. § 546 (Export Smuggling)
- Violations of 18 U.S.C. § 549 (Removing Goods From Customs Custody)
- Violations of 18 U.S.C. § 554 (Smuggling Goods from the United States)
- Violations of 18 U.S.C. § 659 (Felony Theft From Interstate Shipment)
- Violations of 18 U.S.C. § 922(l) (Unlawful Importation of Firearms)
- Violations of 18 U.S.C. §§ 2251, 2252 (Sexual Exploitation of Minors)
- Violations of 18 U.S.C. § 2319 (Copyright Infringement)
- Violations of 18 U.S.C. § 2320 (Counterfeit Goods and Services)
- Violations of 19 U.S.C. § 1590 (*Aviation Smuggling*)
- Violations of 21 U.S.C. §§ 841 - 963 (*Drug Abuse Prevention and Control Act*)
- Violations of 22 U.S.C. § 2778 (*Arms Export Control Act*)
- Violations of 50 U.S.C. §§ 1701-1706 (*International Emergency Economic Powers Act*)
- Violations of 50 U.S.C. App. § 3 (Trading With the Enemy Act)

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Chapter Ten

Controlled Substances

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10.000 Introduction

The two main provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, Oct. 27, 1970, 84 Stat. 1242, 21 USC § 841 et seq. are the Controlled Substances Act, 21 USC § 801 et seq.,and the Controlled Substances Import/Export Act, 21 USC § 951 et seq.. The Controlled Substances Act (CSA) established the control and domestic enforcement provisions found in Subchapter I of Title 21 of the United States Code. Subchapter I is further subdivided into Parts A through F which deal with the authority to control, registration requirements, offenses and penalties, administrative and enforcement provisions, and certain general provisions.

Part B of Subchapter I, consisting of § 811 and § 812, provides the authority and criteria for classifying substances and establishes the five schedules by which all controlled substances are catalogued. Schedule I, for example, lists all controlled substances for which there is no legitimate current medical use for treatment in the United States, a high potential for abuse, and a lack of acceptable safety, even under medical supervision, with regard to physiological and/or psychological dependence. Schedule II, on the other hand, is reserved for those controlled substances that also have a high potential for abuse and severe dependency factors, but for which there is a currently accepted medical use for treatment. Schedules III - V list controlled substances with correspondingly less potential for abuse and dependency.

Since Congress authorized the Attorney General to add to, subtract from or move within the schedules, those substances deserving of such treatment, in accordance with the criteria established in § 811 of Title 21, the schedules are dynamic and change regularly as experience and information dictate. At one time, for example, methaqualone (Quaalude) was prescribed in the treatment of obesity. Since the drug was accepted for medical use in treatment, even though it had a severe potential for dependency and a high potential for abuse, it was originally placed in Schedule II. However, the drug's extensive abuse, its physiological and psychological consequences, soon outstripped its medical utility. The drug was rescheduled as a Schedule I controlled substance and thus absolutely prohibited for any purpose. Similarly, marijuana and its derivatives are also Schedule I substances. Cocaine, on the other hand, is a Schedule II substance because pharmaceutical (legitimately manufactured) cocaine is used as a topical anesthetic and, thus, is currently accepted for medical use for treatment in the United States.

Because of the dynamic nature of the schedules, the contents, as initially established by Congress in § 812 of Title 21, are no longer correct. In order to determine whether or not a particular substance is controlled and, if so, in which schedule it has been placed, one must consult the current regulations, which are located at 21 C.F.R. § 1308, or a current Physicians Desk Reference (PDR).

Subchapter II of the Comprehensive Drug Abuse and Prevention and Control Act of 1970 embodies the offenses and penalties established by the Controlled

Substances Import/Export Act. These violations are of primary investigative concern to CBP. Much case law has developed, with respect to drug violations, in the years since these laws came into existence and concepts have evolved which are unique to this area of law enforcement. In order to fully understand the scope and reach of the drug laws today, it is necessary for the CBP officer to have a fundamental understanding of the concepts underlying the statutory language. Since these concepts evolved mainly under the domestic violations, yet are fully applicable to the import/export offenses, it may be instructive to examine some of the domestic violations and then apply the principles to the import/export arena. An additional benefit, obtained by this approach, is that other statutes (e.g., Aviation Smuggling, 19 U.S.C. § 1590) are built upon the concepts developed under the CSA.

10.100 Analysis of Domestic Sections

10.110 Simple Possession - 21 U.S.C. § 844
10.120 Possession with the Intent to Distribute - 21 U.S.C. § 841(a)(1)
10.130 Distribution - 21 U.S.C. § 841(a)(1)
10.140 Attempt and Conspiracy to Distribute a Controlled Substance

10.110 Simple Possession - 21 U.S.C. § 844

10.111 Knowing or Intentional
10.112 Possession
10.113 Controlled Substance

The analysis begins with the basic simple possession statute, 21 U.S.C. § 844, and its elements. This approach views these elements, indeed the elements of any law to be enforced, from the perspective of the agent. It is one thing to say that, as a matter of law, the essential elements of a violation are such and such but, it is quite another to understand them from an evidentiary perspective; that is, what facts do I, the agent, need to gather in order to establish each individual element?

Simple possession (a misdemeanor), has three essential elements:

- ✓ A knowing or intentional
- ✓ Possession
- ✓ Of a controlled substance.

If all three of these elements are found to be true, then a violation of 21 U.S.C. § 844 has occurred. What *facts* are necessary in a given case to show them to be true may not be so readily apparent.

All drug violations in Title 21 are "specific intent" crimes. It is, therefore, necessary for the government to prove every element of the charged offense, beyond a reasonable doubt, that a defendant specifically intended to do what the

law forbids[1]. In other words, the defendant acted with a bad purpose and not out of accident, mistake or other innocent purpose. If the government cannot make this showing beyond a reasonable doubt, then a judge, either on a defendant's motion or *sua sponte,* will enter a judgment of acquittal.[2]

10.111 Knowing or Intentional

What facts, then, must the knowledgeable agent be looking for in order to establish this initial element? Any facts available that indicate or establish that the defendant *knew of the presence* of the substance involved *and knew of its character.*[3]

Often times, these facts will be readily provided through conversations with the violator or statements made by others in his presence or by coconspirators. Other times, however, the agent, particularly where there is no undercover operative or other cooperating individual involved, will need to acquire circumstantial evidence of this critical element. Here, as in no other area of criminal law, developing case law has been most favorable. If the agent can develop evidence that an individual has *exclusive control* over the area in which a controlled substance is found and this control exists for such a period of time as would accommodate the presence of the substance, then at the very least, a jury question on the issue has been presented.[4]

If, for example, you were to develop facts showing that Bertha lives alone in a one bedroom apartment; has had no visitors for the last several days; has been observed going in and out of the apartment during this period; and currently has four ounces of marijuana in her nightstand drawer, then this exclusive control over the area would be sufficient to establish that whatever it was Bertha was doing with the substance, she was doing it knowingly and intentionally.

As far as the requisite knowledge of the *character* of the substance is concerned, only general knowledge of the substance's character is required.[5] Under the

[1] *See Moore v. United States*, 429 U.S. 20, 22 (1976)

[2] *See* Fed. R. Crim. P. 29

[3] **Presence:** *See United States v. Jewell*, 532 F.2d 697, 703-704 (9th Cir. 1976);*United States v. Iafelice*, 978 F.2d 92, 97 (3rd Cir. 1992); *United States v. Thompson,* No. 05-80750, 2007 U.S. Dist. LEXIS 26656 at 14 (E.D. Mich. S.D. Apr. 11, 2007); *United States v. Morris,* 576 F.3d 661, 666-672 (7th Cir. 2009).

[4] See *United States v. Davis,* No. 98-4435, 1999 U.S. App. LEXIS 2369 at 3 (4th Cir. Feb. 16, 1999); *United States v. Griffin,* No. 04-4536, 175 Fed. Appx. 627 at 9 (4th Cir. Apr.12, 2006); *United States v. Thompson*, No. 05-80750, 2007 U.S. Dist. LEXIS 26656 at 14 (E.D. Mich. S.D. Apr. 11, 2007)

[5] **Character:** *See United States v. Kairouz*, 751 F.2d 467, 467 (1st Cir. 1985); *United States v. Patino-Prado*, 533 F.3d 304, 310-311 (5th Cir. 2008) ; *United States v. Mohamed*, 564 F.3d 119, 125 (2nd Cir. 2009); *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976)

circumstances of the foregoing illustration, one would conclude that Bertha also had the requisite knowledge that the substance was a prohibited substance.

Consider the case in which an undercover officer is engaged in a meeting, resulting from prior negotiations, to acquire a small quantity of cocaine. During this meeting, which takes place in the lobby of an international airport, the target agrees to provide the substance and states that he will call his "man" to bring it. Following the phone call, the violator tells the undercover agent (UCA) that "my man will be here in about ten minutes." About ten minutes later, the UCA and violator see a black Cadillac pull into view below the lobby windows and stop. The violator comments, "Here he is now," and leaves the lobby. The agent observes as the driver gets out of the vehicle, hands the keys to the violator, and enters the airport. The violator then gets into the car, removes a brown paper bag from the glove box and brings it back to the agent. The agent satisfies himself that the bag contains cocaine and the violator is arrested.

By virtue of the statements of the violator, there can be little issue with the idea that he knew of the presence and character of the substance in the bag. A different question, however, arises with respect to the driver of the Cadillac and his criminal liability, if any. The sophisticated agent will recognize that, in this case, the statements by the violator with respect to his "man" are not admissible as evidence against the driver. No exception to the hearsay rule exists on these facts nor are the statements subject to the "coconspirator statement" rule.

The precise issue, in this illustration, is whether the driver had exclusive control over the area in which the drugs were found and, if so, whether that control was for such a period as would accommodate the presence of the drugs. The most that can be said on the point is that the driver had exclusive control of the vehicle during the few seconds that the agent had it in view and, at best, although not certain, for the ten minute interval between the telephone call and arrival at the airport. This period of exclusive control is not adequate, at the level of excluding a reasonable doubt, to accommodate the presence of the substance being within the knowledge of the driver. Stated another way, the period of exclusive control in this case simply does not establish beyond a reasonable doubt that the driver knew that there was a brown paper bag in the glove box and, further, that the bag contained a controlled substance.

At the very least, in such a case, one would want to know who owned the vehicle. If the driver were the owner of the vehicle then, certainly, the issue of his knowledge of the presence and character of the substance in the glove box could properly go to the jury.[6]

It is of critical importance for the agent to recognize that if the inference of knowledge of a substance's presence and of its character is to be drawn from *exclusive* control over the area, then it must be precisely that. If control is not

[6] *United States v. Heredia,* 483 F.3d 913, 922 (9th Cir. 2007).

exclusive, then the inference is not available and other facts will be necessary. The reason for this, since inferences are, of necessity, logical conclusions, is the simple syllogism that if "A" and only "A" had access to an area and drugs appear in that area during the period of that control, then "A" placed the drugs in that area. The moment another has access to the area during the pertinent period, control or access is no longer *exclusive* and it no longer follows as a logical inference that "A" must know of the presence of an object within that area. In this event, other facts become necessary to make the determination as to whether "A" *or* "B" *or* both "A" *and* "B" had the requisite knowledge of a substance found within an area of what is now *shared* access or control. Remember, the government (and thus the agent) has the burden of proving each element of the offense as to each and every defendant. The burden is never upon the defendant to prove his innocence.

Consider, as a further example, the situation in which a Customs officer obtains reliable informant information that three "keys" (kilograms) of cocaine are currently located in an apartment. The informant's information comes from his mother who works for a maid service and in the process of cleaning Jack and Jill's apartment discovered the bags of powder in a kitchen cabinet and brought a sample to her son. The informant has now given it to the Customs officer and the substance field tests positive for a hydrochloride. On these facts, there are three possible choices, or conclusions: Jack has knowledge of the presence and character, but not Jill; Jill has knowledge, but not Jack; both Jack and Jill have knowledge.

The facts, in this case of *shared* control over the area, do not force a particular conclusion as in the case where there is *exclusive* control. Additional facts are necessary to make the determination as to which conclusion is true and without which there can be no presentable case. In this same regard, merely developing facts on the knowledge issue may not establish the minimum *prima facie* case, since mere knowledge of a crime does not make one a participant in that crime. All elements must be present.

Not only does the law permit an inference of knowledge from facts establishing exclusive control over the area, but the courts have permitted certain facts to substitute for knowledge where there is, in fact, no actual knowledge of the presence and character. Known as the doctrine of "*deliberate ignorance*,[7]" if officers are able to establish that a particular suspect voluntarily participated in a drug transaction but did so in a way that was deliberately designed by him to preclude his actual knowledge of the fact that the transaction involved drugs, then the jury is authorized to find guilt, the lack of actual knowledge notwithstanding. [8] Jimmy, for example, is approached by a known drug dealer who asks Jimmy to work as a well-paid courier. Jimmy responds that he does not want to transport drugs but will carry anything else. He also says that if in

[7] *See Jewell,* 532 F.2d at 700
[8] *See Heredia,* 483 F.3d at 922

transporting various things for his new employer, drugs just happened to be included without his knowledge, he couldn't much help that.

Jimmy is later arrested transporting boxes of books in which several kilos of cocaine had been secreted. Upon proof of the circumstances of Jimmy's employment, a "deliberate ignorance" instruction should be given to the jury that if it finds "to a substantial likelihood" that but for Jimmy's deliberate conduct to avoid actual knowledge, he would have had such knowledge, it is authorized to find the requisite knowledge. [9]

10.112 Possession

Traditionally, when one thinks of "possession," the concept of "custody" comes to mind. If one "has" something, he has possession; if he does not "have" it, then he does not have possession. Possession, as it has been defined for purposes of determining drug violations, includes much more than mere physical custody. Conceptually, the issue is one of *control* and does not turn on notions of ownership or physical custody. Although these and similar factors may accompany a possession, they do not determine the issue. By the same token, the mere, naked *ability* to control will not determine possession either. Two factors are essential and must exist at the same time for possession to exist. There must be *the ability to exercise control* and that ability must be coupled with *the intent to exercise that control.*[10]

If the agent can develop facts that establish a person has the ability to exercise control over a substance and that ability is coupled with the intent to exercise that control, then such a person has possession of that substance. When "possession" is accompanied by physical custody of the substance, one has "actual" possession. In those events in which possession does not involve physical custody, the possession is said to be "constructive."[11] The distinction is simply one of labeling, for possession of either variety is fully sufficient for conviction.

By way of illustration, consider that "Big Joey" hires a boat captain to bring in a load of marijuana and to off-load it into a tractor-trailer driven by Joey's nephew, who then stores the rig in Joey's warehouse. On these facts, the boat

9 *See Jewell* 532 F.2d at 700; *United States v. Azubike,* 564 F.3d 59, 64 (1st Cir. 2009)

10 *See United States v. Sweat,* No. 03-20612, 2004 U.S. App. LEXIS 12151 at 7 (5th Cir. Jun. 21, 2004);*United States v. Gonzalez*, 570 F.3d 16, 19-20 (1st Cir. 2009);*United States v. Mata*, 491 F.3d 237, 242 (5th Cir. 2007); *United States v. Burton*, No. 08-15528, 337 Fed. Appx. 786, 788-789 (11th Cir. Jul. 8, 2009).

11 *See United States v. Thompson*, No. 05-80750, 2007 U.S. Dist. LEXIS 26656, at 14-15 (E.D. Mich, S.D.Apr. 11, 2007); *United States v. Morris*, 576 F.3d. 661, 666 (7th Cir. 2009); *United States v. Iafelice*, 978 F.2d 92, 97 (3rd Cir. 1992); *United States v. Davis,* No. 98-4435, 1999 U.S. App. LEXIS 2369 at 3-4 (4th Cir. Feb. 16,1999)

captain had actual possession of the marijuana while en route to the off-load site and while loading into the trailer; the nephew had actual possession while loading it and transporting it to Joey's warehouse; and Joey had constructive possession throughout. When the nephew brings a sample to Joey, both have actual custody of the sample while Joey, at least, has constructive possession of the lot in the warehouse.

The case of Jack and Jill, discussed earlier in illustrating the difference between shared and exclusive control, is illustrative here as well. One should see that it is necessary to have facts to show that *specifically* Jack, or *specifically* Jill, had the requisite control and intent in addition to the knowledge in order for a case to be made against either of them.

One other point must be made with respect to the "intent to exercise control" component. Consider the hapless father who, upon seeing a strange pill on his teenaged son's desk, calls the local DEA office and, after describing the tablet, is told that it is a controlled substance and one which may not be lawfully prescribed or possessed. Following the suggestion by DEA, the father then places the tablet in his coat pocket and heads off to the DEA office to turn it in for recorded disposal.

As the father is en route, can it be said that he has knowledge of both the presence and character of the tablet? May it also be said that the father has the ability to control the tablet as well as the intent to exercise that ability? Since the tablet is a controlled substance, it would seem that the essential elements for a violation of § 844 have been fully met and, indeed, they would be fully met if it were not for the fact that the intent required is a *criminal* intent. This, as with all elements, must be proved beyond a reasonable doubt with the facts developed by the agent.

10.113 Controlled Substance

There must be, in all events, a controlled substance. Federal drug laws do not contain any "turkey" provisions such as exist under many state laws. If one deals in "turkey" (sham) substances representing them to be controlled substances, then many state schemes punish that conduct as "trafficking" in drugs even though the actual substance involved is not prohibited. Under federal drug laws, one cannot be convicted of a substantive violation unless the substance is in fact a controlled substance.[12] If the facts are such that the government can prove beyond a reasonable doubt that the individual actually believed that the substance he possessed, manufactured or distributed was a controlled substance, then he may be properly convicted of *attempted* possession, manufacture, distribution, etc., under the attempt statute, 21 U.S.C. § 846, but not otherwise.

In 1986, Congress passed the Controlled Substance Analogue Enforcement Act

12 *United States v. Oviedo*, 525 F.2d 881, 886 (5th Cir. 1981)

of 1986, Pub. L. No. 99-570, §1202, 100 Stat. 3207-13, 21 U.S.C. §§ 802. 813, which was enacted to solve the problem of drugs which had similar chemical makeups but were not listed in the CSA. The effects of these similar drugs however were substantially the same as or, in some instances, stronger than the listed controlled substance.[13] Again, under § 813, if the analogue drug is intended for human consumption then it is treated as a Schedule I drug.

There is no minimum amount that must be shown to establish the offense, however. Any amount that is sufficient to establish that the substance is in fact a controlled substance is enough, even if the substance is wholly consumed in the test making that determination.[14]

10.120 Possession with the Intent to Distribute - 21 U.S.C. § 841(a)(1)

The move from a § 844 misdemeanor to a felony under § 841(a)(1) is accomplished solely by the nature of the possession element discussed above. If one possesses a substance *with the intent to distribute* that substance, then the possession is felonious. Indeed, the elements of the felony offense of possession with the intent to distribute are identical to those discussed above with the additional element of an intent to distribute.

Thus, a crime occurs when there is a

- ✓ Knowing or intentional
- ✓ Possession
- ✓ Of a controlled substance
- ✓ With the intent to distribute

A distribution is any transfer from one to another, actual or constructive. With the exception of a small amount of marijuana as an "accommodation" (e.g., a puff on a cigarette) where there is no remuneration received, any transfer of a controlled substance is a felony. Any possession of a controlled substance, coupled with the intent to make such a distribution is, as noted, also a felony.[15]

Since intent, unlike "knowledge," cannot usually be demonstrated by direct evidence, the evidence of one's intent must be drawn or developed by the agent from the attendant circumstances. Evidence of the quantity of the substance involved, its purity or value, are all facts from which one may infer that the possession was for distribution rather than personal use. Similarly, the

13 *United States v. Roberts*, 363 F.3d 118 (2nd Cir. 2004)
14 See *U.S. v. Jeffers*, 524 F.2d 253, 258 (7th Cir. 1975)
15 *United States v. Gonzalez*, 570 F.3d 16, 20 (1st Cir. 2009); *United States v. Mata*, 491 F.3d 237, 242 (5th Cir. 2007); *United States v. Burton*, No. 08-15528, 337 Fed. Appx. 786, 788(11th Cir. Jul 8, 2009)

presence of drug distribution paraphernalia such as packaging, heat sealers, "hot boxes" for determining purity, diluents ("cutting" agents such as procaine, sugar, etc.) are also valuable for this purpose. Records of past or intended distributions ("score sheets") and the presence of large sums of cash are also facts from which the inference of an intent to distribute may be drawn.[16] If it can be established that the possessor is a nonuser, then the possession may certainly be inferred to be with the intent to distribute. If the possession also culminates in a distribution, then the possession was with the intent to distribute.

10.130 Distribution - 21 U.S.C. § 841(a)(1)

Since all drug violations have two elements in common (i.e., "knowing or intentional" and "controlled substance"), the remaining element or elements are simply as contained in the name by which the particular offense is commonly called. For example, when we say that one is guilty of distribution, we mean that the facts establish that one has committed a

- ✓ Knowing or intentional
- ✓ Distribution of a
- ✓ Controlled substance

As noted above, a distribution occurs any time that a transfer from one to another takes place. [17] No sale or exchange need take place nor anything other than the simple transfer of possession. [18] Moreover, just as the possession can be actual or constructive, so also may the distribution be actual or constructive and the same considerations for the distinction apply to a distribution as they do to possession.

Consider "Big Joey" from the illustration above, whose nephew, on behalf of Joey, drove a tractor-trailer of marijuana into Joey's warehouse. Joey has now arranged to sell the trailer load to Sam and has agreed to have his nephew leave the rig at a specific truck stop for pickup by Sam. At the point the nephew does so, Joey (and the nephew) have transferred the load, albeit constructively, to Sam, and a distribution has occurred.

16 See *United States v. Moore,* 911 F.2d 140, 145 (8th Cir. 1990) (quantity); *United States v. Rosier*, No. 07-13138, 264 Fed. Appx. 841, 844 (11th Cir. Feb. 8, 2008) (value);*United States v. Villarreal*, 324 F.3d 319, 324 (5th Cir. 2003)(value)

17 *United States v. Wallace*, 532 F.3d 126, 127 (2nd Cir. 2008) (distribution)

18 21 U.S.C. § 802 (8) The terms "deliver" or "delivery" mean the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship.

10.140 Attempt and Conspiracy To Distribute Controlled Substances- 21 U.S.C. § 846

Congress intended to punish *attempts* to distribute controlled substances even when completion of the attempted crime was impossible.[19] It can be the distribution of a noncontrolled substance but believed by the defendant to be a controlled substance which will complete the crime of attempt under § 846. The government must introduce some measure of objective evidence corroborating the attempt of the controlled substance.[20]

For a conspiracy charge, on the other hand, the government must prove that here was an agreement between two or more persons to commit the underlying crime and the defendant knowingly and voluntarily participated in that agreement. [21] However, the government does *not* have to prove the existence of an overt act since it is not a required element of a conspiracy charge pursuant to § 963 (and thus § 846 since the two statutes use identical language were enacted at the same time as part of the same public law.[22]

10.200 Analysis of Import/Export Sections

10.210 Importation - 21 U.S.C. § 952
10.220 Extraterritorial Activities - 21 U.S.C. § 959
10.230 Other Import/Export Statutes

10.210 Importation - 21 U.S.C. § 952

The same two elements that are common to the domestic violations are also common to most import/export violations. It is necessary only to add the name of the particular criminal activity in order to supply the missing element or elements.

In doing so, with respect to a § 952 violation, a crime is committed by one who:

- ✓ Knowingly or intentionally
- ✓ Brings into the United States
- ✓ A controlled substance

Although bringing drugs into the United States is commonly referred to as "importation," the use of the term does not have any technical meaning as

19 *United States v. Everett*, 700 F.2d 900, 903 (3rd Cir. 1983)
20 *Id.* at 908
21 *United States v. Rosier,* No. 07-13138, 264 Fed. Appx 841 at 843-844 (11th Cir. Feb. 8, 2008); *United States v. Thompson*, 422 F.3d 1285, 1290 (11th Cir. 2005); *United States v.Drew*, No. 08-16990, 2009 U.S. App. LEXIS 26896 at 14
22 *United States v. Montgomery,* 150 F.3d 983, 997 (9th Cir. 1998)

developed or applied under the tariff schedules.[23] The term "United States" in this statute means any geographical area in the world over which the United States exercises territorial jurisdiction Thus, a violation under § 952 occurs whenever illicit drugs are brought into, for example, Guam or the Virgin Islands.. This section specifically contemplates that transporting drugs into Hawaii, for example, which is within the Customs territory, from Guam, a U.S. possession, would be a prohibited importation, both being the "United States" notwithstanding. Further, it should be apparent from this that an "importation" into the Virgin Islands, for example, although violating § 952, would ***not*** be a violation of 18 U.S.C. § 545. Perhaps the most significant implication is that any forfeitures in such circumstance could proceed only under 21 U.S.C. §§ 881, 965 and not under 19 U.S.C. § 1595a.

Indictments charging violations of § 952 and 18 U.S.C. § 545 are separate offenses and are not subject to the Double Jeopardy Claim of the Fifth Amendment.[24]

10.220 Extraterritorial Activities - 21 U.S.C. § 959
10.221 United States Impact
10.222 United States Aircraft
10.223 United States Citizen
10.224 Conspiracy to import controlled substances

Congress is empowered to legislate against activities *outside* the territory of the United States that have as their focus or impact consequences *within* the United States. So long as the enactments are consistent with precepts of international law, such statutes are fully lawful and enforceable.

In this regard, Congress has determined that activities conducted abroad that involve controlled substances can have a significant and deleterious effect on the health and welfare of United States citizens and residents. Acting upon this recognition, Congress has enacted several "extraterritorial" statutes of which § 959 is but one.[25] There are three distinct activities proscribed by this statute and thus three separate forms of conduct which can be punished pursuant to it:

23 21 U.S.C. § 951

24 See *United States v. Sidhu*, No. 04-CR-260A(F) 2005 U.S. Dist. LEXIS 5739 at 5 (D.N.Y.Feb. 15, 2005); *United States v. Jerome-Oboh*, 883 F. Supp. 917, 923-926 (W.D.N.Y 1995).

25 See *United States v. Mohammad-Omar*, No. 08-4596, 323 Fed. Appx. 259(4th Cir. Apr.27, 2009)

10.221 United States Impact

First, a crime is committed by anyone who engages in the:

- ✓ Manufacture or distribution
- ✓ Of a Schedule I or II controlled substance
- ✓ Intending or knowing that such will be unlawfully imported into the United States

Notice that there is no limitation as to where this conduct takes place. Stevedores (longshoremen) who knowingly load hashish onto a freighter in Morocco destined for the United States violate § 959. Given the evidence and physical presence before the court (whether voluntarily, by extradition or otherwise), such persons may be successfully prosecuted and convicted for that activity in Morocco. Note also that there is no concern for the nationality of the violator. This provision reaches any person in any place who engages in the particular conduct for the particular purpose.

10.222 United States Aircraft

This statute also reaches conduct, without regard to its purpose, if it is done by any person on board any United States aircraft.

Any person, regardless of nationality or intended destination, engages in punishable conduct if they:

- ✓ Manufacture, distribute or possess with the intent to distribute
- ✓ A controlled substance
- ✓ On any United States aircraft

If, for example, a French citizen boards a TWA flight en route from Hong Kong to Paris with a pound of heroin in his pocket, a violation of § 959 occurs.

10.223 United States Citizen

Not only can Congress punish the conduct of any person that adversely impacts the United States, but Congress can punish the conduct of any United States citizen for his conduct anywhere in the world (or, presumably, in space).

In this regard, § 959 punishes any

- ✓ Manufacturing, distribution, or possession with the intent to distribute
- ✓ A controlled substance

- ✓ By a United States citizen
- ✓ On *any* aircraft

10.224 Attempt and Conspiracy 21 U.S.C. § 963

The final statute relating to importation of controlled substances provides that any person who attempts or conspires to commit any offense defined in this title [26] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

As with §846, for a conspiracy charge, the government must prove beyond a reasonable doubt, hat there was an agreement between two or more persons to commit the underlying crime and the defendant knowingly and voluntarily participated in that agreement. [27] However, the government does *not* have to prove the existence of an overt act since it is not a required element of a conspiracy charge pursuant to § 963 (and thus § 846 since the two statutes use identical language were enacted at the same time as part of the same public law.[28]

10.230 Other Import/Export Statutes

There are other statutes in the import/export section of Title 21, but these have been overtaken by newer statutes. Specifically, the *Maritime Drug Law Enforcement Act* (46 U.S.C. §§ 1901-1904) and the *Aviation Smuggling Act* (19 U.S.C. § 1590) proscribe virtually all of the activities within the scope of the remaining provisions of the older *Controlled Substances Import/Export Act*.

10.300 Administrative Subpoena

10.310 Procedure
10.320 Delegation of Authority

A Customs Title 21 Controlled Substance Enforcement Subpoena (CF 389) is available to Customs special agents authorized to conduct drug smuggling investigations for use in those investigations. The Customs Summons (CF 3115) is not to be used in drug smuggling investigations. See Customs Directive 4210-013A of December 12, 2001.

10.310 Procedure

Service of the Customs Title 21 Controlled Substances Enforcement Subpoena (CF 389) may be made upon domestic or foreign corporations or upon a

26 21 U.S.C. § 951 et seq.
27 *United States v. Rosier,* No. 07-13138, 264 Fed. App. 841 at 843-844 (11th Cir. Feb. 8, 2008); *United States v. Thompson*, 422 F.3d 1285, 1290 (11th Cir. 2005); *United States v.Drew*, No. 08-16990, 2009 U.S. App. LEXIS 26896 at 14
28 *United States v. Montgomery,* 150 F.3d 983, 997 (9th Cir. 1998)

partnership or other unincorporated association which is subject to suit under a common name, by delivering the subpoena to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.

Customs special agents are reminded that this subpoena, like the Customs summons, is an administrative tool that may be used to gather information and evidence for both civil and criminal purposes. However, the important aspect of this subpoena is that it is authorized *only* for drug smuggling investigations. While this does not mean that 18 U.S.C. § 545 must be charged, it does mean that the investigation *must* relate to the unlawful importation or clandestine introduction of controlled substances into the United States.

Remember also that under § 545, the term "United States" means "Customs territory of the United States," which is defined as the several states, the District of Columbia, and Puerto Rico. Thus, the subpoena cannot be used for drug "imports" into the Virgin Islands, Guam or other territorial or insular possessions of the United States.

The completed original must be photocopied, with the copy delivered to the subject being served.

If the subject refuses to comply with the instructions contained in the subpoena, the serving agent should immediately contact an Associate/Assistant Chief Counsel to seek compliance with the subpoena through the appropriate U.S. attorney and federal district court.

10.320 Delegation of Authority

The authority to issue of the Customs Title 21 Controlled Substances Enforcement Subpoena (CF 389) has been delegated to the Assistant Commissioner for Internal Affairs.

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Chapter Eleven

Conspiracy

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11.000 Introduction

Conspiracy can be defined as an agreement between two or more persons to commit an unlawful act.[1] A conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy.[2] A conspiracy poses distinct dangers quite apart from those of the substantive offense. As Justice Frankfurter stated,

> [a] . . . collective criminal agreement -- partnership in crime -- presents a greater potential threat to the public than individual [offenses]. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger that a conspiracy generates is not confined to the substantive offense that is the immediate aim of the enterprise.[3]

In a business partnership each partner is liable for the acts and admissions of the other partners.[4] So it is with co-conspirators. A unity of design and purpose is the essence of a conspiracy. There must be a confederation, a working together to achieve a common goal by concerted action.[5]

Conspiracy involves the deliberate plotting by two or more persons to subvert the law. Its chief characterization is secrecy, which renders it difficult to detect, adding to the importance of punishing it when discovered.[6] A combination of persons to accomplish by concerted action an unlawful purpose comes within the accepted definition of conspiracy,[7] as does an agreement to accomplish a lawful objective by unlawful means.[8]

[1] *Iannelli v. United States,* 420 U.S. 770, 777 (1975); *United States v. Feola*, 420 U.S. 671 (1975); *Pinkerton v. United States*, 328 U.S. 640, 644 (1946); *Braverman v. United States*, 317 U.S. 49, 53 (1942).

[2] *United States v. Rabinowich,* 238 U.S. 78 (1915).

[3] *Callanan v. United States*, 364 U.S. 587, 593-94 (1961).

[4] *See Liansky v. United States,* 31 F.2d 846 (4th Cir. 1929); *Auerbach v. United States*, 136 F.2d 882 (6th Cir. 1943).

[5] *See Pinkerton v. United States*, 145 F.2d 252 (5th Cir. 1944).

[6] *United States v. Rabinowich*, 238 U.S. 78, 88 (1915).

[7] *United States v. Hutto,* 256 U.S. 524, 528 (1921); *Pettibone v. United States,* 148 U.S. 197, 203 (1893).

[8] *American Cyanamid Co. v. Shariff,* 309 F.2d 790 (3rd Cir. 1962); *Yates v. United States,* 225 F.2d 146, 155 (9th Cir. 1955), *rev'd on other grounds*, 345 U.S. 298 (1957).

Persons who could not be convicted of aiding and abetting or as an accessory because a crime was never consummated may still be punished for the conspiracy.[9] Consecutive sentences can be imposed for the conspiracy and for the underlying crime.[10] The conspiracy can even be punished more harshly than the accomplishment of its purpose.[11]

11.100 Elements of the Offense
11.110 Agreement
11.120 Withdrawal
11.130 The Overt Act
11.140 State of Mind

11.110 Agreement
11.111 The "Two or More Persons" Requirement
11.112 The Objects of the Agreement

The agreement is the essential evil of which the crime of conspiracy is composed, independent of any other evil it seeks to accomplish. It is the agreement that distinguishes conspiracy from aiding and abetting which, although often based on an agreement, does not require proof of that fact.[12] The mere fact that each of several defendants acted illegally with the same end in view does not constitute a conspiracy unless such acts were done pursuant to a mutual agreement. It is sufficient that there was a meeting of the minds, i.e., an intelligent and deliberate agreement to do a prohibited act. Neither formal words nor a written contract is necessary. The heart of every conspiracy is a common understanding and this combination of minds in the unlawful purpose is the foundation of the offense.[13]

Since the gravamen of a conspiracy is the agreement between or among those agreeing, the question quickly becomes, in the absence of direct evidence, what circumstances will evidence that such an agreement has been reached? In *United States v. Falcone*,[14] the government prosecuted several jobbers who sold sugar, yeast and five-gallon cans to people knowing that the materials would be used for illicit distilling. Some of the jobbers purchased at higher prices to meet the demand and one even refused credit because "your business is too risky." The Supreme Court, however, held that simply knowing that the materials would be used for illicit purposes, does not evidence an agreement between the seller and buyer to accomplish the buyers' illegal purpose. The Supreme Court

9 *United States v. Rabinowich,* 238 U.S. 78 (1915); *United States v. Torres,* 503 F.2d 1120, 1124 n.2 (2d Cir. 1974); *Cross v. United States,* 392 F.2d 360, (8th Cir. 1968); *United States v. Soblen,* 301 F.2d 236, 242-43 (2d Cir. 1962).
10 *United States v. Feola,* 420 U.S. 671 (1975); *Callanan v. United States*, 364 U.S. 587 (1961); *Pinkerton v. United States*, 328 U.S. 640 (1946).
11 *Clune v. United States,* 159 U.S. 590 (1895).
12 *Pereira v. United States*, 347 U.S. 1 (1954).
13 *United States. v. Jensen*, 41 F.3d 946 (5th Cir. 1994).
14 *United States v. Falcone*, 311 U.S. 205 (1940).

left undecided the question of whether knowing that the buyer was involved in a conspiracy, as opposed to being a single criminal actor, would be sufficient proof. The Court, however, would later answer this question in the negative.

In *Direct Sales Co. v. United States*,[15] Dr. Tate, a small-town, rural physician, purchased morphine tablets from Direct Sales Company, a manufacturer and mail-order distributor of pharmaceuticals. Dr. Tate's purchases gradually increased over a seven-year period from a few hundred quarter-grain tablets a year to around six thousand half-grain tablets a month, equivalent to 400 average doses every day. Dr. Tate, of course, was distributing the morphine to addicts and other purchasers at two to four times the price he paid to Direct Sales. In holding that Direct Sales was a co-conspirator with Dr. Tate, the Court held that the agreement to accomplish the illicit distribution of the drugs was evidenced by proof that fifteen percent of its annual income was attributable to its sales of narcotics, whereas most competitors limited sales to 100-tablet units; the company's distribution policy attracted a disproportionate number of physicians convicted of violating the narcotics laws (27% of all such physicians); the Federal Bureau of Narcotics (FBN) had warned Direct Sales that it was being used as a source of supply for the illicit traffic by convicted physicians, and that the national average for morphine sales to individuals physicians was no more than 400 one-quarter grain tablets per year. The FBN had also asked Direct Sales to curtail selling morphine in 5,000-tablet lots. In response, Direct Sales limited Dr. Tate to 1,000-tablet lots, but doubled the strength to half-grain tablets.

If the gravamen of conspiracy is an agreement to do what the law forbids, the operant factor of an agreement is the intent to further, promote and cooperate in that which the law forbids. As the Supreme Court observed in *Direct Sales*, "this intent, when given effect by overt act, is the gist of conspiracy."[16]

The evidence of such intent must be "more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. [In this case] [t]here is informed and interested cooperation, stimulation, instigation." The Court also found a "stake in the venture" which, although not essential, is certainly relevant to the question of intent. In this case the "stake" was the profits derived from the volume of Tate's' illicit distribution scheme.

Investigators, therefore, must develop evidence that the conspirators acted together with a common understanding and intent.

11.111 The "Two or More Persons" Requirement
11.111a Buyer and Seller
11.111b Corporations
11.111c Partners
11.111d Attorney and Client

15 *Direct Sales Co. v. United States*, 319 U.S. 703 (1943).
16 *Id.* at 711.

11.111e Employer and Employee
11.111f Landlord and Tenant
11.111g Husband and Wife
11.111h Government Undercover Agent and Another Person

The offense of conspiracy necessarily involves at least two persons.[17]

11.111a Buyer and Seller

As noted above, a sale to another, in and of itself, does not show participation of the seller in a conspiracy with the buyer even where the seller had knowledge that the merchandise was to be used for an illegal purpose. The question is always one of intent to further or assist in the accomplishment of the buyer's illegal purpose, as seen in the above discussion of *Direct Sales Co.*

Wharton's Rule is a legal doctrine also impacting this question of buyer and seller. See § 11.400 for a full discussion of this doctrine. Simply stated, where a given crime necessarily requires two people for its commission, (e.g., adultery), Wharton's Rule prohibits the finding of a conspiracy among themselves to commit that crime. In drug cases, a sale (distribution) necessarily requires two persons to effect the required transfer. That being so, Wharton's Rule would bar a conspiracy based solely on the agreement to transfer. On the other hand, the seller of drugs certainly aids and abets the possession by the buyer - a separate crime. Whether or not that circumstance will support a conspiracy is, as *Falcone* teaches, dependent upon the evidence of the seller's intent to actually further the buyer's illegal purpose beyond the immediate sale as instructed by *Direct Sales*.

In the rare case, a buyer may be deemed part of the seller's conspiracy where the purchase is intended to advance or further the *seller's* activity. For example, a street dealer of drugs tried repeatedly to insinuate himself into the organization from whom he bought. The organization became his sole source of supply and he introduced other customers directly to the organization. Although he was buying from the organization and selling to others, he regarded himself as a distributor for the organization. For its part, the organization "accepted" the relationship. Under these unique circumstances, the court held that the buyer was involved in a joint venture with the organization sufficient to include a common agreement to distribute drugs.[18]

Finally, perhaps the strongest point for recognizing the division of conspiracies along the buyer-seller line is made by examining the nature of the agreement involved. A conspiracy, by definition, is a *common* agreement, i.e., an agreement by two or more to do an unlawful act. Simply put, one who decides to rob a bank and another who determines to burn out a store are not joined in a conspiracy to commit crimes in general unless there is an underlying agreement

17 *Morrison v. California,* 291 U.S. 82, 92 (1934).
18 *United States v. Moran*, 984 F.2d 1299 (1st Cir. 1993).

between them to accomplish *both* objectives, the assignment to each being but a division of labor. Similarly, a seller of drugs has as his purpose the distribution, whereas the buyer seeks to possess. The criminal objectives are separate and distinct. Only in the circumstance, such as noted above, where there is a *common* agreement to achieve *both* objectives (i.e., the buyer and seller each specifically intends to accomplish the other's objective, as opposed to the other's achievement merely being a necessary by-product of achieving his own) could the transaction evidence a conspiracy between the buyer and seller.

11.111b Corporations

A corporation may be indicted as a conspirator,[19] the rationale being that the intent and acts of its agents are imputed to the corporation when the agents are acting on behalf of the corporation and within the scope of their duties. A corporation may also conspire with its officers and employees but where one corporate officer acts for his corporation without consulting any other natural person, a charge of conspiracy will not lie.[20] An unincorporated association or organization may also be a conspirator.[21] Although at least two persons are required to constitute a conspiracy, one defendant may be indicted and convicted of conspiracy although the names of his co-conspirators are unknown.[22]

11.111c Partners

A partnership is not a separate legal entity in the sense that a corporation is. The individual partners may be indicted for their participation in a conspiracy but not the partnership.

11.111d Attorney and Client

When an attorney advises conspirators before or during the commission of the conspiracy, with knowledge of the conspiracy *and for the purpose of furthering its aims*, he becomes a co-conspirator. Attorneys have been convicted of conspiracy where they deliberately gave false information to law enforcement officers to enable conspirators to evade apprehension or have obtained a stake in the outcome by accepting stolen property in payment of their fee or deposited the fruits of the crime in their personal bank accounts.

19 *Joplin Mercantile Co. v. United States,* 213 F. 926, 936 (8th Cir. 1914), *aff'd*, 236 U.S. 531 (1915).
20 *Almo Fence Co. v. United States,* 240 F.2d 179, 181 (5th Cir. 1957).
21 *American Medical Ass'n v. United States,* 317 U.S. 519, 528 (1943).
22 *Rogers v. United States,* 340 U.S. 367, 375 (1951); *United States v. Green,* 421 F.2d 1237 (2d Cir. 1970).

11.111e Employer and Employee

An employer and his employees may be convicted of conspiracy even though there is no evidence to show that the employee received anything more than legal wages. As a general rule, if the employees know of the unlawful nature of the transactions being carried on and if they continue to work to accomplish the unlawful ends, they may be guilty of conspiracy.

11.111f Landlord and Tenant

A landlord is not necessarily guilty of conspiracy merely because he has knowledge that conspiratorial activities are being conducted on his leased premises and does not stop it. Remember that the gist of the crime of conspiracy is the unlawful agreement. If a landlord merely collects his normal rent from the conspirators and does no more, a charge of conspiracy will not lie.

To find a landlord guilty of conspiracy, as always, you must show that he was a party to the agreement, i.e., did something with the intent to further the accomplishment of the criminal objective. However, where a landlord knowingly permitted his premises to be used in an illicit business, he may be guilty of aiding and abetting. The difference is that to be a co-conspirator the landlord must be a party to the agreement.

11.111g Husband and Wife

The conspirators may be husband and wife.[23]

11.111h Government Undercover Agent and Another Person

Since the gravamen of conspiracy is an agreement, underlying which is the intent to achieve a criminal purpose, an undercover agent or informer, who necessarily lacks such intent, cannot be one of the two essential parties to the creation of a conspiracy.

11.112 The Objects of the Agreement

11.112a Need Not be a Crime
11.112b May Be Impossible

The goal of a conspiracy may be a purpose unlawful in itself or in the means to be employed for its accomplishment. A single conspiracy may embrace several unlawful acts.[24] Each conspiracy statute will set forth the object of the conspiracy.

23 *United States v. Dege,* 364 U.S. 51 (1960); *Pegram v. United States,* 361 F.2d 820 (8th Cir. 1966).
24 *United States v. Manarite*, 44 F.3d 1407 (9th Cir. 1995).

11.112a Need Not Be a Crime

It will be enough to find a conspiracy if the object contemplated is corrupt, dishonest, or fraudulent. It need not be a crime.[25]

11.112b May Be Impossible

The objective of the conspiracy may be impossible. The defendant may be incapable of committing the offense that is the object of the conspiracy or the government, unbeknownst to some of the conspirators, may have defeated the object of the conspiracy. In either case, the defendant may be prosecuted for his role in the conspiracy.

See, *United States v. Jimenz Recio*, 537 U.S. 270 (2003).

11.120 Withdrawal

11.121 Requirements for Withdrawal
11.122 Effect of Withdrawal
11.123 Proving Withdrawal

One common attempted defense to conspiracy is that the defendant withdrew from the scheme. The Model Penal Code in section 5.03, states that withdrawal is a complete and voluntary renunciation of the criminal purpose of the conspiracy in conjunction with an affirmative action toward the thwarting of the success of the objective. Simple abandonment or "walking away" will not in itself establish withdrawal.

11.121 Requirements for Withdrawal

To accomplish effective withdrawal from the conspiracy the defendant must (1) effectively communicate to his co-conspirators that he is ceasing participation in the conspiracy and then (2) act affirmatively to defeat or disavow the purpose of the conspiracy. In the words of the Supreme Court:

> Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonable calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment.[26]

An example of sufficient withdrawal would be a confession to authorities and a clear communication to the co-conspirators of one's abandonment of the conspiracy's goals.[27]

25 *Hammerschmidt v. United States*, 265 U.S. 182 (1924).
26 *United States v. United States Gypsum Co.,* 438 U.S. 422, 464-65 (1978).
27 *United States v. Maloney*, 71 F.3d 645, 666 (7th Cir. 1995).

11.122 Effect of Withdrawal

The withdrawal of a single conspirator does not terminate the conspiracy or change the status of the remaining members, nor does it relieve him of liability for the conspiracy or the criminal acts which have occurred to that point. The withdrawing member, however, will escape liability for any future criminal acts of his former co-conspirators.

11.123 Proving Withdrawal

Since withdrawal is a defense to liability for later offenses, the burden of proof properly rests with the defendant.[28] Once the defendant presents sufficient evidence of withdrawal, the government must then prove beyond a reasonable doubt that the defendant did not withdraw, hence the burden ultimately rests on the government to prove a lack of withdrawal.[29]

11.130 Overt Act

11.131 Not Required by Some Statutes
11.132 Required by Some Statutes

11.131 Not Required by Some Statutes

At common law the crime of conspiracy was complete upon the mere formation of the agreement. This is still true for many widely used federal conspiracy statutes such as conspiracy to violate federal drug laws, 21 U.S.C. § 846, conspiracy to violate the *Money Laundering Control Act*, 18 U.S.C. § 1956, conspiracy to violate the *RICO Act*, 18 U.S.C. § 1962(d) and conspiracy to violate the *Export Administration Act*, 50 U.S.C. App §§ 2410(a) and 2410(b). The theory is that these conspiracies are so dangerous to society that the agreement itself is enough. For a list of federal conspiracy statutes, see Section 11.1000.

11.132 Required by Some Statutes

An overt act to further the crime is required by some statutes to show intent. The acts show that the agreement to commit the crime has progressed from thought and talk to action. The acts manifest the actual intent to commit the offense.[30] As a result, an overt act marks the point in time before which an individual can withdraw without incurring any criminal liability, since conspiracies requiring an overt act are not complete until there has been an overt act.

[28] *Hyde v. United* States, 225 U.S. 347 (1914); *United States v. LeQuire*, 943 F.2d 1554 (11th Cir. 1991); *United States v. Lash,* 937 F.2d 1077 (6th Cir. 1991).
[29] *United States v. Read*, 658 F.2d 1225 (7th Cir. 1981).
[30] *United States v. Yates*, 354 U.S. 298 (1957), overruled on other grounds by *Burks v. United States,* 437 U.S. 1 (1978).

The question of whether or not an overt act is in fact "in furtherance" of the conspiracy is, of course, for the jury to decide.[31] It need not be an unlawful or criminal act, itself, but any act taken toward the accomplishment, or in preparation of the accomplishment of the objective is "in furtherance" and will establish the offense.[32] Moreover, the overt act can be performed by any one of those who have agreed and such act establishes the crime of conspiracy as to all.

The general conspiracy statute, 18 U.S.C. § 371, requires an overt act in furtherance of the conspiracy for the crime of conspiracy to occur.

Where an overt act is required, preliminary acts that merely tend toward an agreement are not enough. On the other hand, once there is the agreement any act is sufficient so long as it tends toward achievement of an object of the agreement. The following acts have been held sufficient to complete the crime of conspiracy: (1) purchase of an automobile; (2) attempt to open a door in a burglary; (3) conversation with the victim; (4) appearance on the scene; (5) telephone call to prospective buyer of counterfeit currency;[33] (6) telegram to "ship the stuff"; (7) telephone call to prostitute - *Mann Act.*[34]

11.140 State of Mind

11.141 Intent to Agree
11.142 State of Mind Concerning the Object of the Agreement
11.143 Mere Knowledge, Approval, Association Not Enough
11.144 Extent of Knowledge
11.145 Proof of Intent

Intent is an integral part of conspiracy. There are two necessary requirements: (1) intent to agree and (2) intent to achieve the objective.[35]

11.141 Intent to Agree

There must be a "meeting of the minds" on what is to be accomplished. A mistake concerning the other "conspirator's" intent will eliminate the state of mind necessary.

To be a party to a conspiracy one must know of its existence and its overall plan or purpose. Each conspirator need not know all the details of the plan or the exact part to be performed by other conspirators. Some conspirators may not be personally acquainted with other conspirators, and may not even know their identity or number.

31 *United States v. Armone,* 363 F.2d 385 (2d Cir. 1966).
32 *Hyde & Schneider v. United States*, 225 U.S. 347 (1912).
33 *Bartoli v. United States*, 192 F.2d. 130 (4th Cir. 1951).
34 *Smith v. United States*, 92 F.2d. 460 (9th Cir. 1937).
35 *United States. v. Jensen*, 41 F.3d 946 (5th Cir. 1994).

11.142 State of Mind Concerning the Object of the Agreement

The government must prove that the parties to the agreement intended the consequences of their actions. The jury must find that the defendants intended to do something the law forbids. The state of mind requirement has been properly labeled "specific intent."[36] The parties are not charged with attempting to commit the unlawful act or with committing the unlawful act. They are charged with the agreement to commit the crime.

11.143 Mere Knowledge, Approval, Association Not Enough

Mere knowledge, acquiescence or approval, without participation or a stake in the outcome, does not make one a party to a conspiracy. Nor can a conspiracy be proved solely by a family relationship.[37] Mere association with conspirators is not enough. There must be cooperation or an agreement to cooperate. There must be a willful participation in the conspiracy with an intent to further the common purpose or plan. However, certain kinds of behavior viewed in the light of all circumstances may justify an inference of complicity in the conspiracy (e.g., continuous presence at meetings).[38]

11.144 Extent of Knowledge

Each conspirator is liable for a multi-faceted conspiracy only to the extent of his knowledge of the various criminal objectives. One could join a conspiracy to sell cocaine and not be liable for the broader conspiracy to import and sell marijuana, if he was unaware that such was an objective of the larger conspiracy. Further, where the objective itself requires specific intent or specific knowledge, such must be shown for each person to be charged with conspiracy to achieve that objective. For example, to convict employees of a numbers operator for conspiracy to evade the federal wagering taxes, the government had to show that the employees had knowledge of the requirement to pay the tax.[39] In a conspiracy to evade a currency reporting requirement, knowledge of the requirement must be established for one to be a co-conspirator.

With respect to liability for substantive crimes, one may not be liable for an unrelated homicide committed by one of his co-conspirators. However, if the homicide had been reasonably foreseeable as a consequence of accomplishing the original objective, then all the conspirators would be guilty of murder. For example, if the plan called for carrying deadly weapons, it would be foreseeable that someone would be murdered, or in a drug smuggling scheme, for a suspected informant to be killed.

36 *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991); *United States v. Garcia-Pena,* 743 F.2d 1462 (11th Cir. 1984); *United States v. Burroughs*, 876 F.2d 366 (5th Cir. 1989).

37 *United States v. Ismoila*, 100 F.3d 380 (5th Cir. 1996).

38 *United States v. Calabro,* 449 F.2d 885, 890 (2d Cir. 1971).

39 *Ingram v. United States*, 361 U.S. 856 (1959).

11.145 Proof of Intent

11.145a Inferred from Acts
11.145b From Providing Lawful Goods and Services
11.145c Specific Intent and Federal Crimes

11.145a Inferred from Acts

The Supreme Court has held that the existence of a criminal conspiracy need not be proven by direct evidence; a common plan may be inferred from circumstantial evidence.[40] Indeed, the informal agreement present in most conspiracy cases must frequently be proven entirely by circumstantial evidence.[41] The absence of direct proof of the agreement generally results from the secretiveness and complexity of modern-day conspiracies, particularly those involving drugs.[42] In fact, when proof of a conspiracy is shown, some circuits have said that only slight additional evidence is necessary to connect a particular defendant with it.[43] Intent to participate in the conspiracy may be inferred from the intentional acts of the defendant and may even be presumed

[40] *Glasser v. United States,* 315 U.S. 60, 80 (1942). Accord. *Langel v. United States,* 451 F.2d 957, 961 (8th Cir. 1971); *United States v. Bates,* 429 F.2d 557, 558-59 (9th Cir. 1970); *United States v. Tyminski,* 418 F.2d 1060, 1062 (2d Cir. 1969); *Grant v. United States,* 407 F.2d 56, 57 (5th Cir. 1969); *Tillman v. United States,* 406 F.2d 930, 939 (5th Cir. 1969), vacated per curiam as to petitioner Fox and cert. denied as to all other petitioners, 395 U.S. 830 (1969); *Lacaze v. United States,* 391 F.2d 516, 519 (5th Cir. 1968); *Williams v. United States,* 271 F.2d 703, 706 (4th Cir. 1959).

[41] *King v. United States,* 402 F.2d 289, 292 (l0th Cir. 1968); *United States v. Ragland,* 375 F.2d 471, 477 (2d Cir. 1967); *Calderon v. United States,* 196 F.2d 554, 555 (10th Cir. 1952).

[42] *See Lynch v. United States,* 397 U.S. 1028 (1970); *Blumenthal v. United States,* 332 U.S. 539, 557 (1947); *United States v. Calabro,* 449 F.2d 885, 890 (2d Cir. 1971); *United States v. Geaney,* 417 F.2d 1116, 1121 (2d Cir. 1969); *United States v. Monica,* 295 F.2d 400, 401 (2d Cir. 1961); *United States v. Stromberg,* 268 F.2d 256, 264 (2d Cir. 1959); *United States v. Rich,* 262 F.2d 415, 417-18 (2d Cir. 1959).

[43] *United States v. Morado,* 454 F.2d 167, 175 (5th Cir. 1972); *Langel v. United States,* 451 F.2d 957, 961-62 (8th Cir. 1971); *United States v. Addonizio,* 449 F.2d 100, 102 (3rd Cir. 1971); *United States v. Henderson,* 446 F.2d 960 (8th Cir. 1971); *United States v. Warner,* 441 F.2d 821, 830 (5th Cir. 1971), overruled on other grounds by *United States v. Bell*, 678 F.2d 547 (5th Cir. 1982); *United States v. Weber,* 437 F.2d 327, 336 (3rd Cir. 1970); *United States v. Jones,* 425 F.2d 1048, 1051 (9th Cir. 1970); *United States v. Knight,* 416 F.2d 1181, 1184 (9th Cir. 1969). But cf. *United States v. Huezo*, 546 F.3d 174, 180 (2d Cir. 2008), cert. denied 2009 U.S. LEXIS 6633 (Oct. 5, 2009) (holding that the "slight evidence" rule does not adequately reflect the government's burden of proof in a conspiracy case); *United States v. Malatesta*, 590 F.2d 1379, 1382 (5th Cir. 1979) (overruled the use of the "slight evidence" rule in conspiracy cases in the 5th Circuit).

where the acts are unlawful. Coordination between conspirators is strong circumstantial proof of an agreement. As the degree of coordination rises, the likelihood that their actions were driven by an agreement increases.[44]

Courts have held that a "single act" may be insufficient to demonstrate membership in a conspiracy.[45] A single act may suffice, however, if it will justify an inference of knowledge of the criminal objectives of the conspiracy.[46] In many drug prosecutions the only proof of a person's involvement with the ongoing conspiracy is that on one occasion he was caught fostering the goals of the conspiracy.

One court of appeals approved the following jury instruction:

> [T]he single act must be such that it "was so related to the conspiracy or such a qualitative part of it as to justify an inference that the defendant involved in the single act has knowledge of the broader activity which constituted the conspiracy." When that is the case, the "single act may be sufficient for an inference that a given defendant was involved in a criminal enterprise of substantial scope which was likely to involve other persons."[47]

However, knowledge will not be imputed from one member of the conspiracy to another for the purpose of showing knowing participation in a criminal act - each defendant must be shown individually to be sufficiently aware of the crime to satisfy the requirements of the substantive offense before he can be held criminally liable for it.[48]

11.145b From Providing Lawful Goods and Services

The *Direct Sales* case discussed earlier is an example of how intent can be legitimately inferred from the knowledge of an illegal venture even though its acts were lawful in their own right. The Supreme Court in that case, of course, was dealing with a situation where Direct Sales had been put on notice by the government as to the illegal purpose for its drugs. Moreover, Direct Sales encouraged large purchases for known illegal purposes and ignored the government's warning. It will be fairly infrequent, though, where proof beyond a reasonable doubt can be inferred from sales of legitimate goods and services.

11.145c Specific Intent and Federal Crimes

In most Federal crimes there is the requirement that whatever the act, it either must be done in or affect interstate or foreign commerce. The question is

44 *Unites States v. Iriarte-Ortega*, 113 F.3d 1022, 1024 (9th Cir. 1997).
45 *See United States v. DeNoia,* 451 F.2d 979, 981 (2d Cir. 1971).
46 *United States v. Torres,* 503 F.2d 1120, 1123 (2d Cir. 1974).
47 *United States v. Romero*, 856 F.2d 1020 (8th Cir. 1988).
48 *United States v. Tavoularis,* 515 F.2d 1070 (2d Cir. 1975).

whether the government must prove that the parties to the agreement knew that interstate or foreign commerce would be affected or that a federal law would be violated. The Supreme Court addressed this issue in *United States v. Feola*[49] and stated that

> [w]ith the exception of the infrequent situation in which reference to the knowledge of the parties to an illegal agreement is necessary to establish the existence of federal jurisdiction, we hold that where knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a *mens rea* requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense.[50]

The plain meaning of this holding is that unless the substantive statute requires that the defendants have knowledge of some jurisdictional factor, the conspiracy statute does not require it either.

11.200 Conspirator's Responsibility for Substantive Offenses

A party to a continuing conspiracy is responsible for any substantive offense committed by him or any other co-conspirator in furtherance of the conspiracy, even though that party does not participate in the substantive offense or have any actual knowledge of it.[51] Before it may convict under this theory, the jury must be satisfied beyond a reasonable doubt (1) that the substantive offense was in fact committed by one or more members of the conspiracy; (2) that the defendant whose guilt it is considering was then a member of the conspiracy; and (3) that the act which constituted the offense was done in furtherance of that conspiracy or was a foreseeable consequence of the unlawful agreement.

Under the so-called *Pinkerton* anti-merger rule, the substantive crimes and the conspiracy do not merge. The Supreme Court stated in *Pinkerton v. United States,* that the "agreement to do an unlawful act is . . . distinct from the doing of the act."[52] For a conspiracy conviction an agreement has to be shown. That is not an element of any of the substantive crimes. Thus, there is no double punishment.

11.300 Late Joiners

11.310 Liability of New Conspirator
11.320 New Conspirator does not Create New Conspiracy

49 *United States v. Feola*, 420 U.S. 671 (1975).
50 *Id.* at 696.
51 *Pinkerton v. United States,* 328 U.S. 640, 645-48 (1946); *United States v. Finkelstein,* 526 F.2d 517 (2d Cir. 1975); *United States v. Cobb,* 446 F.2d 1174, 1177 (2d Cir. 1971); *United States v. Roselli,* 432 F.2d 879, 894 (9th Cir. 1970); *Roberts v. United States,* 416 F.2d 1216, 1223 (5th Cir. 1969).
52 *Pinkerton v. United States*, 328 U.S. 640, 644 (1946).

11.310 Liability of New Conspirator

One who joins a conspiracy is a party to the conspiracy, and is liable, in an evidentiary sense, for acts done by co-conspirators either before or after he joined, in carrying out the common design. The late joiner is not liable, however, for the criminal acts of co-conspirators prior to his joining, but the prior acts are admissible against him for purposes of proving the conspiracy.

11.320 New Conspirator Does Not Create New Conspiracy

The addition of a new member to the combination does not create a new conspiracy, as it would in a business partnership. For example, one who joined a conspiracy to kidnap after the child had been abducted, but while the ransom was being negotiated, became a co-conspirator.[53]

11.400 Wharton's Rule

Wharton's Rule, named for a 19th century legal scholar, which is more of a concept than a rule, prohibits a conviction for conspiracy where the substantive crime requires a concert of action. In the original case the crime was adultery. Since the parties to the agreement are also necessary for the commission of the crime itself, prosecutions for adultery and conspiracy are improper. In addition, it cannot be assumed that parties to this kind of agreement will produce agreements to engage in a more general pattern of criminal conduct. The rule does not rest on double jeopardy principles[54] but stands as an exception to the general principle that a conspiracy and the substantive offense do not merge upon proof of the substantive offense.[55] Other similar crimes are bribery, dueling, and incest.

Numerous exceptions have developed to the rule. Adding conspirators is one of them. This is known as the "third-party exception." Wharton's Rule is inapplicable when the conspiracy involves the cooperation of a greater number of persons than is required for commission of the substantive offense.[56] Express legislative intent is another exception. Courts have found that certain statutes contain determinations that merging the conspiracy conviction with the substantive offense would violate the manifest legislative intent.

The *RICO Act* is one such statute. RICO prohibits, for example, illegal gambling businesses involving five or more persons.[57] If Wharton's rule is applicable, then gambling operations of five or more people could not be convicted of both the RICO violation and conspiracy. By reviewing RICO's legislative history, the

53 *Shannon v. United States*, 76 F.2d 490 (5th Cir.1935).
54 *Pereira v. United States*, 347 U.S. 1 (1954).
55 *Iannelli v. United States,* 420 U.S. 770 (1975).
56 *Baker v. United States*, 393 F.2d 604 (9th Cir. 1968); *United States v. Bommarito*, 524 F.2d 140 (2d Cir. 1975).
57 18 U.S.C. § 1955.

Supreme Court found a clear legislative intent to retain the separate convictions for conspiracy and the RICO gambling offense.[58]

In practice Wharton's Rule issues do not often arise today because prosecutors generally charge conspiracies that do not raise these questions.

11.500 Venue
11.510 Where Any Overt Act Is Committed or the Agreement is Formed
11.520 Offenses Not Committed in Any District

The Sixth Amendment requires that prosecution shall be had "in the State and District wherein the crime shall have been committed."

11.510 Where Any Overt Act Is Committed or the Agreement Is Formed

Any district where the agreement was formed or where any overt act to further it was committed is proper venue for the trial of a charge of conspiracy. If the agreement was made in one district and an overt act in another, then venue would lie in both districts. Since the act of one is the act of all, an act by one will lay venue for all the conspirators in a particular district even where the others were never physically present within that district.

11.520 Offenses Not Committed in Any District

The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which any one of two or more joint offenders is arrested or is first brought; but if such offenders are not so arrested or brought into any district, an indictment may be filed in the district of the last known residence of any one of two or more joint offenders, or is no such residence is known the indictment may be filed in the District of Columbia.

11.600 Scope of the Conspiracy
11.610 Scope
11.620 The Number of Conspiracies
11.630 Duration of the Conspiracy

11.610 Scope

Scope of the conspiracy can mean different things. In a large group it can refer to the number of conspirators, whether there is one conspiracy or a number of conspiracies. Scope can also refer to the number of criminal objectives of the one agreement. Still other uses of the word "scope" are not concerned with the number of agreements or parties, but the time frame involved from the inception of the conspiracy to its termination.

58 *Iannelli v. United States,* 420 U.S. 770 (1975).

11.620 The Number of Conspiracies

11.621 Multiple Goals of a Single Conspiracy
11.622 Single Versus Multiple Conspiracies

In large multiple defendant cases it is essential to determine just how many conspiracies exist. This is important for evidentiary, improper joinder and double jeopardy issues.

11.621 Multiple Goals of a Single Conspiracy

A single agreement to accomplish multiple objectives can impact one or many conspiracy statutes. When more than one conspiracy statute is implicated, questions of double jeopardy and multiple punishments for one offense can arise. These issues are likely to come up in drug conspiracies. Congress has provided separate conspiracy statutes for violations of the *Controlled Substances Act* (e.g., distribution) and the *Controlled Substances Import-Export Act* (e.g., importation). Although the one agreement comprehends both statutes, the double jeopardy issue is settled by answering the question of whether Congress intended multiple punishments for a single transaction (or agreement). By virtue of establishing two conspiracy statutes for crimes where the proof of one does not establish proof of the other, Congress has manifested such an intent in the case of drug conspiracies.[59]

11.622 Single Versus Multiple Conspiracies

11.622a Chain Conspiracies
11.622b Wheel Conspiracies

In reviewing evidentiary objectives (points to be established or proven by investigators) during case management, consideration must be given to whether the proof shows a single continuous conspiracy or a series of separate conspiracies.

The question will usually surface when there are multiple defendants charged in a single conspiracy whose roles are not all known to each other. In a single conspiracy the conspirators can be joined together for trial in a place not convenient to them, statements of one defendant are admissible against the others, acts of one conspirator can eliminate statute of limitations claims as to others and all of the parties may be held substantively responsible for the particular crimes committed by any one of them. For these reasons, improper joinder motions and claims of double jeopardy usually accompany such indictments.

The basic test to negate these claims and motions is whether there was one overall agreement by each of the conspirators to perform various functions to achieve the known multiple objectives of the single agreement.

[59] *Albernaz v. United States*, 450 U.S. 333 (1981).

A single agreement to accomplish an unlawful objective does not cease to be a single conspiracy because it continues over a period of time, or because there exists a time gap in the proof or a change in the membership. There may be a single continuing agreement to commit several offenses by a multiplicity of means. Similarly, an agreement to achieve several objectives is still a single conspiracy as to those so agreeing.

Multiple conspiracies, on the other hand, exist when each of the conspirators' agreements has its own end, and each constitutes an end in itself.[60] Multiple conspiracies can also be created within a single overarching conspiracy as when several conspirators have agreed to achieve several criminal objectives, but subordinates, wholly ignorant of the other objectives, agree only to those which are known by them.[61] The question is: Can a particular defendant be charged with full *knowledge* of the larger criminal enterprise, i.e., the other objectives, and thus be held to have joined that enterprise? If not, the larger conspiracy does not include him as a member.

11.622a Chain Conspiracies

Simply put, a "chain" conspiracy is a nonlegal descriptor for a conspiracy where the members are linked by a common purpose to achieve a single objective and their roles and activities are further linked by the acts taken over time in the effort to achieve the common objective. A conspiracy to import and distribute marijuana demonstrates the term. Organizers, implementers and flunkies necessary to develop and implement the plan to sail to Colombia to acquire, bring back and resell marijuana are linked by the agreement and "chain of events" resulting in the accomplishment of the objective. Graphically, the organization and its activities would look like a chain. See figure (1).

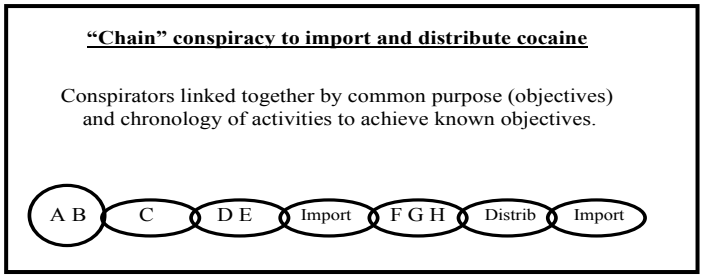


Figure 1

[60] *United States v. Paiz*, 905 F.2d 1014, 1019 (7th Cir. 1990); *United States v. Calbas*, 821 F.2d 887 (2d Cir. 1987); *United States v. Cardenas Alvarado*, 806 F.2d 566, 569-570 (5th Cir. 1986).

[61] *United States v. Calderone*, 982 F.2d 42 (2d Cir. 1992); *United States v. Gambino*, 729 F. Supp. 954 (S.D.N.Y. 1990) *aff'd*, No. 95-1223 (2d Cir. May 15, 1996) (unpublished opinion).

11.622b Wheel Conspiracies

The basic difference between a "wheel" and "chain" conspiracy is that a "wheel" conspiracy describes a "hub" of organizers agreeing to achieve multiple objectives, each objective being a "spoke" emanating from the hub. The rim of the wheel defines the point along the spokes where those inside the wheel perform their "spoke" functions with full knowledge of the existence of the other spokes, but those outside know only the objective associated with their own particular spoke. Properly understood, one can see that the spokes of a given wheel conspiracy are themselves individual chains, the "length" of which may extend beyond the wheel's rim to the extent the chain is composed of persons ignorant of the larger conspiracy's objectives. Such persons are thus not "in" the larger conspiracy and may be prosecuted only for the particular "chain" conspiracy or spoke of which they are a part. See figure (2).

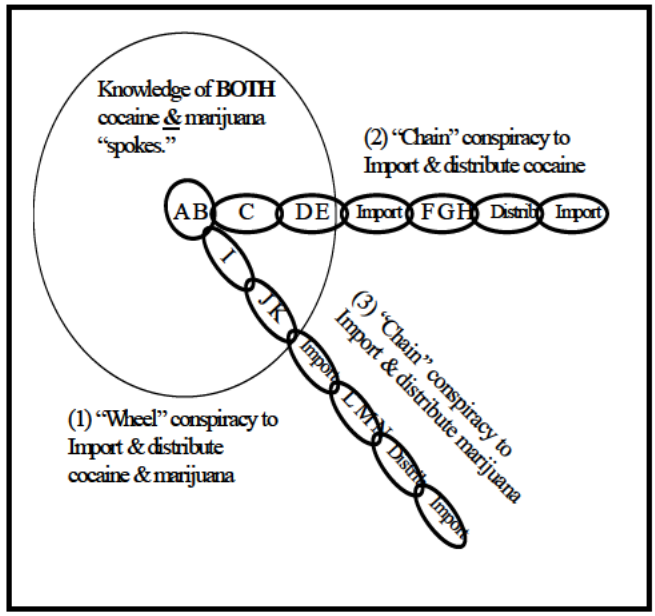


Figure 2

The "wheel" analogy, however, can be applied only so far. If, for example only two people in one spoke or chain have sufficient knowledge to be included within the rim, as do four in the second chain and eight people in the third, the shape of the wheel would bear little resemblance to its namesake! Moreover, it may be that some spoke/chain members may know of the existence of some but not all of the other spokes. In such a case one could hardly draw a wheel at all. These limitations notwithstanding, the conceptual notion of a hub, spoke and wheel is nonetheless workable to identify those who may be included in a conspiracy larger than their own chain and those who cannot. Where only one "key man" is aware of the existence of multiple spokes, there can be no single, overriding conspiracy. For example, Jerome Jacobson stole winning Monopoly game pieces from McDonald's while in charge of security for the promotion and created a distribution network to redeem the winning pieces. No "distributors" knew each other, and many "redeemers" did not know the pieces were stolen, so there was no single conspiracy to embezzle game pieces and fraudulently redeem them.[62]

[62] *United States v. Chandler*, 388 F.3d 796 (11th Cir. 2004).

11.630 Duration of the Conspiracy

The question of when a conspiracy ends is important for at least three reasons: (1) only statements made during the course of the conspiracy are admissible under the rule concerning declarations by co-conspirators; (2) co-conspirators can be held criminally responsible for acts committed by co-conspirators only so long as they are committed prior to the termination of the conspiracy; (3) termination is critical for statute of limitations purposes.

Since the essence of a conspiracy is an agreement to commit an illegal act, the agreement itself constitutes a social harm regardless of whether the original object of the conspiracy is achieved. For this reason, the Supreme Court has ruled that government intervention that renders the object of a conspiracy impossible to achieve will not automatically terminate the conspiracy.[63]

11.700 Statute of Limitations

The applicable statute is the general statute of limitations that states:

> Except as otherwise expressly provided by law, no person shall be prosecuted . . . for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.[64]

There are some statutes that provide for a different period, notably the internal revenue statutes.

The statute of limitations begins to run on a particular co-conspirator when he withdraws or, if not, with the commission of the last overt act by any member of the conspiracy or achievement of the criminal objective, whichever last occurs.[65] Determining just when the statute of limitations begins to run in a given case is not always easy because of the continuing nature of the conspiracy to conceal. As a practical matter the focus in any given case will be on the last overt act.[66] Thus, the statute of limitations could run on the substantive crimes but not on the conspiracy to commit them.

11.800 Co-Conspirator Declarations: The Hearsay Exception

Because co-conspirators become agents of one another, the Federal Rules of Evidence allow an out-of-court statement made "during the course of and in furtherance of the conspiracy" by a member of a conspiracy to be admissible against other members of the conspiracy.[67] In order to admit a statement under

63 *United States v. Jimenez Recio*, 537 U.S. 270 (2003).
64 18 U.S.C. § 3282.
65 *Id.*
66 *See United States v. La Spina*, 299 F.3d 165 (2d Cir. 2002).
67 Fed. R. Evid. 801(d)(2)(E).

this rule, the government must prove by a preponderance of the evidence that (1) a conspiracy existed; (2) the defendant and declarant were both members of the conspiracy at the time of the statement; and (3) the statement was made both (a) during the course of and (b) in furtherance of the conspiracy.[68] To be "in furtherance" of a conspiracy, the statement must in some way have been designed to promote or facilitate achievement of the goals of that conspiracy. Providing information or reassurance to a co-conspirator about another, seeking assistance from a co-conspirator, or by communicating with a person who is not a member of the conspiracy in a way that is designed to help a co-conspirator achieve the conspiracy's goals, are all examples of statements "in furtherance" of the conspiracy. Other examples are found in statements such as vouching for another and "puffing" up a co-conspirator's ability to perform.

Although a co-conspirator's statement can be considered in determining "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered," such statements alone are not sufficient.[69] In other words, proving the existence of a conspiracy and membership in it must be done with sufficient evidence in addition to the statement by a co-conspirator such that the totality of the circumstances establishes the predicate requirements by a preponderance of the evidence.

The statements subject to the rule are not limited to oral declarations but include written statements and nonverbal conduct by the "declaring" co-conspirator.

11.900 The General Conspiracy Statute - 18 U.S.C. § 371

11.910 Introduction
11.920 The Elements of a § 371 Conspiracy
11.930 The Object of the Conspiracy

11.910 Introduction

18 U.S.C. § 371 reads as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy

68 *Bourjaily v. United States,* 483 U.S. 171 (1987); *United States v. Burton,* 126 F.3d 666 (5th Cir. 1997); *United States v. Stephens*, 46 F.3d 587 (7th Cir. 1995); *United States v. Rivera*, 22 F.3d 430 (2d Cir. 1994).
69 Fed. R. Evid. 801(d)(2).

shall not exceed the maximum punishment provided for such misdemeanor.

11.920 The Elements of a § 371 Conspiracy

- ✓ Two or more persons;
- ✓ Agree to Commit Offense against the United States
 or
 Agree to Defraud the United States; and
- ✓ Overt act in furtherance thereof

At the point in time that all elements are present the offense is said to be complete. This does not mean that the conspiracy is over or finished, but only that a chargeable offense now has been committed, albeit continuing.

11.930 The Object of the Conspiracy

11.931 Offense Against the United States
11.932 Defraud the U.S. Government

18 U.S.C. § 371 consists of both an "offense" clause and a "defraud" clause. A conspiracy "to commit any offense against the United States" and a conspiracy "to defraud the United States or any agency thereof" are separate crimes.

11.931 Offense Against the United States

The offense clause covers conspiracies to violate a statute or regulation other than the conspiracy statute itself. An offense against the United States is not confined to criminal offenses. It ordinarily does consist of uniting to violate a criminal statute or regulation, but an offense against the United States is broad enough to include anything that interferes with or hampers the United States in the achievement of any government policy.[70] For example, a conspiracy to cause government officers to neglect their duty or to obstruct the lawful function of any government agency is an offense against the United States.

11.932 Defraud the U.S. Government

To conspire to defraud the United States means

> primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation,

70 *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957).

chicanery or the overreaching of those charged with carrying out the governmental intention[71]

To defraud the United States "in any manner" puts no limits on the method used to defraud. A method that makes use of innocent individuals or businesses to reach and defraud the United States is within the scope of § 371.[72] A person cannot be convicted of conspiracy to defraud the government unless the government can prove he knows that his acts would have the effect of defrauding the government.

11.1000 Federal Conspiracy Statutes

1. 8 U.S.C. § 1327 - Aiding or Assisting Certain Aliens to Enter
2. 10 U.S.C. § 881 - Article 81 Conspiracy
3. 15 U.S.C. § 1 – Trusts, etc., in Restraint of Trade Illegal; penalty
4. 15 U.S.C. § 2 - Monopolizing Trade a Felony; penalty
5. 15 U.S.C. § 3 - Trusts in Territories or District of Columbia Illegal; combination a felony
6. 15 U.S.C. § 8 - Trusts in Restraint of Import Trade Illegal; penalty
7. 15 U.S.C. § 714m - Crimes and Offenses
8. 16 U.S.C. § 831t - Offenses; fines and punishment
9. 18 U.S.C. § 224 - Bribery in Sporting Contests
10. 18 U.S.C. § 241 - Conspiracy Against Rights
11. 18 U.S.C. § 286 - Conspiracy to Defraud the Government with Respect to Claims
12. 18 U.S.C. § 351 - Congressional, Cabinet, and Supreme Court Assassination, Kidnapping, and Assault; penalties
13. 18 U.S.C. § 371 - Conspiracy to Commit Offense or to Defraud United States
14. 18 U.S.C. § 372 - Conspiracy to Impede or Injure Officer
15. 18 U.S.C. § 757 - Prisoners of War or Enemy Aliens
16. 18 U.S.C. § 793 - Gathering, Transmitting, or Losing Defense Information
17. 18 U.S.C. § 794 - Gathering or Delivering Defense Information to Aid Foreign Government
18. 18 U.S.C. § 894 - Collection of Extensions of Credit by Extortionate Means

71 *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924).
72 *Tanner and Conover v. United States*, 483 U.S. 107 (1987).

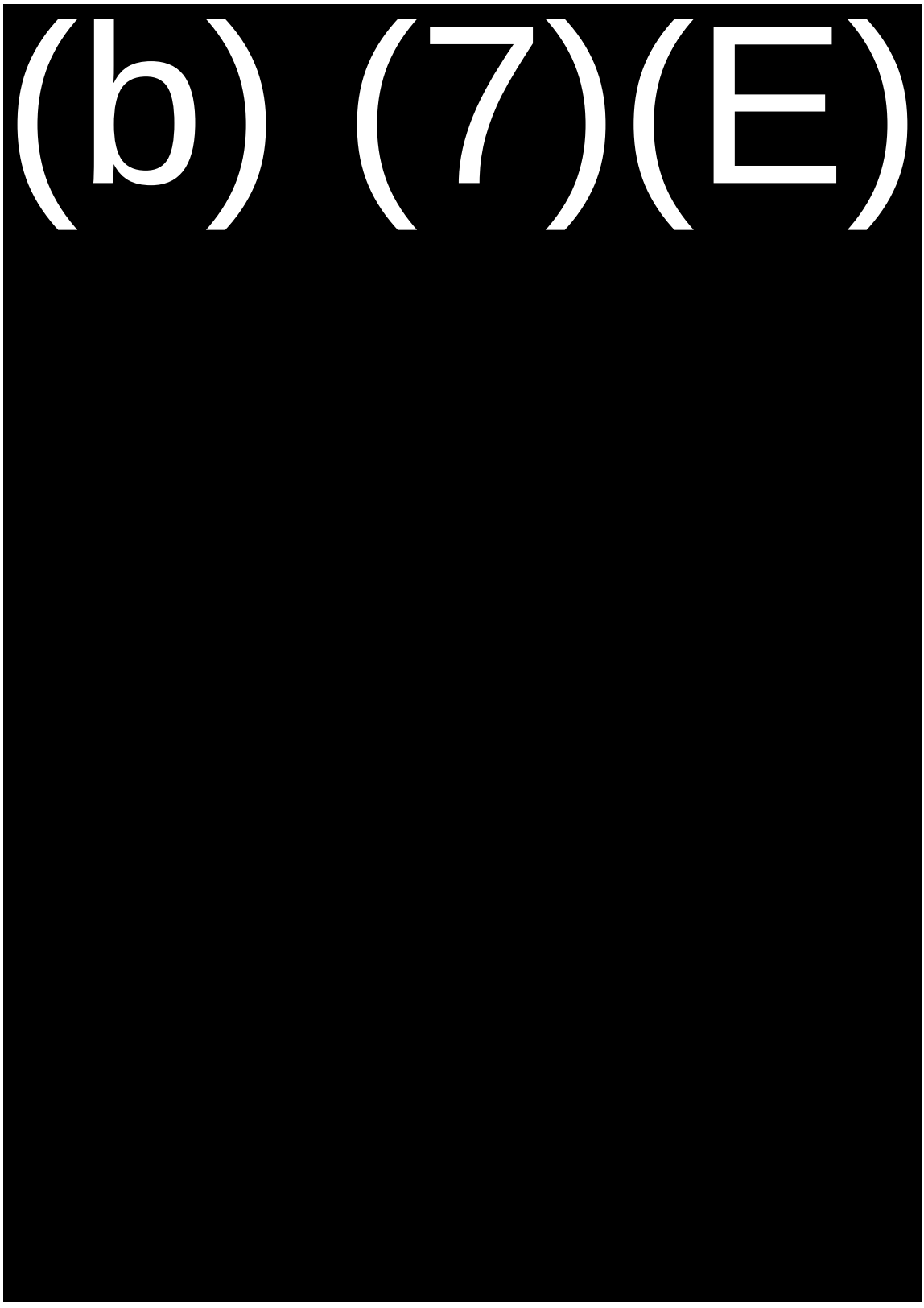
19. 18 U.S.C. § 956 - Conspiracy to Injure Property of Foreign Government
20. 18 U.S.C. § 1117 - Conspiracy to Murder
21. 18 U.S.C. § 1201 - Kidnapping
22. 18 U.S.C. § 1511 - Obstruction of State or Local Law Enforcement
23. 18 U.S.C. § 1751 - Presidential and Presidential Staff Assassination, Kidnapping, and Assault; penalties
24. 18 U.S.C. § 1752 – Restricted Buildings or grounds
25. 18 U.S.C. § 1792 - Mutiny and Riot Prohibited
26. 18 U.S.C. § 1831 - Economic Espionage
27. 18 U.S.C. § 1832 – Theft of Trade Secrets
28. 18 U.S.C. § 1962(d) – Racketeer Influenced and Corrupt Organizations; Prohibited Activities
29. 18 U.S.C. § 2153 - Destruction of War Material, War Premises, or War Utilities
30. 18 U.S.C. § 2154 - Production of Defective War Material, War Premises, or War Utilities
31. 18 U.S.C. § 2155 - Destruction of National-Defense Materials, National-Defense Premises or National-Defense Utilities
32. 18 U.S.C. § 2156 - Production of National-Defense Materials, National-Defense Premises or National-Defense Utilities
33. 18 U.S.C. § 2192 - Incitation of Seamen to Revolt or Mutiny
34. 18 U.S.C. § 2252 – Certain Activities Relating to the Sexual Exploitation of Minors
35. 18 U.S.C. § 2252A – Certain Activities Relating to Material Constituting or Containing Child Pornography
36. 18 U.S.C. § 2271 - Conspiracy to Destroy Vessels
37. 18 U.S.C. § 2384 - Seditious Conspiracy
38. 18 U.S.C. § 5109 - Advocating Overthrow of Government
39. 21 U.S.C. § 846 - Attempt and Conspiracy
40. 26 U.S.C. § 7214 - Offenses by Officers and Employees of the United States
41. 31 U.S.C. § 3729 - False Claims
42. 40 U.S.C. § 193h - Prosecution and Punishment of Offenses; procedure
43. 42 U.S.C. § 1973j - Civil and Criminal Sanctions
44. 42 U.S.C. § 2272 - Violation of Specific Rights

45. 42 U.S.C. § 2273 - Violation of Sections
46. 42 U.S.C. § 2274 - Communication of Restricted Data
47. 42 U.S.C. § 2277 - Disclosure of Restricted Data
48. 47 U.S.C. § 509 - Prohibited Practices in Contests of Knowledge, Skill, or Chance
49. 50 U.S.C. App. § 462 - *Selective Service Act*

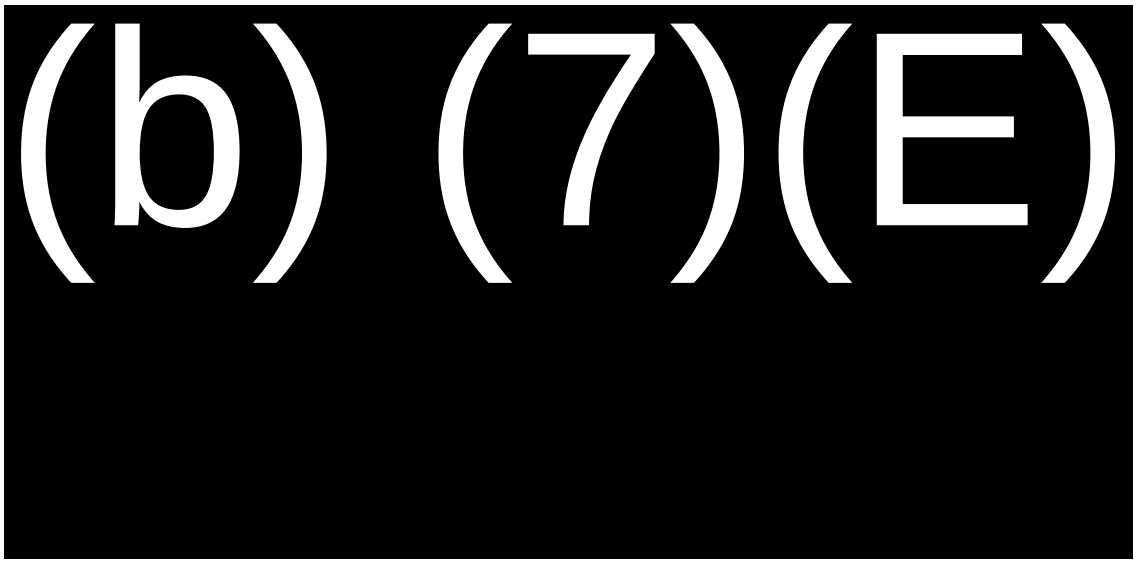
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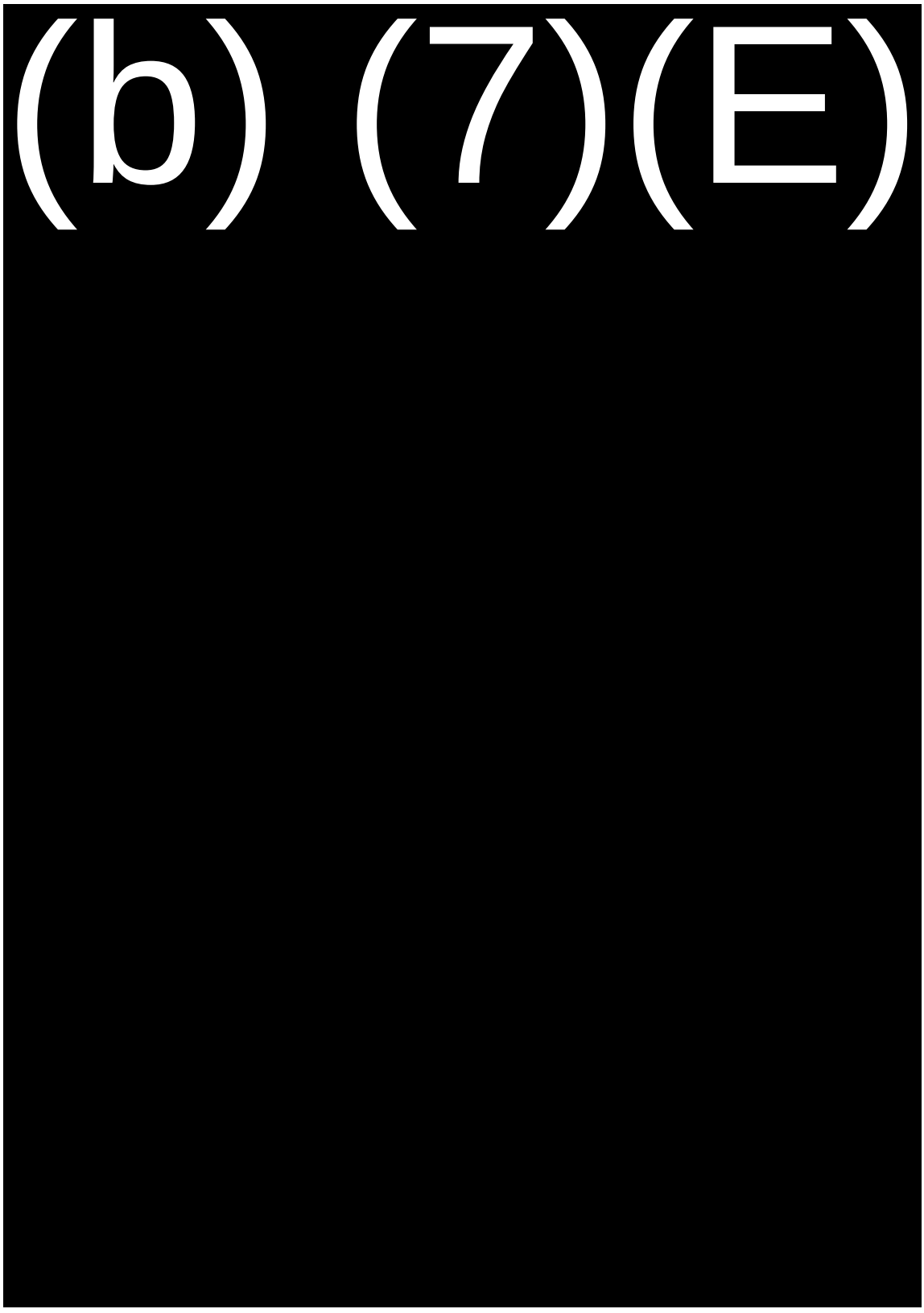
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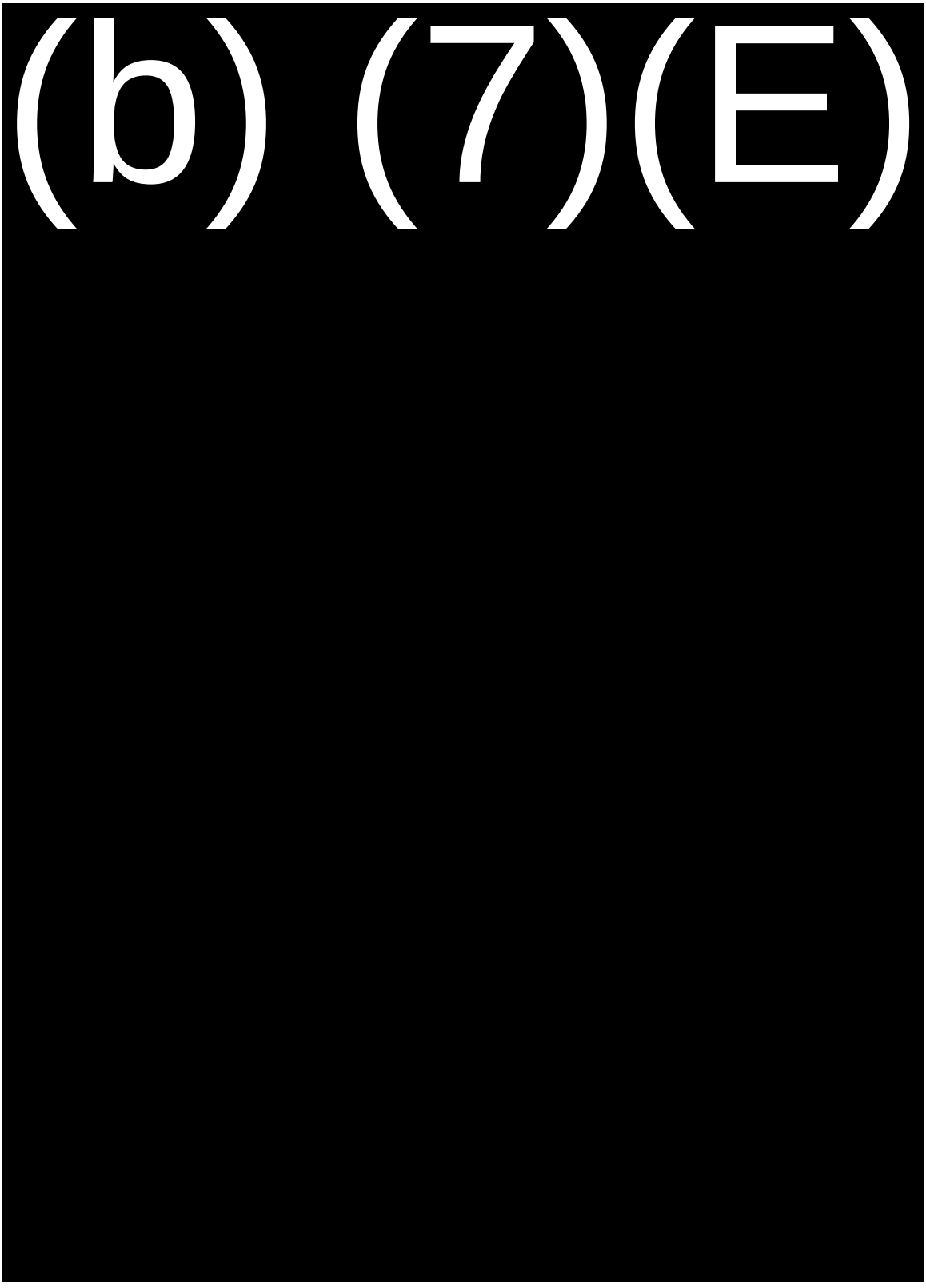


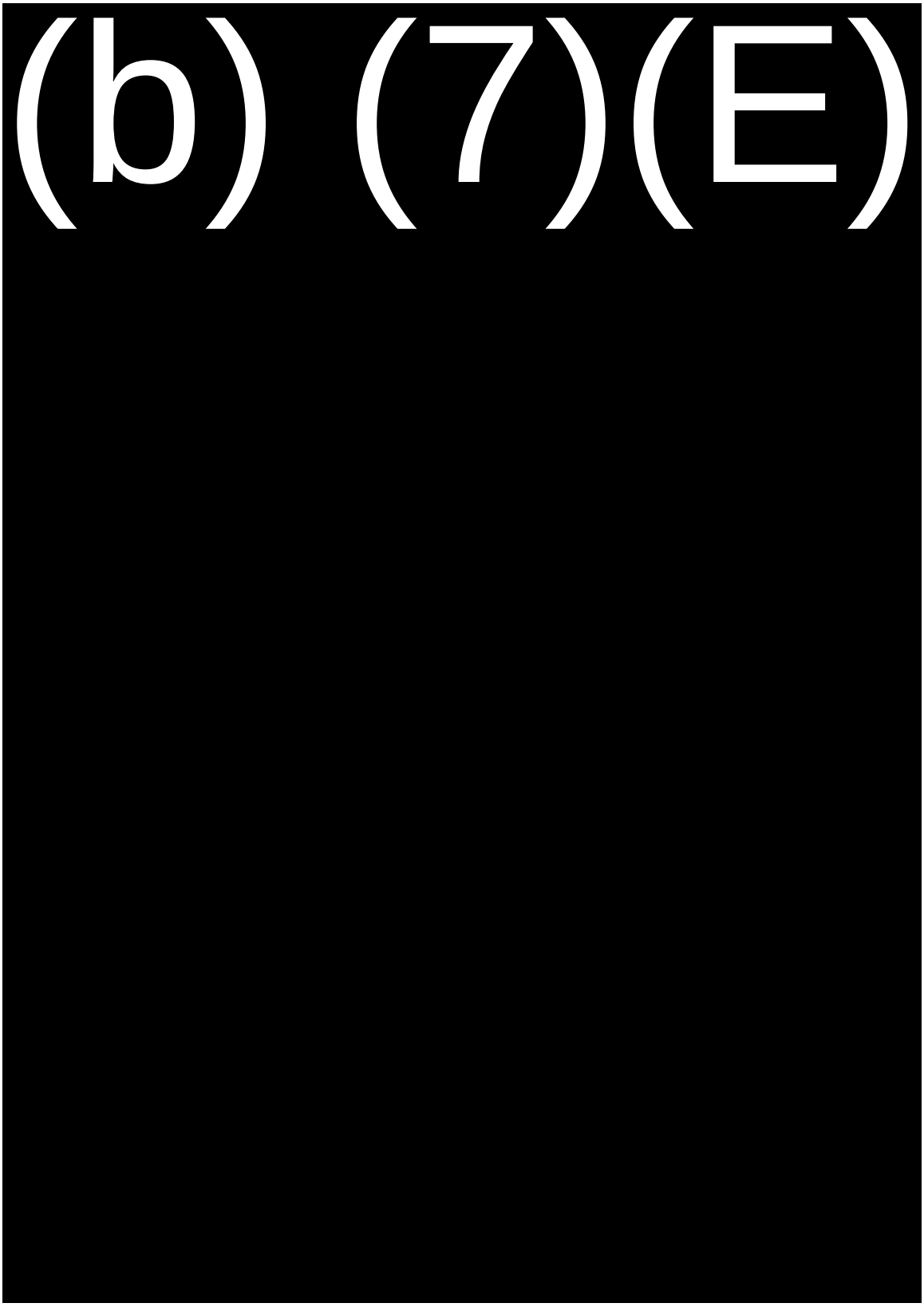

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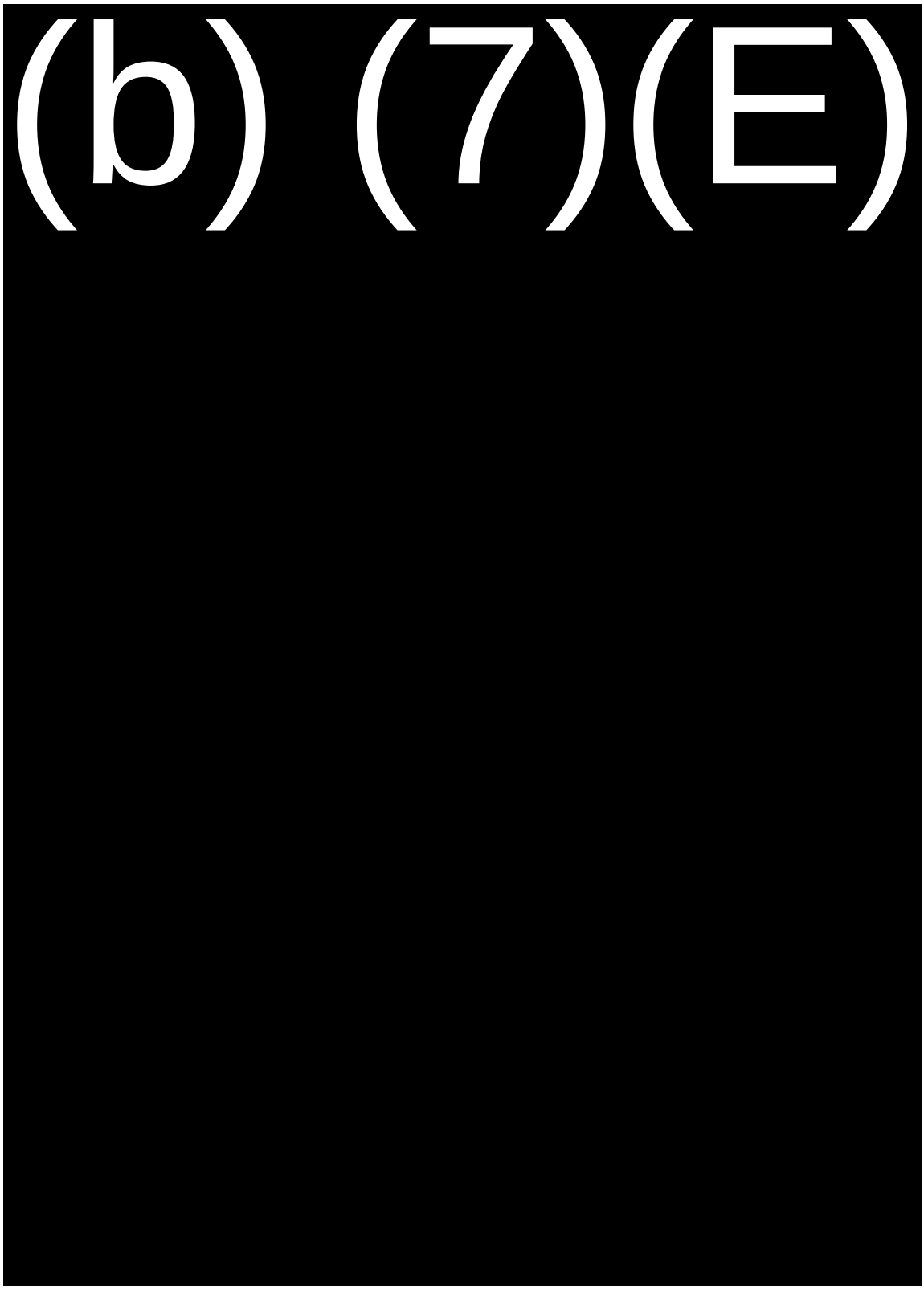
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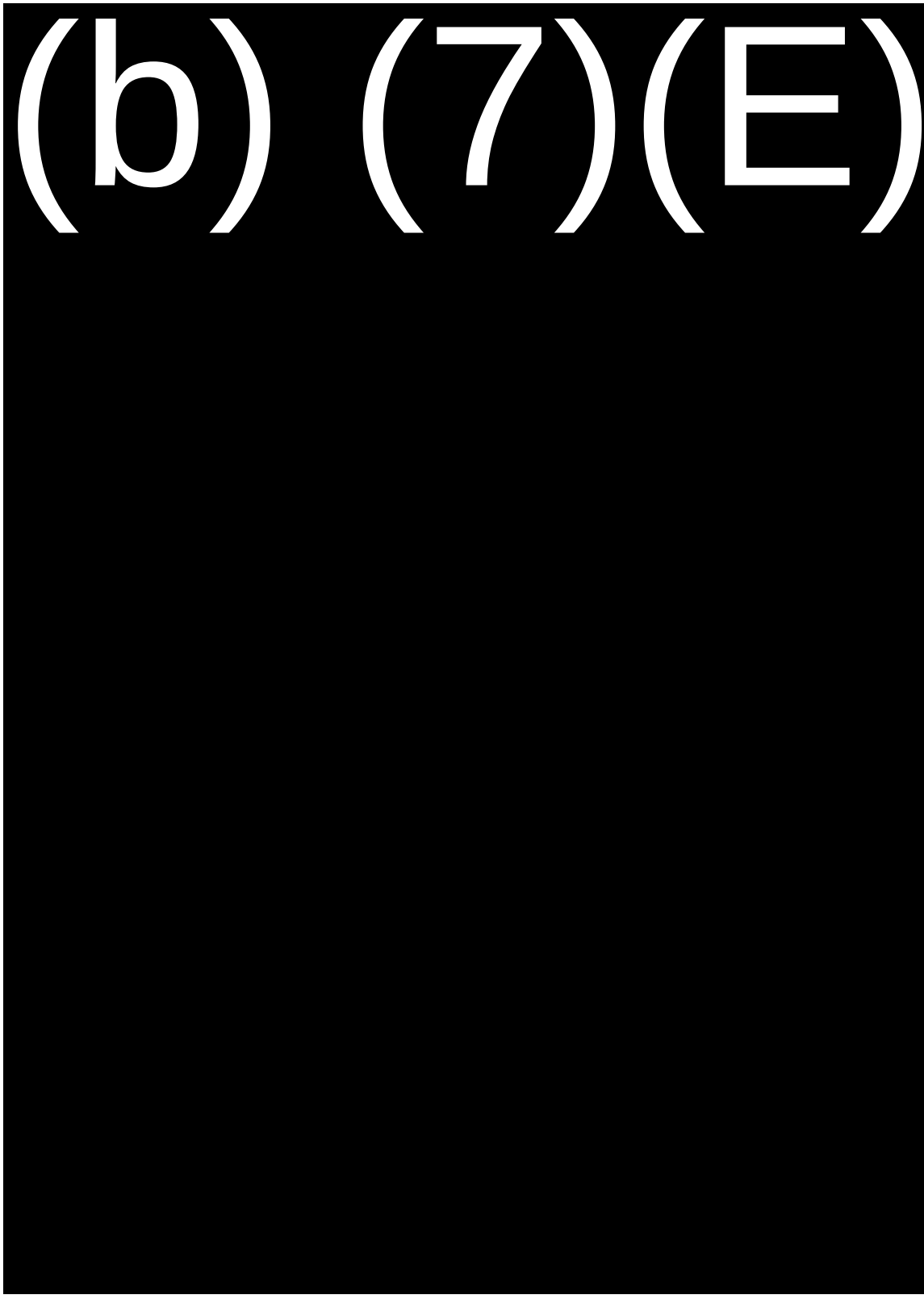

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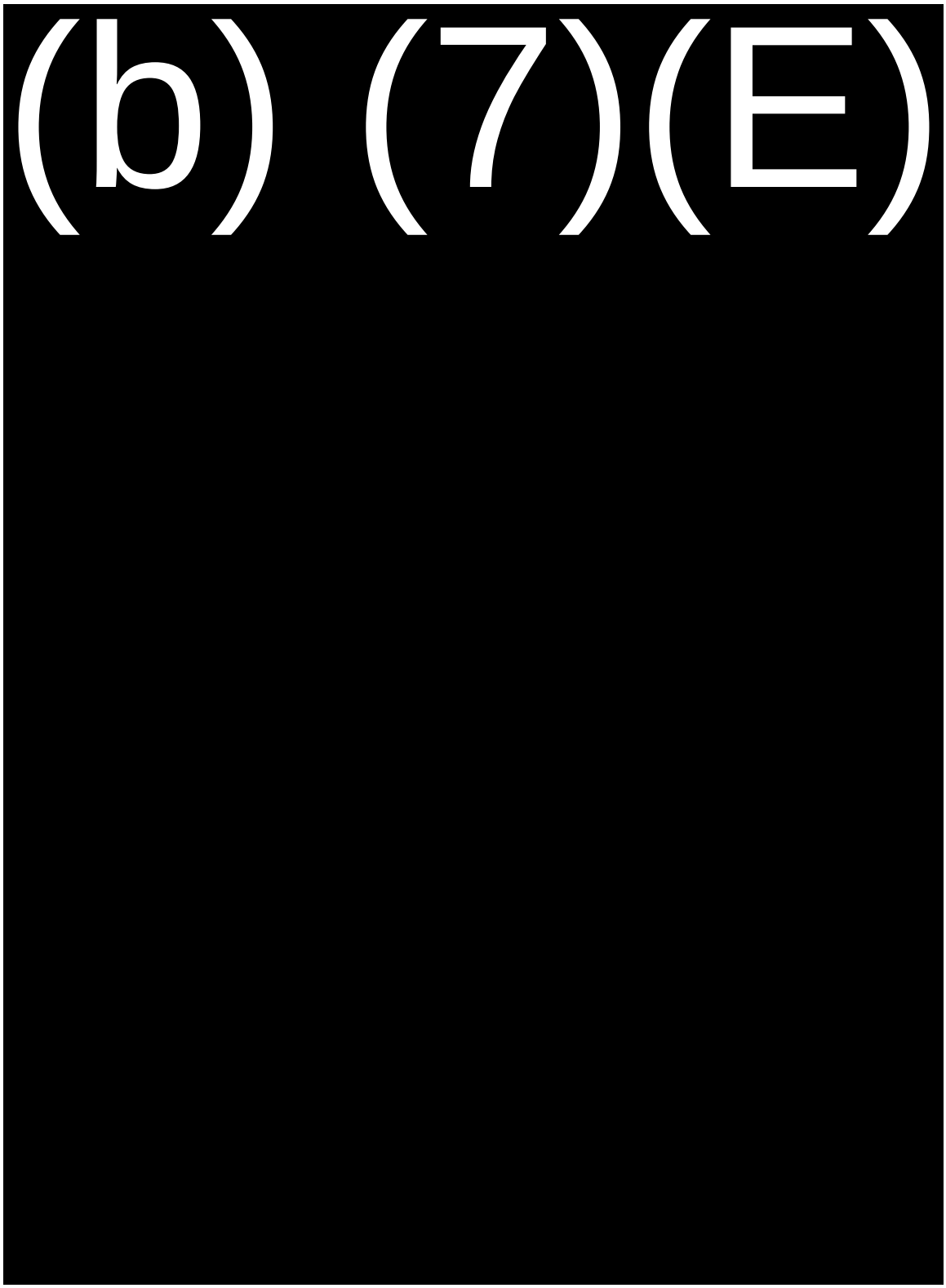

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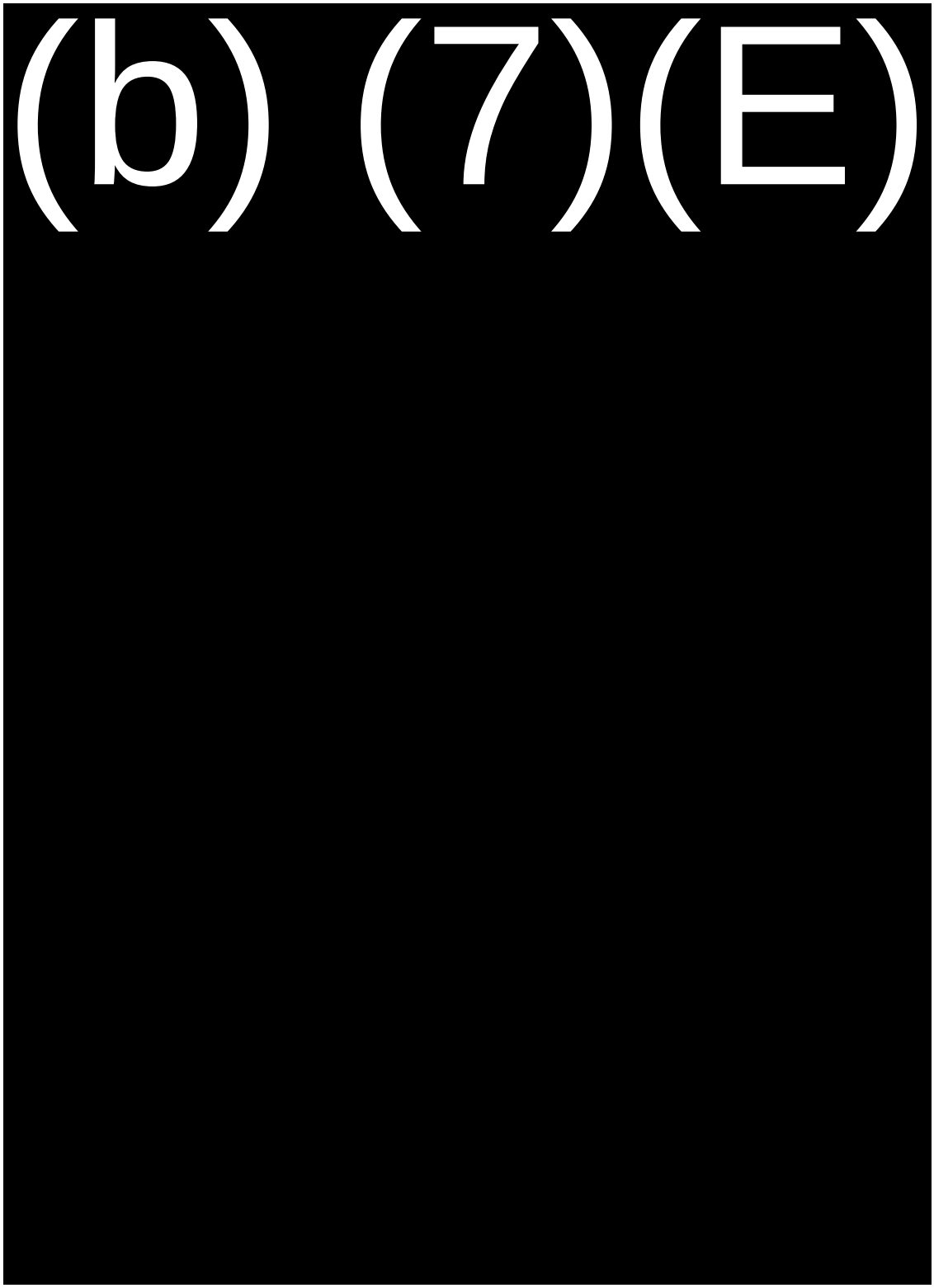

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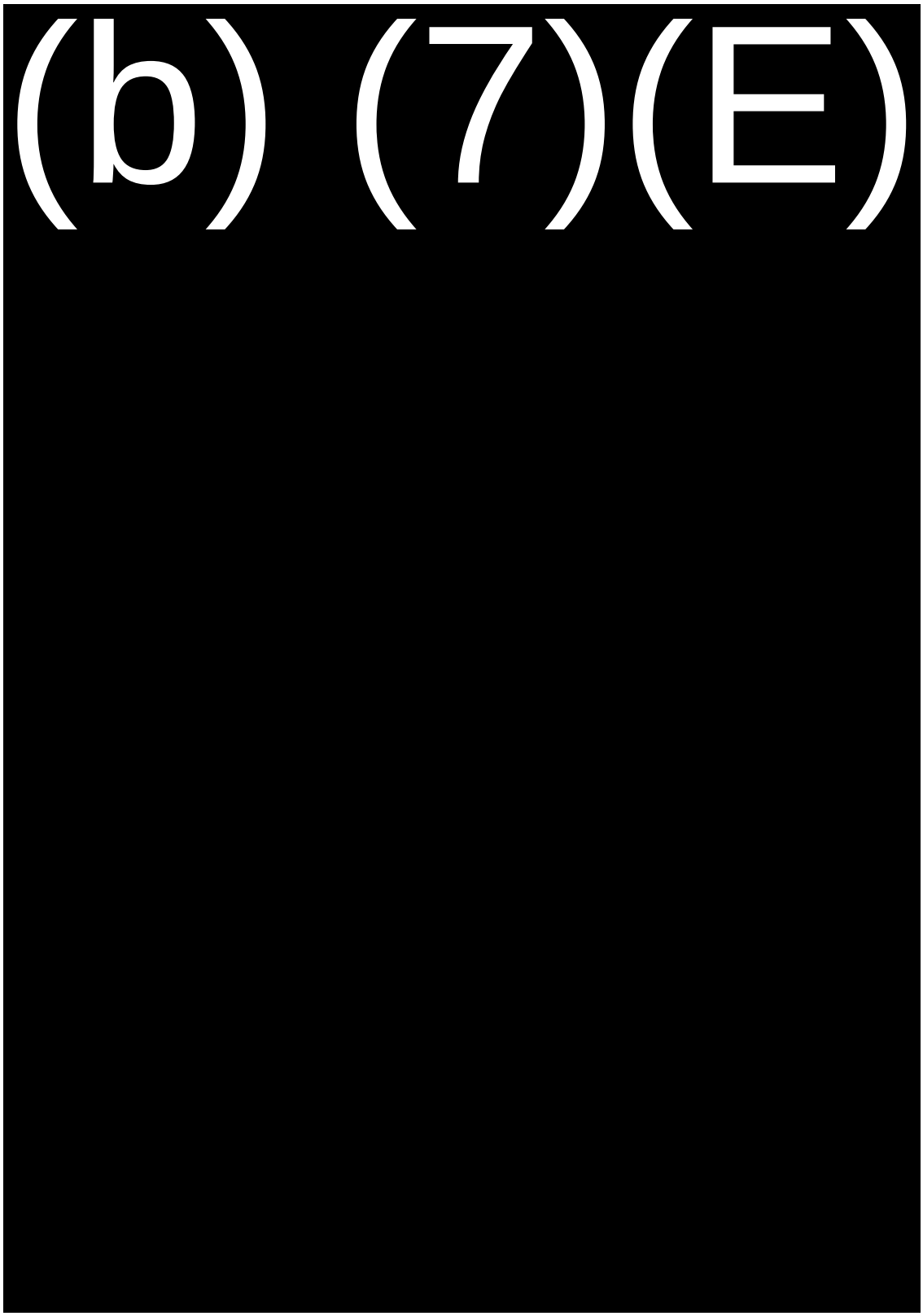

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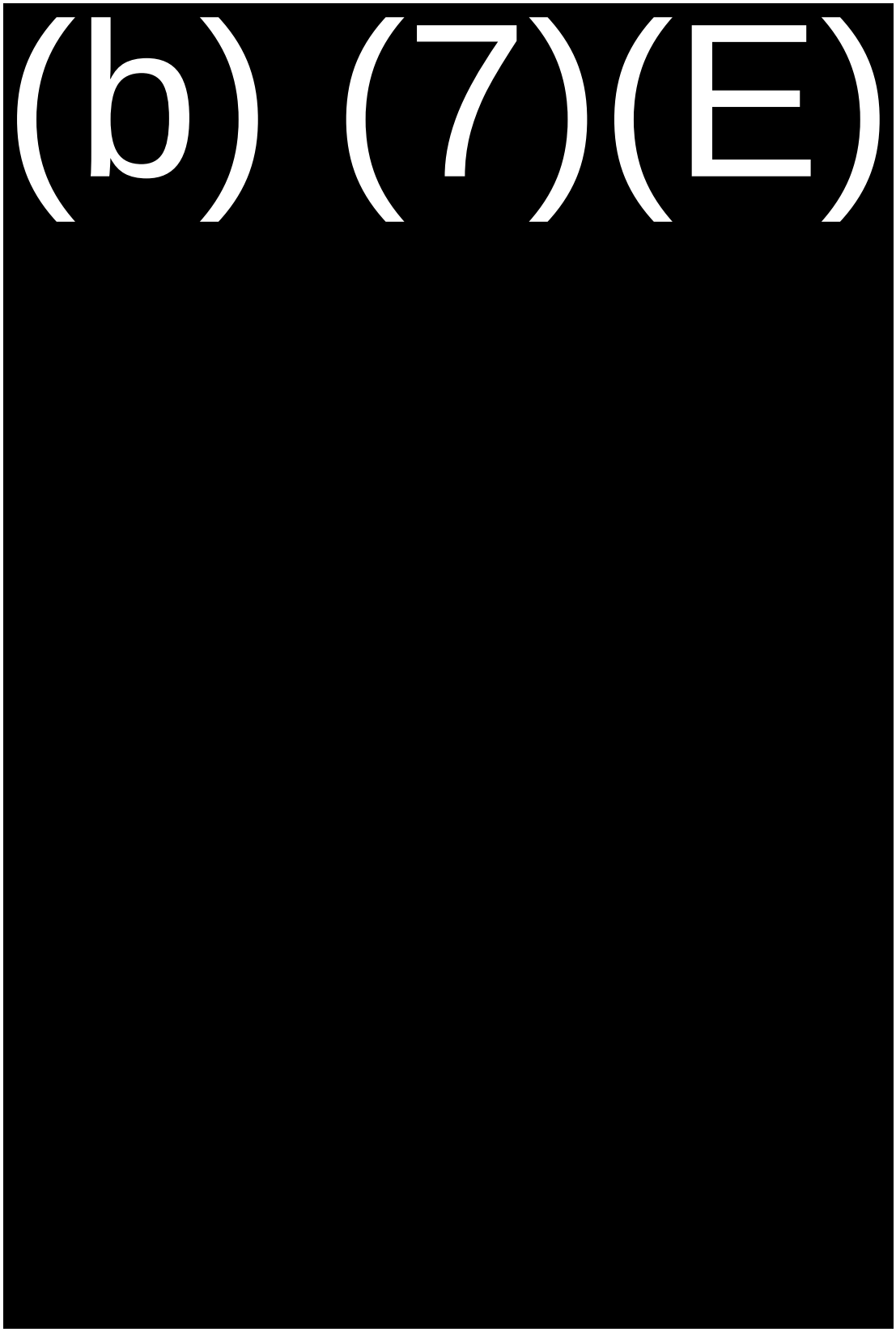

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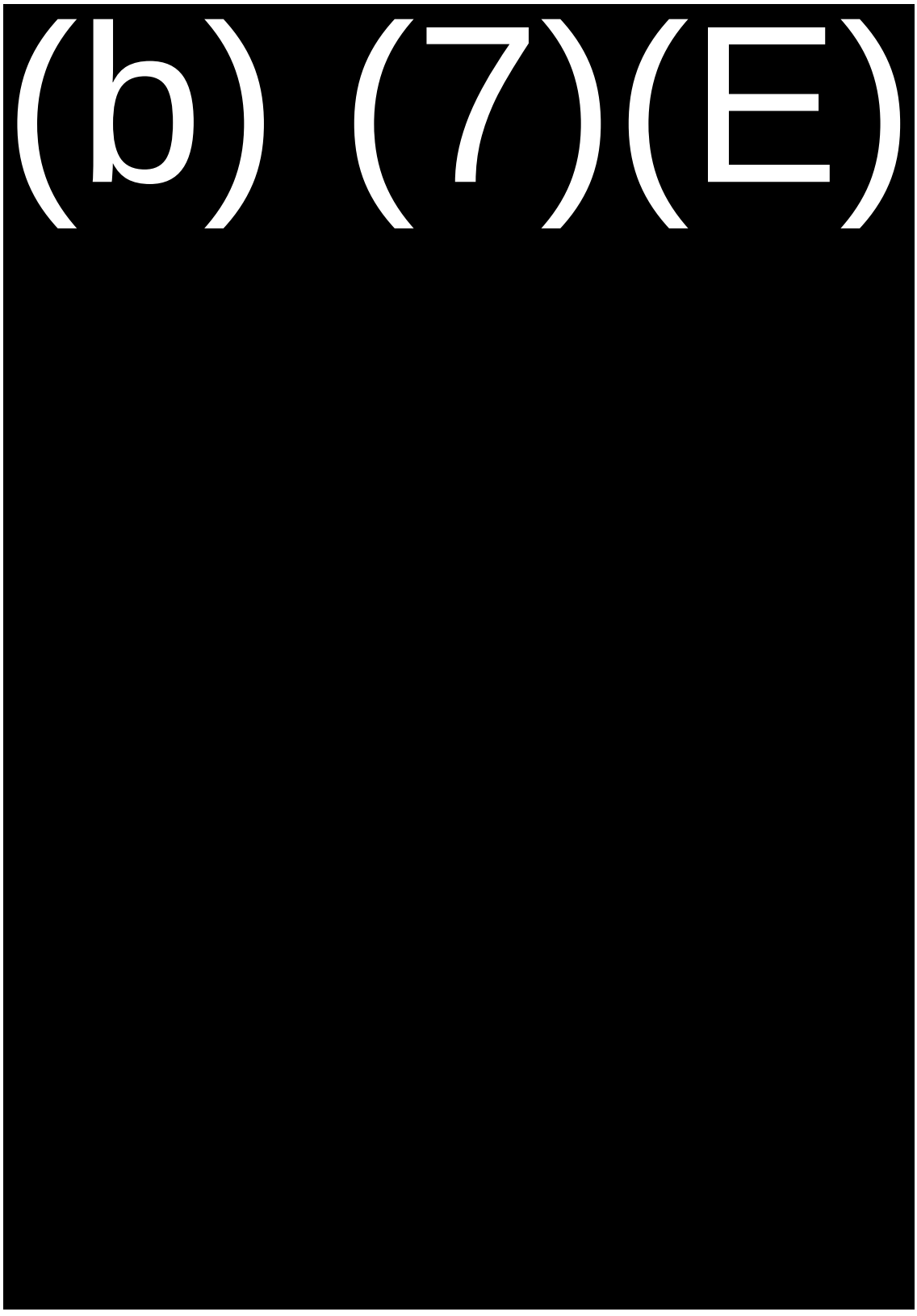

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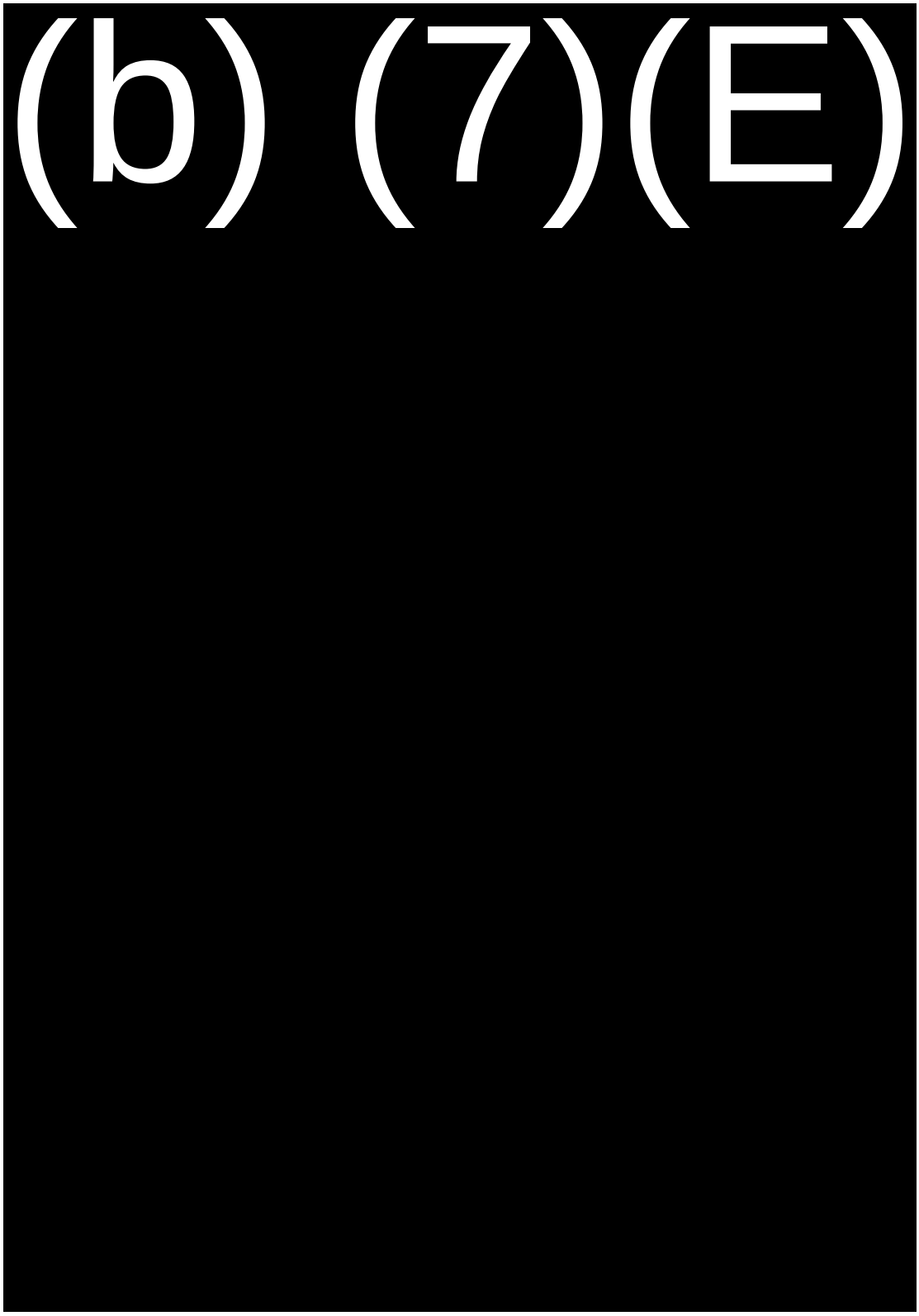

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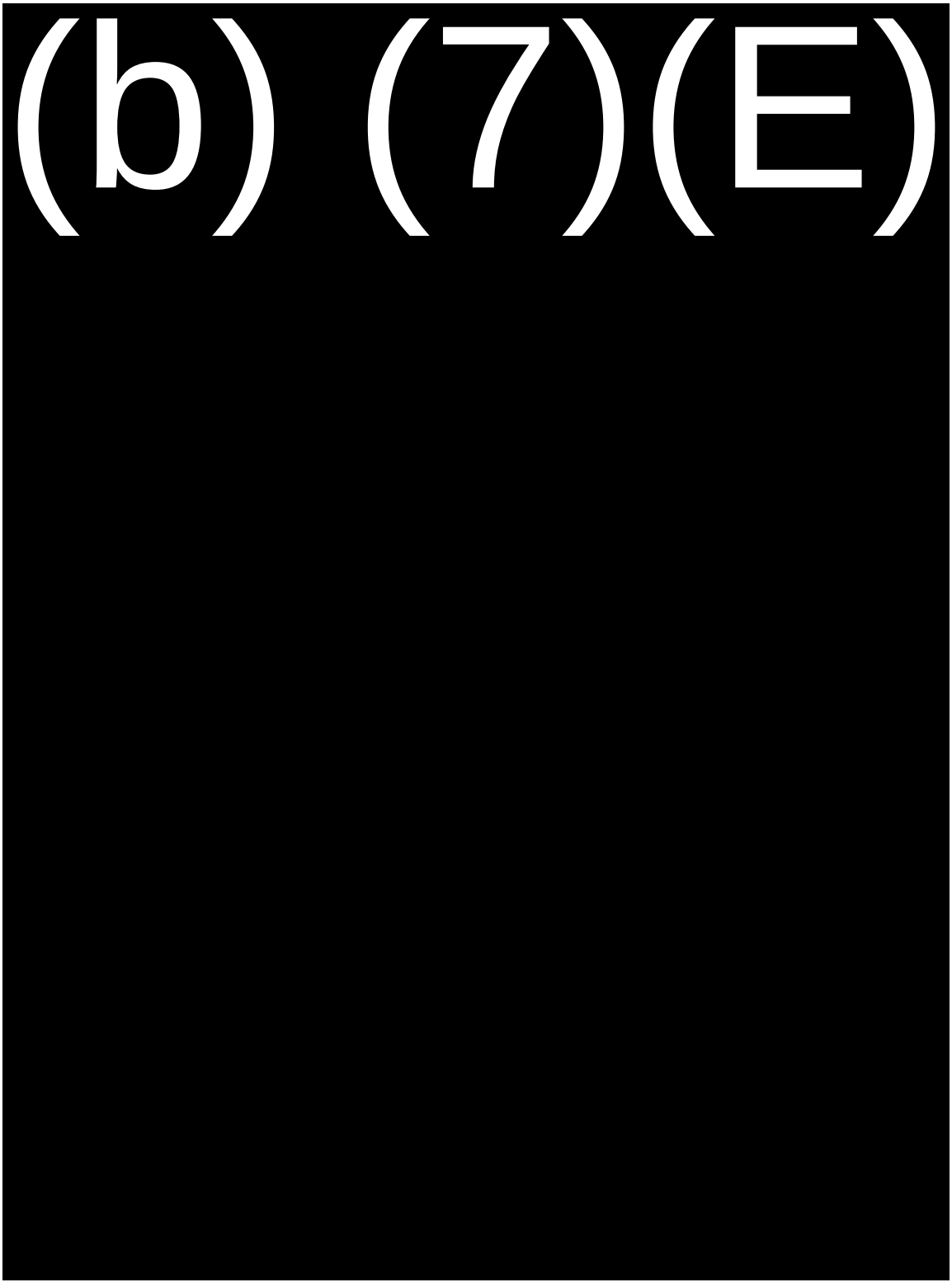

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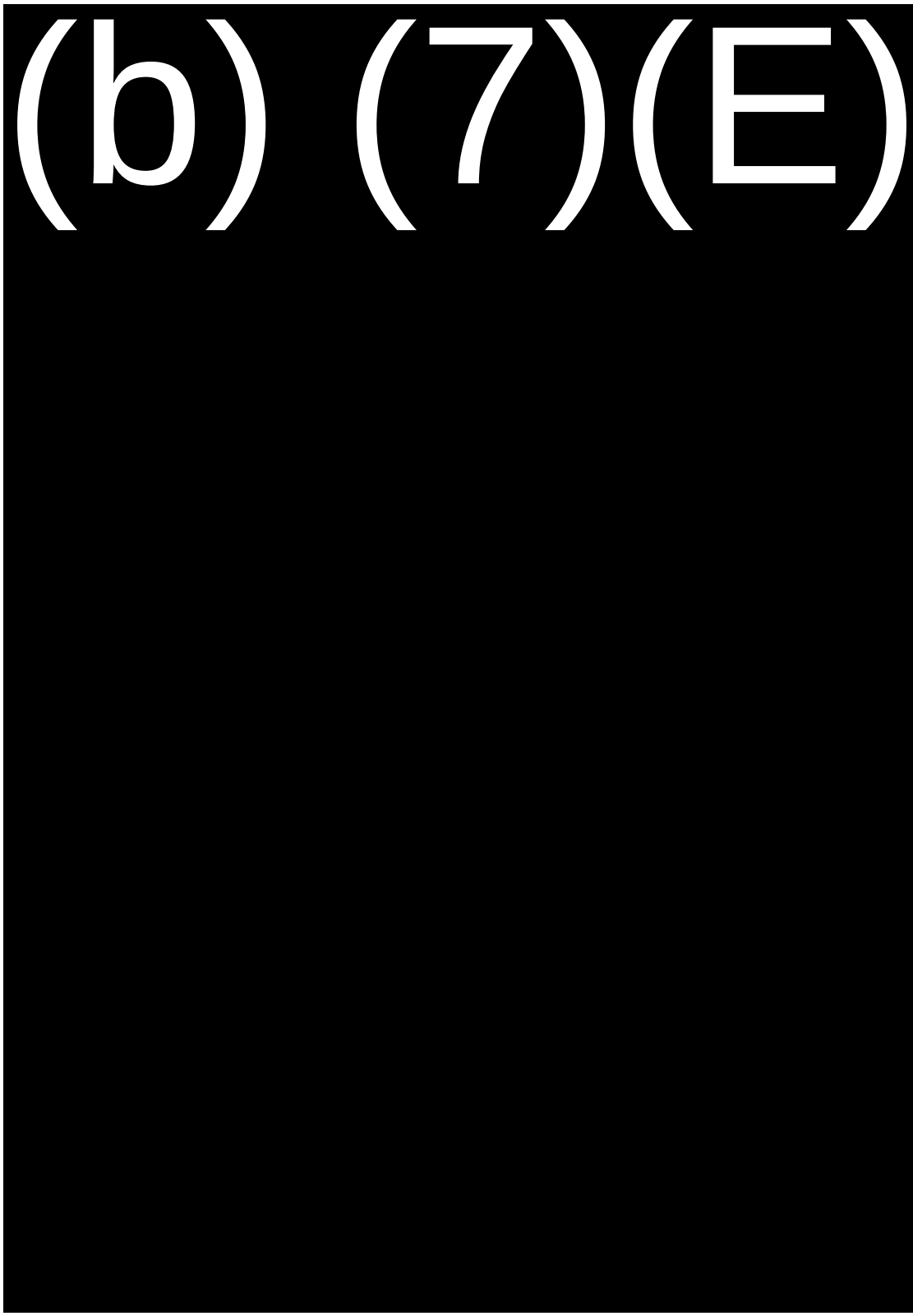

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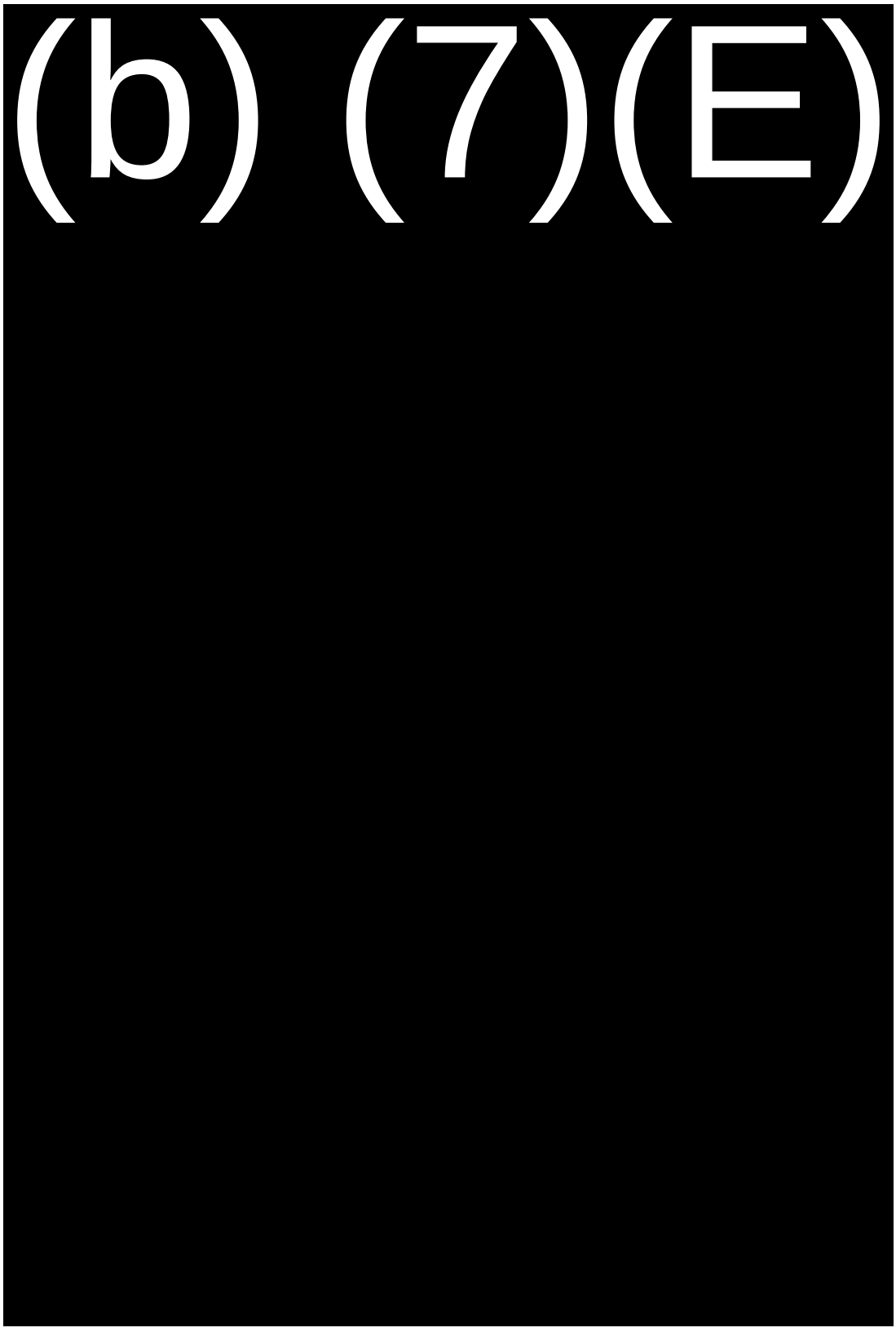
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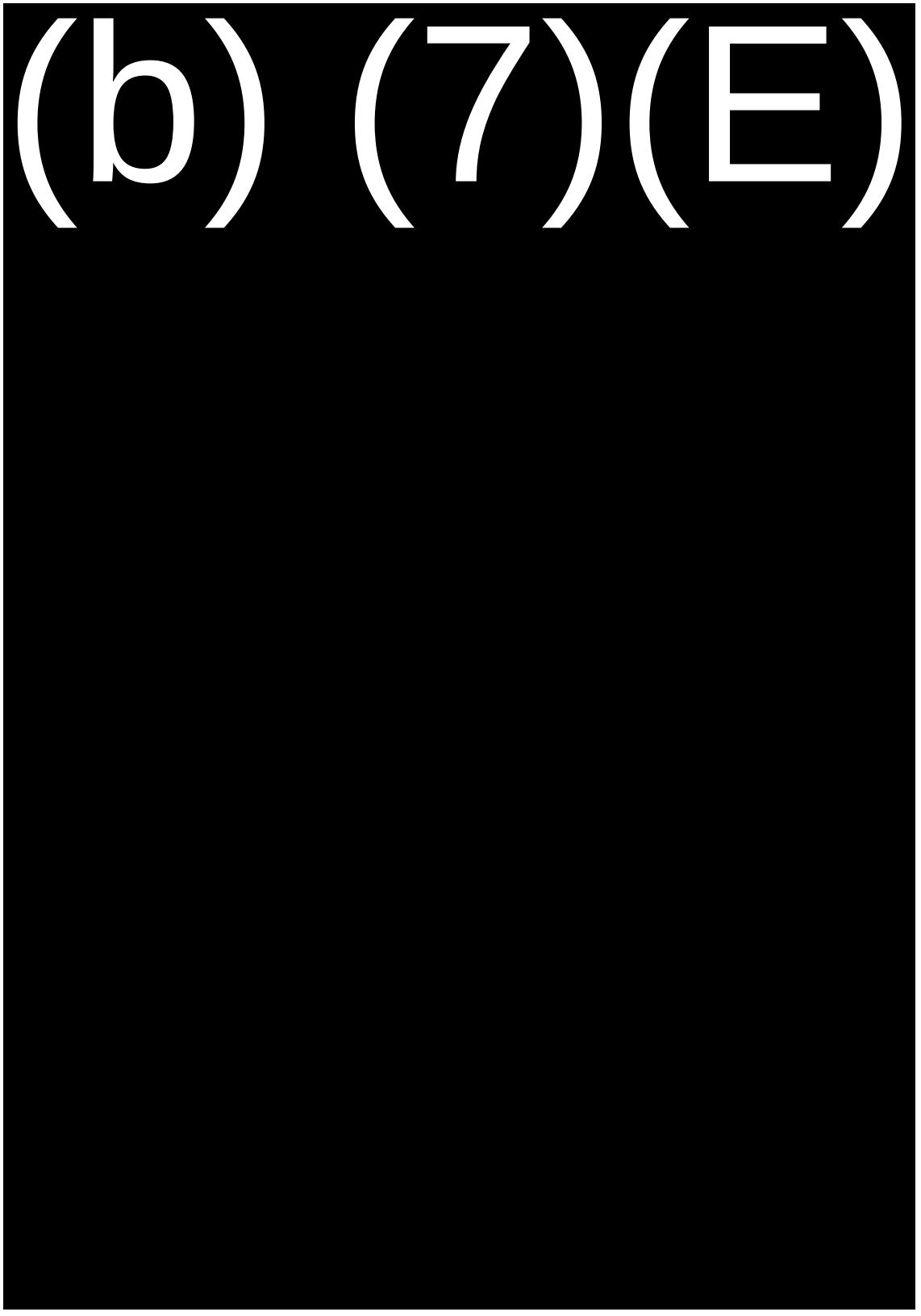

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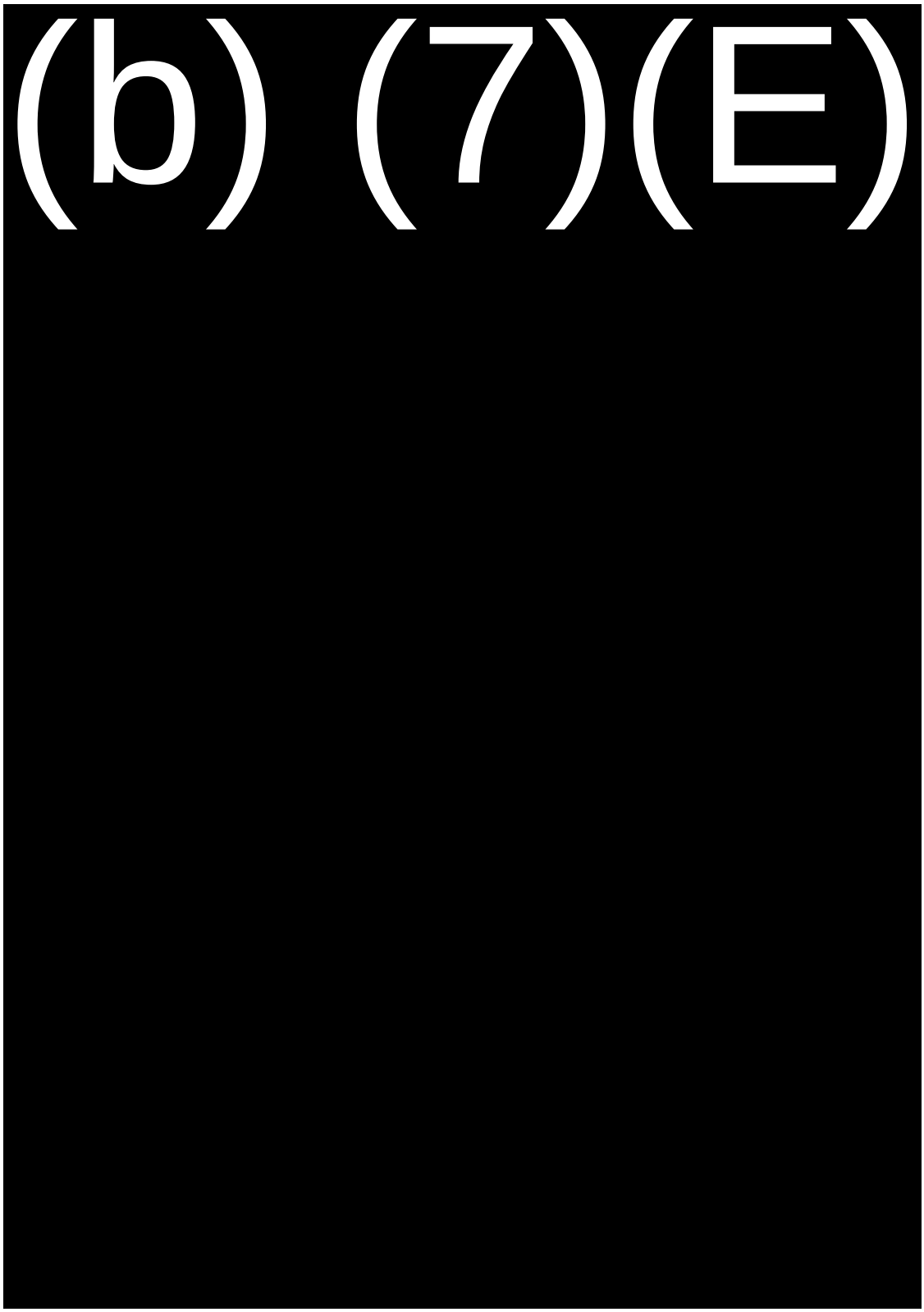

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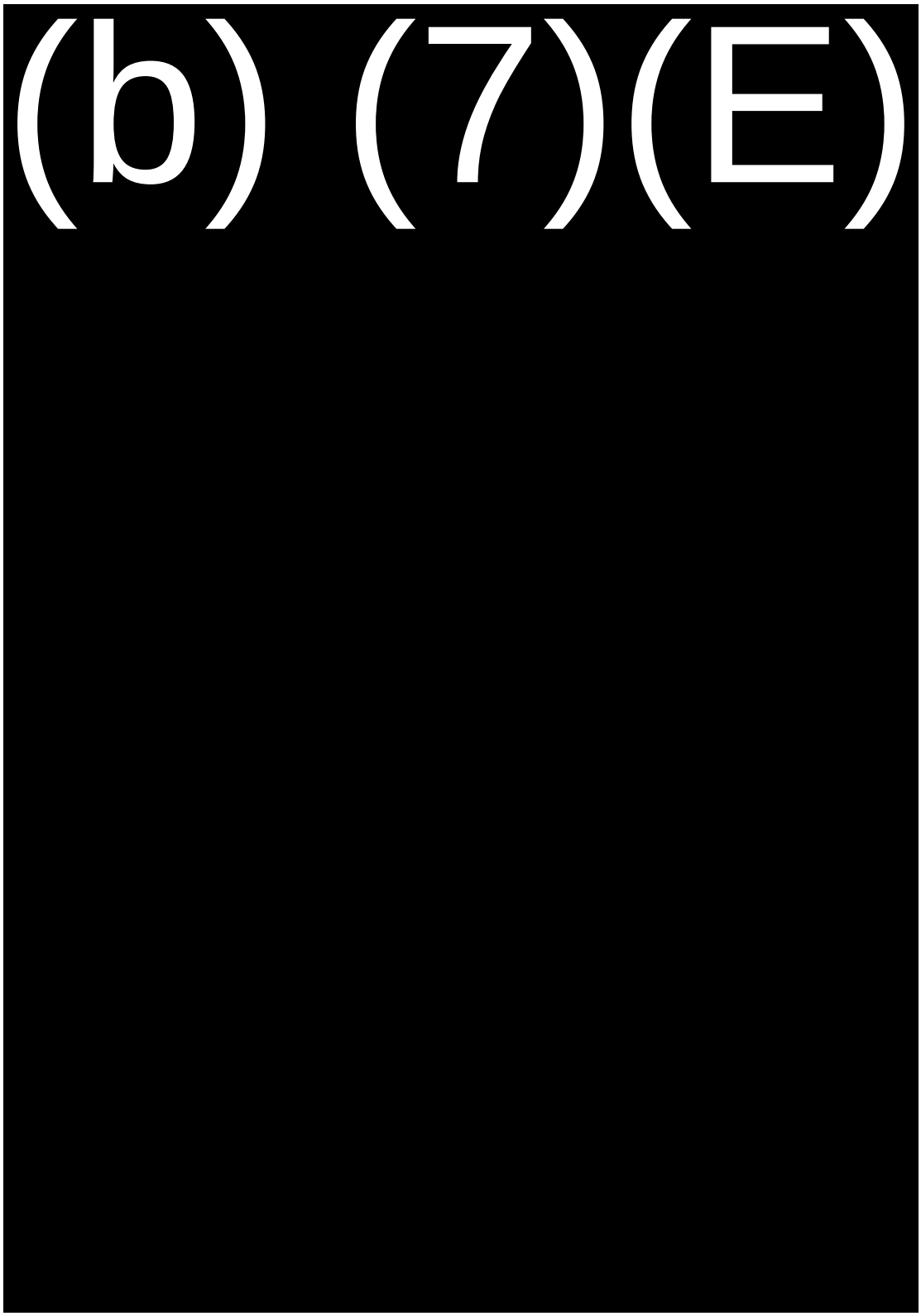

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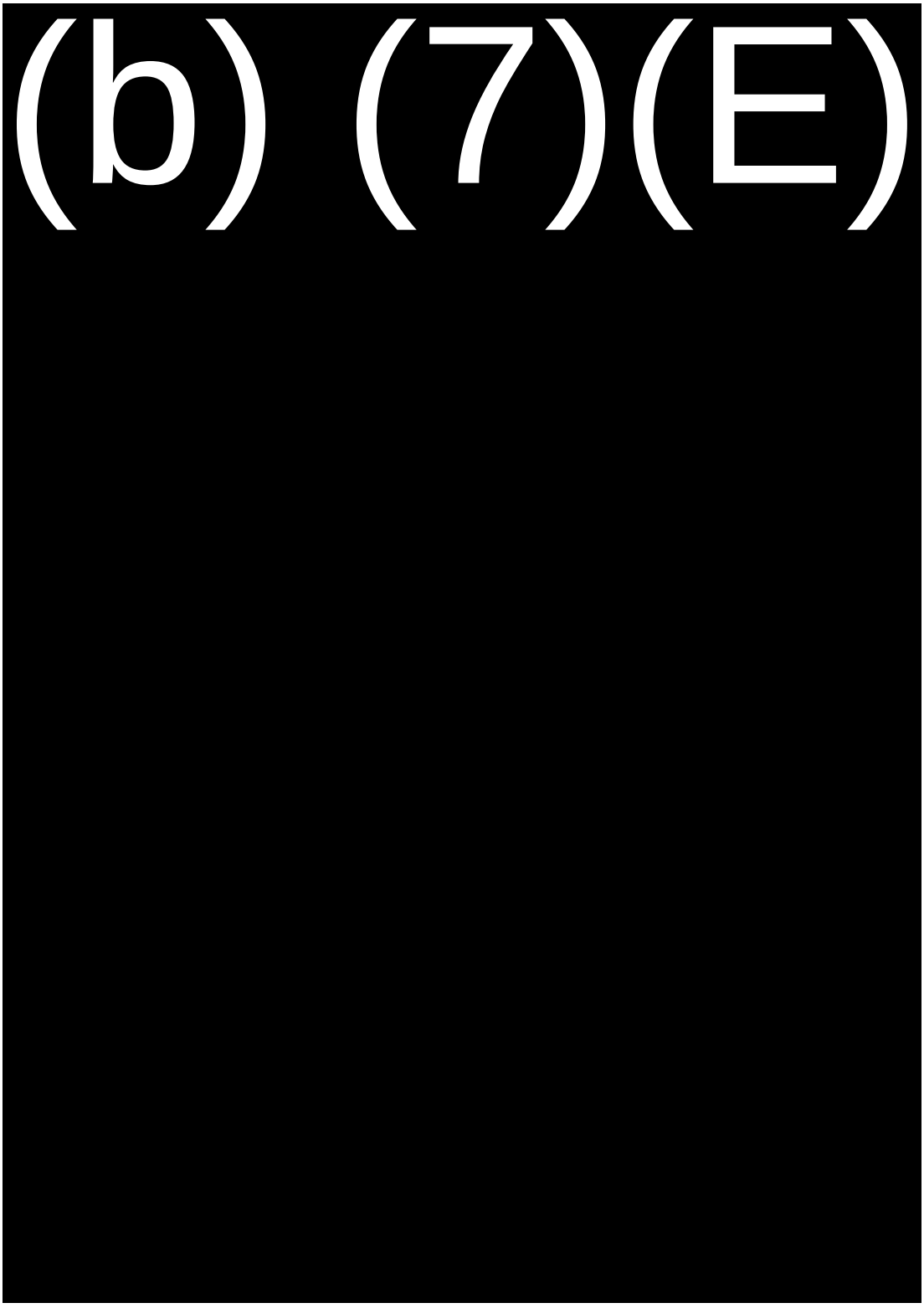

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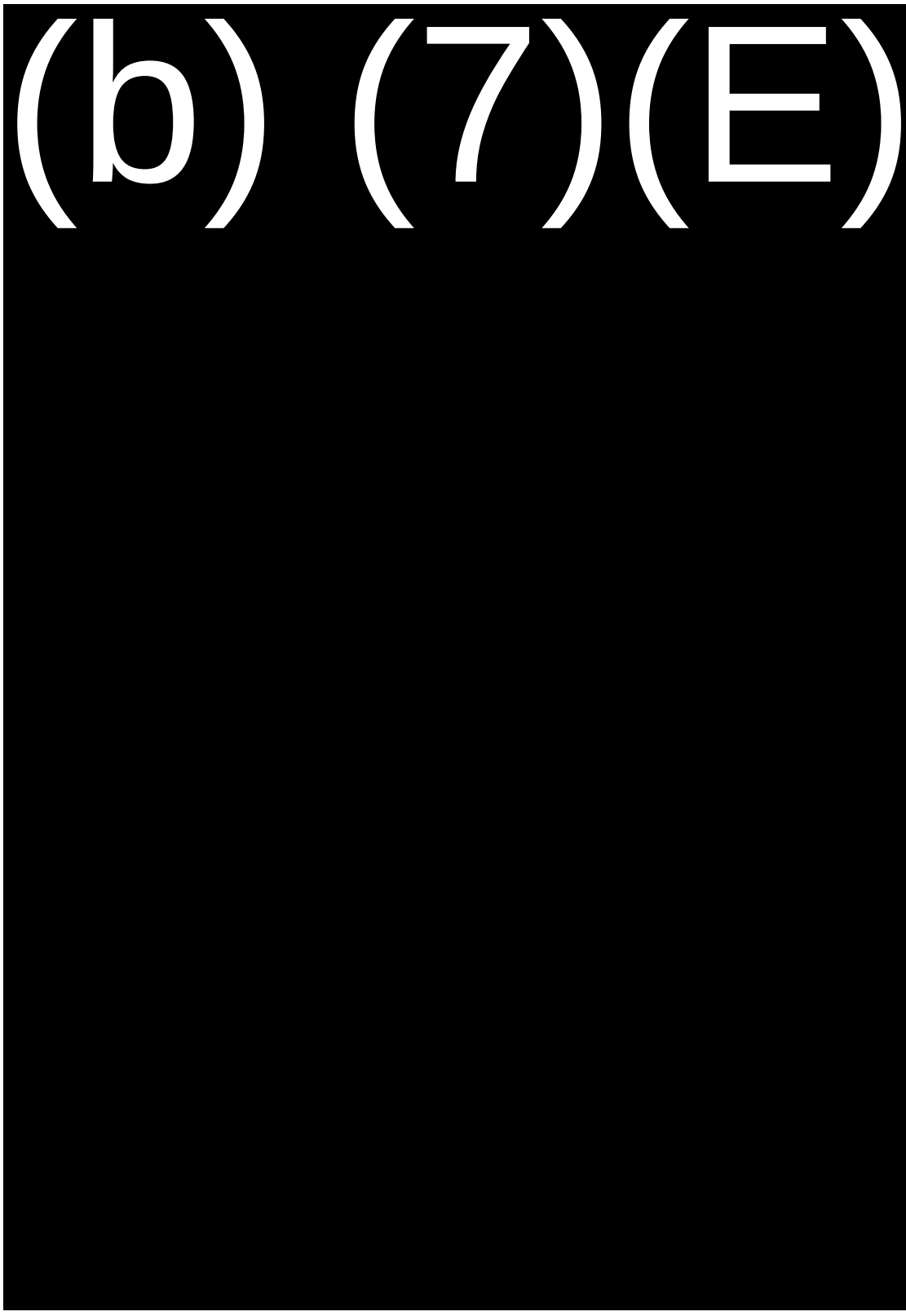

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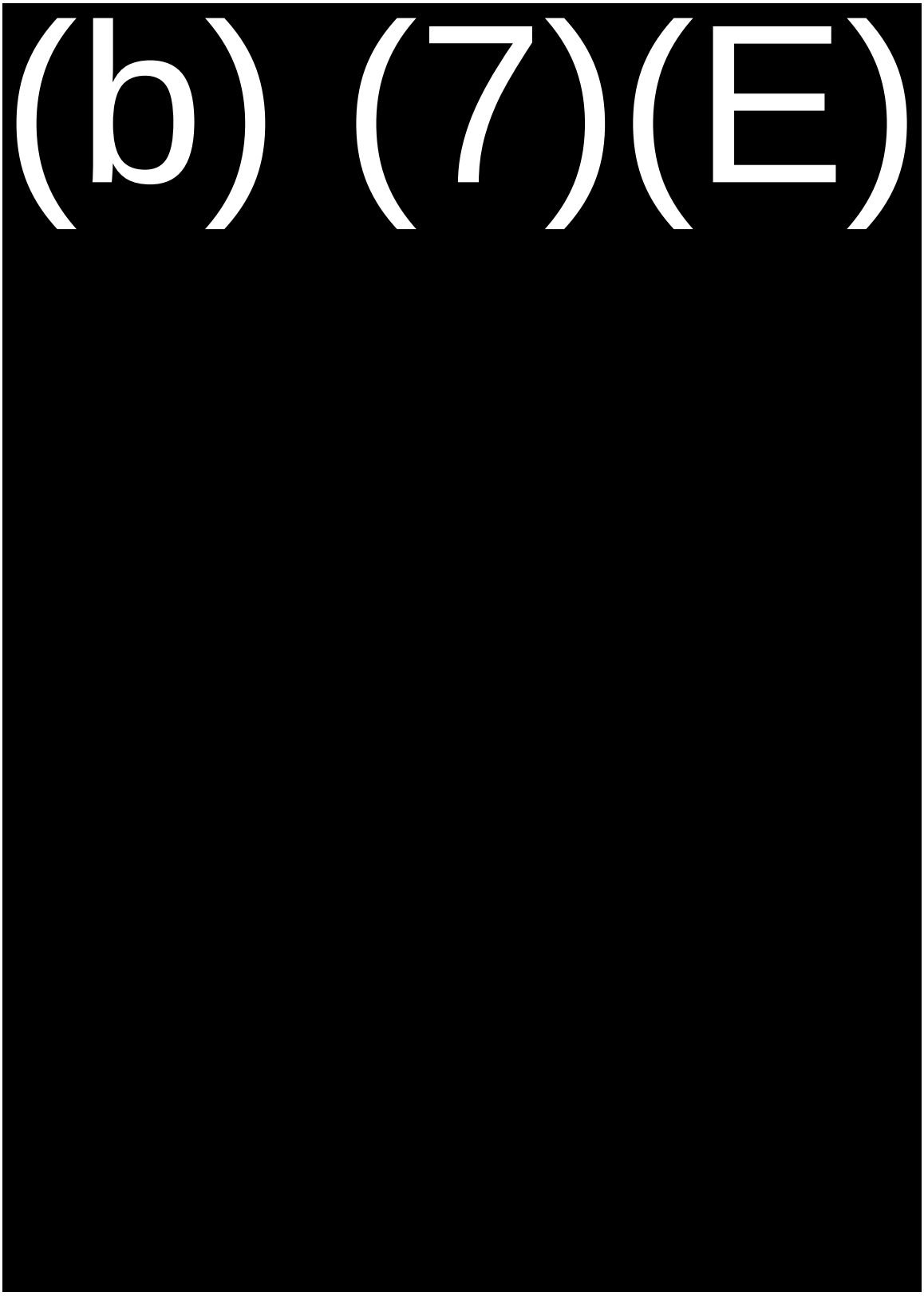

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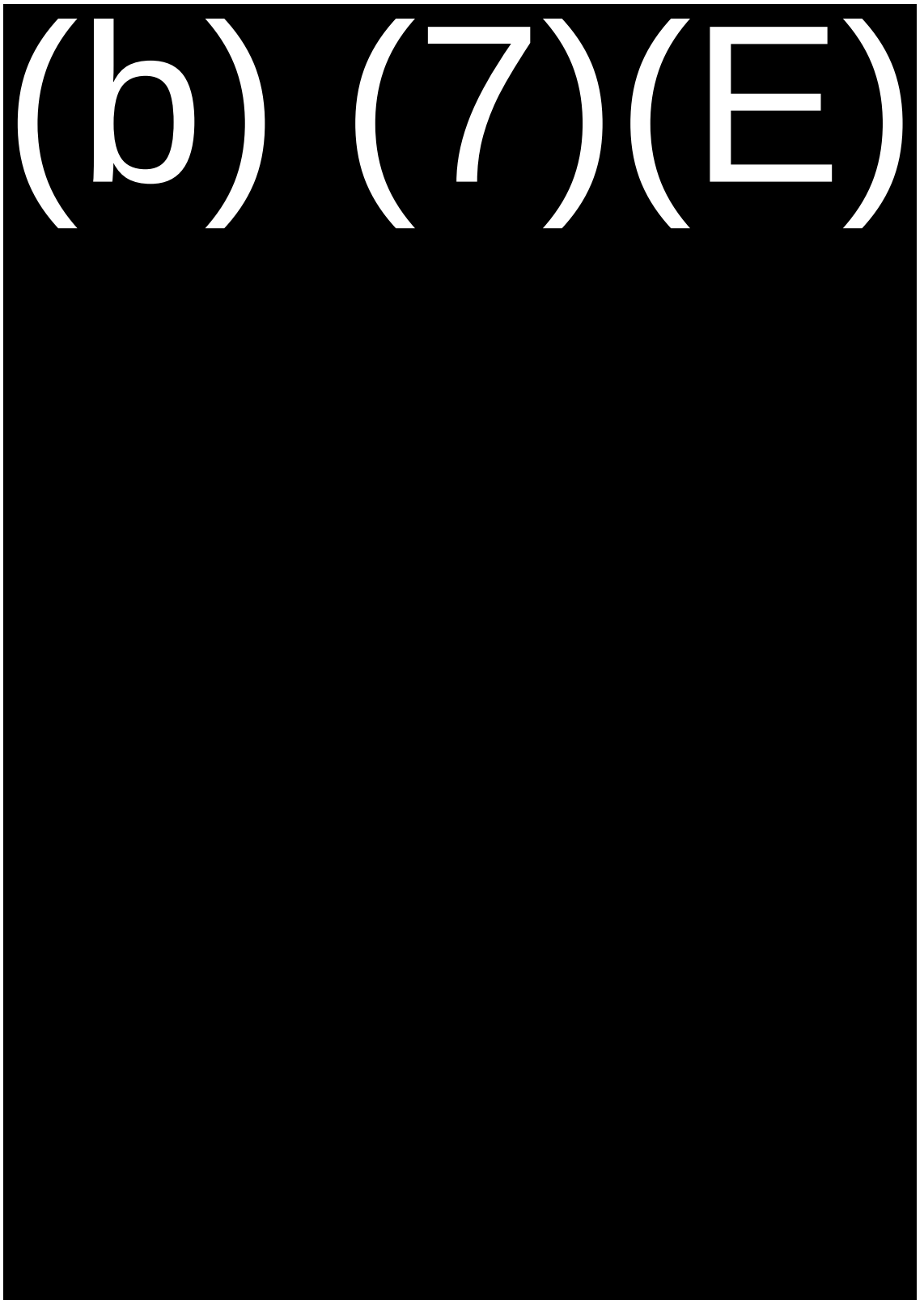

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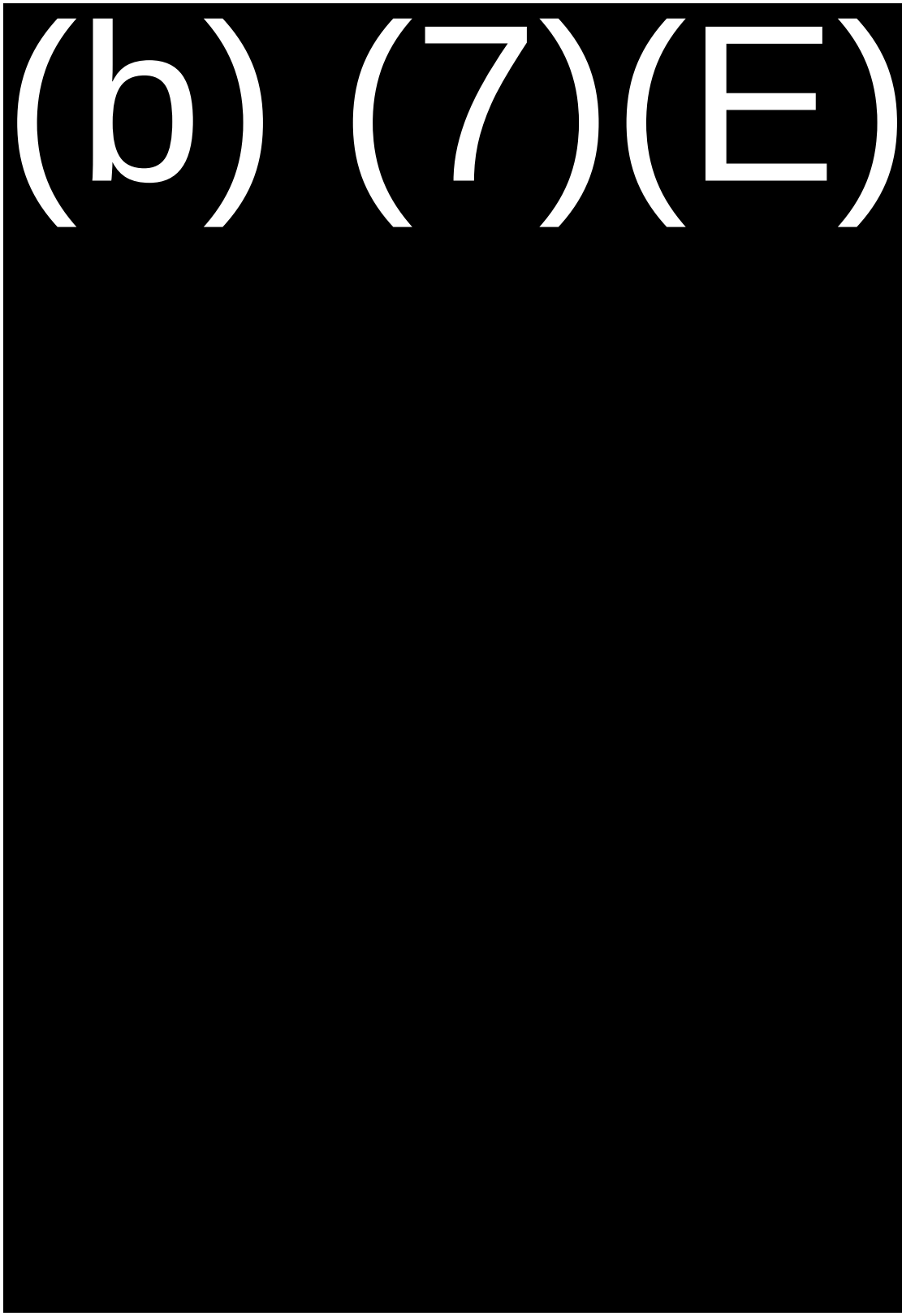

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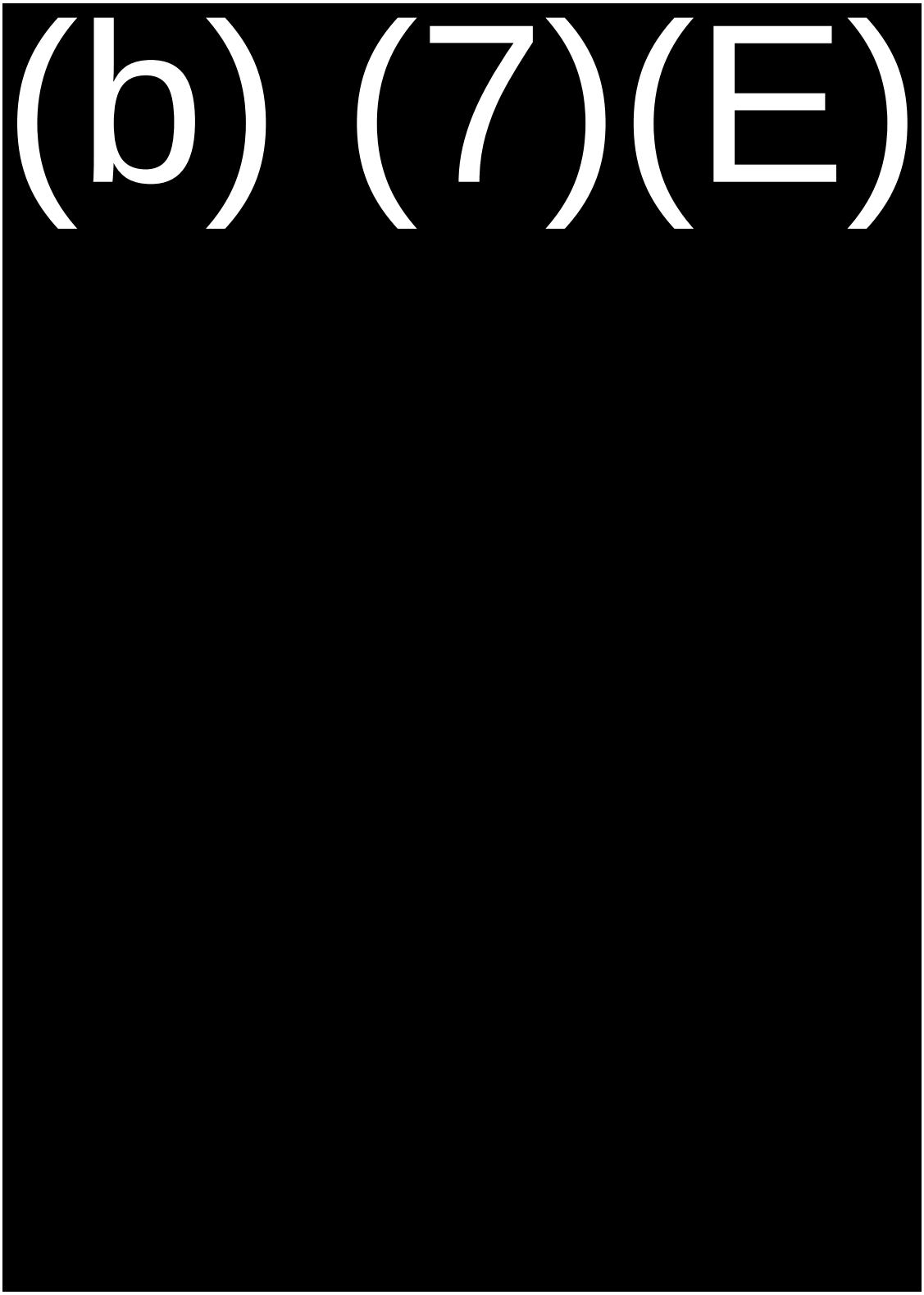

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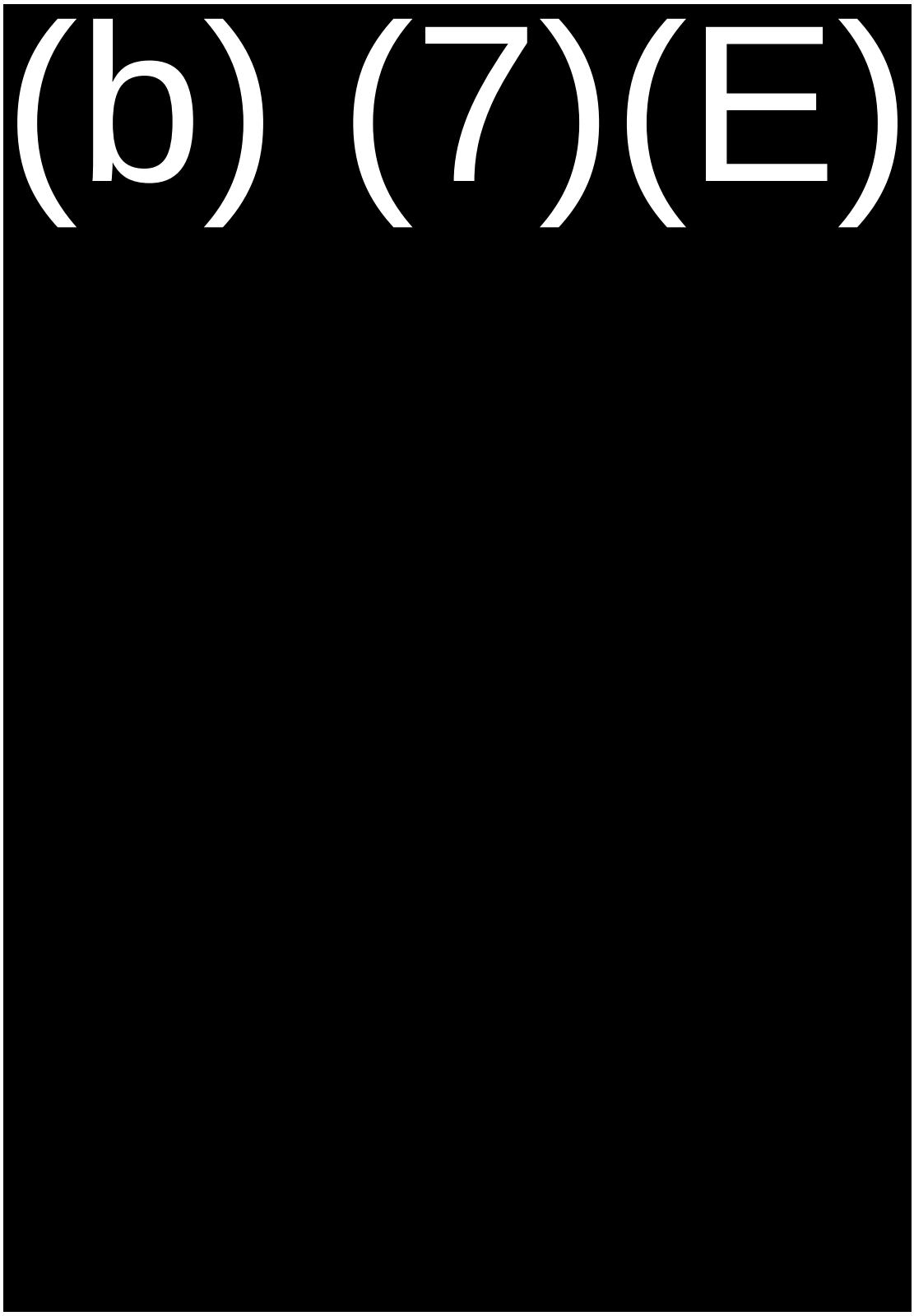

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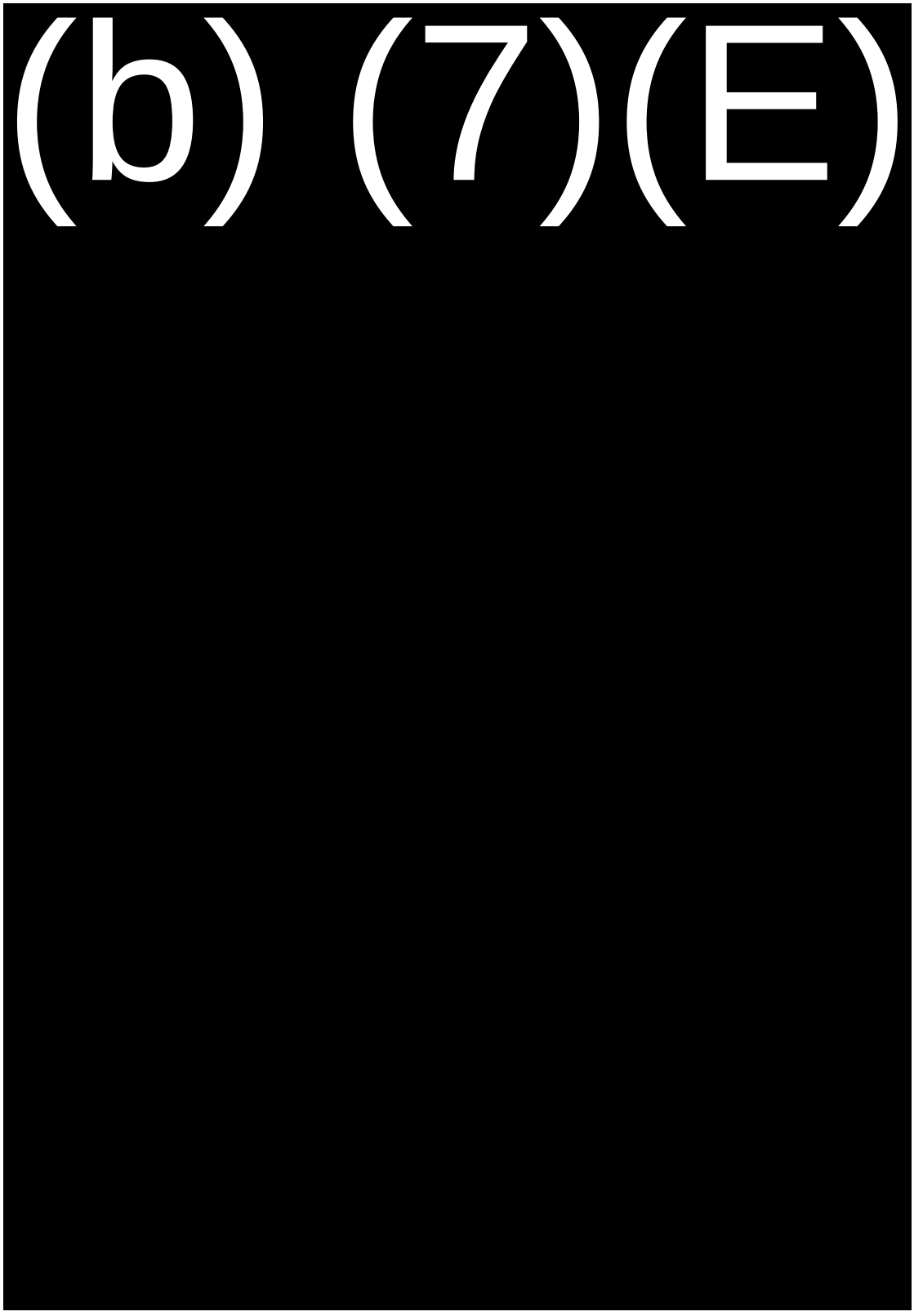

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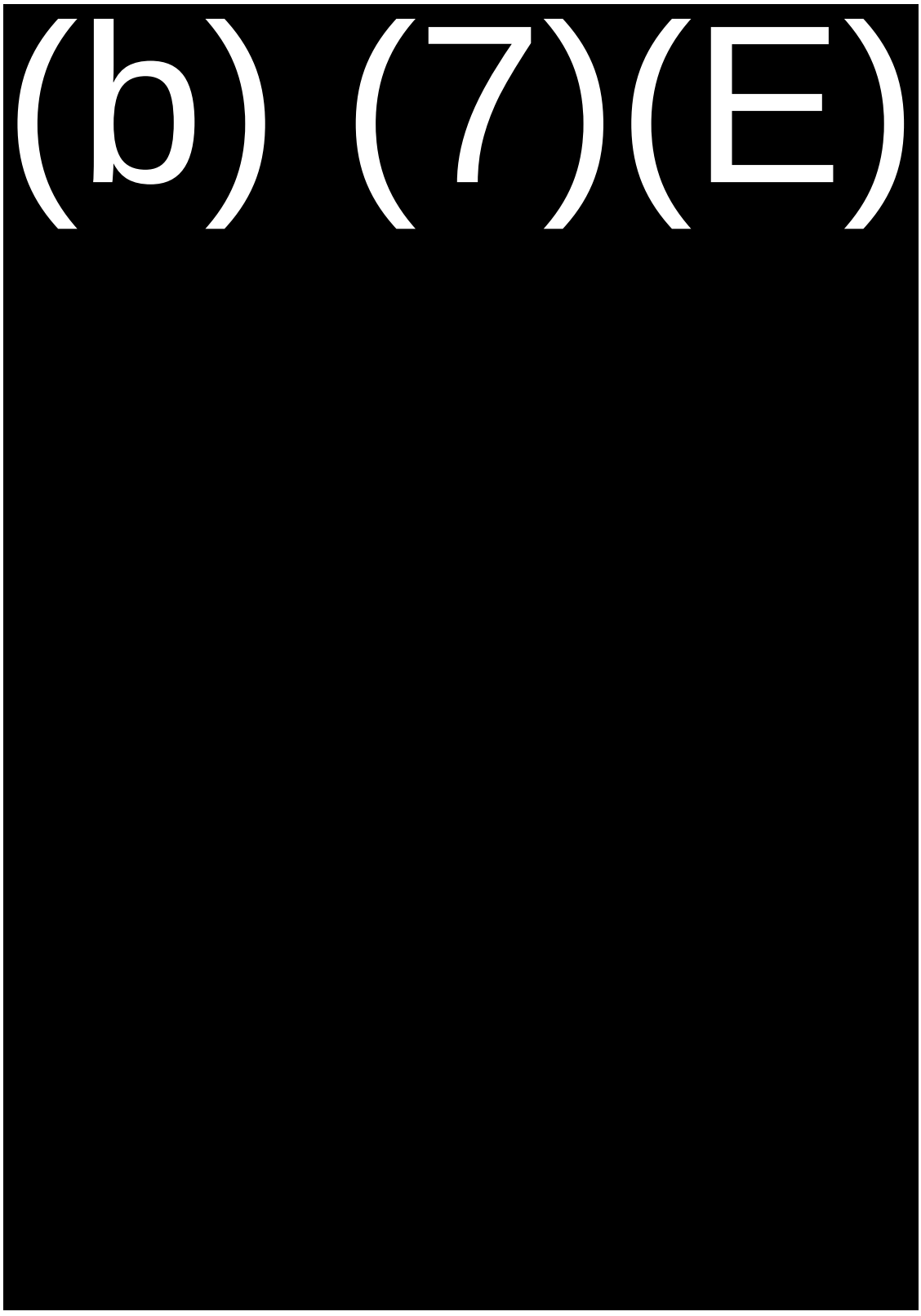

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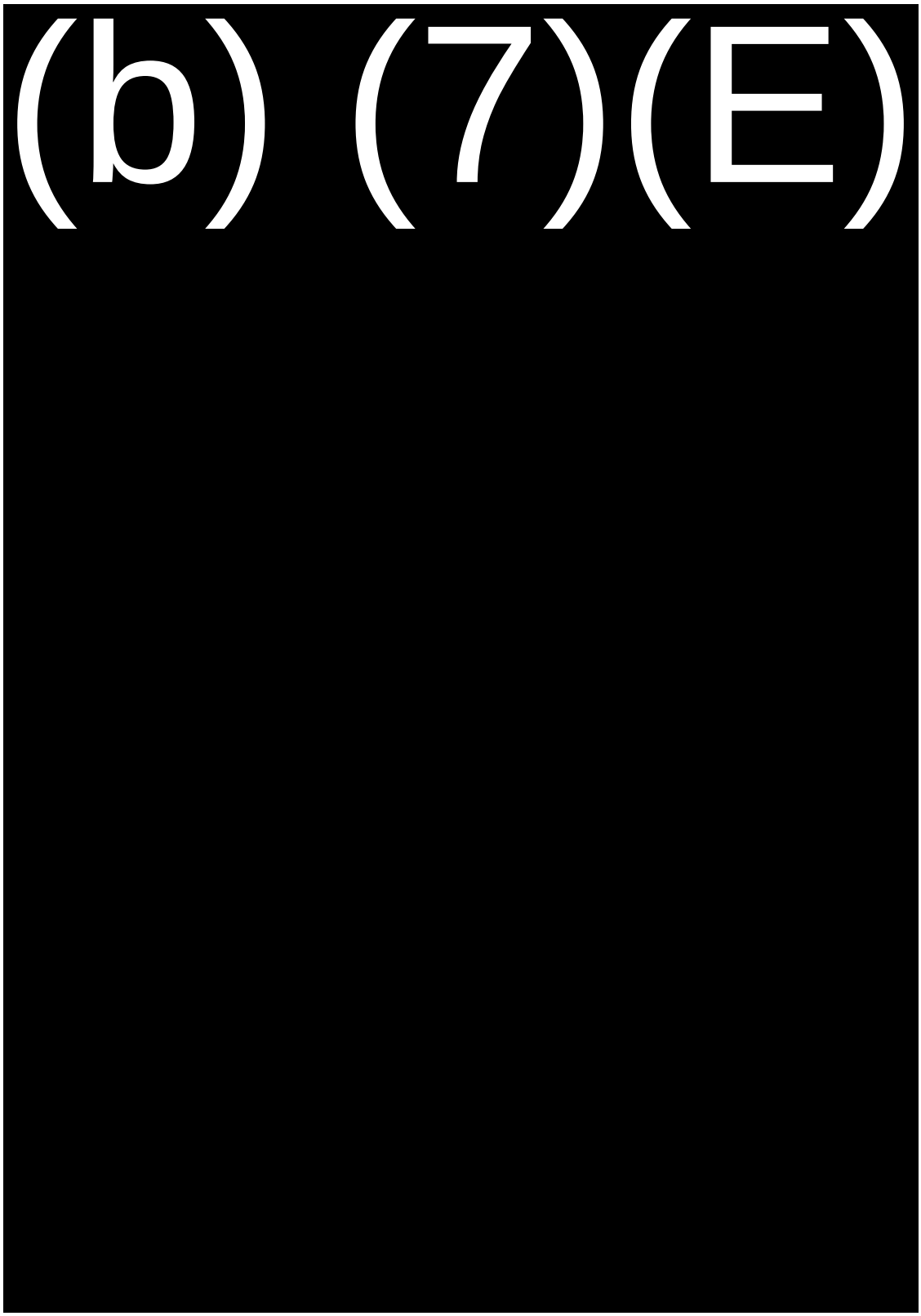

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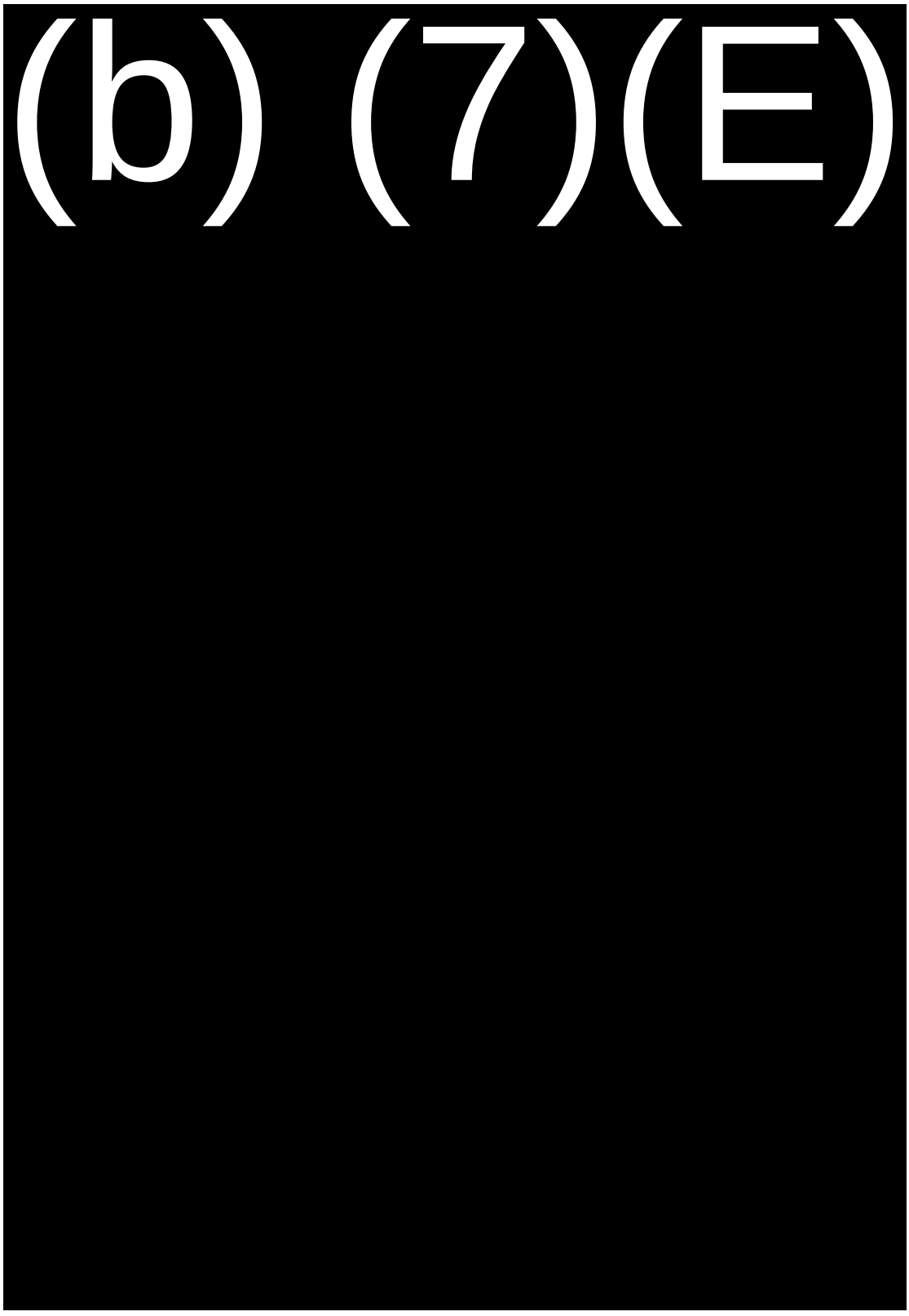

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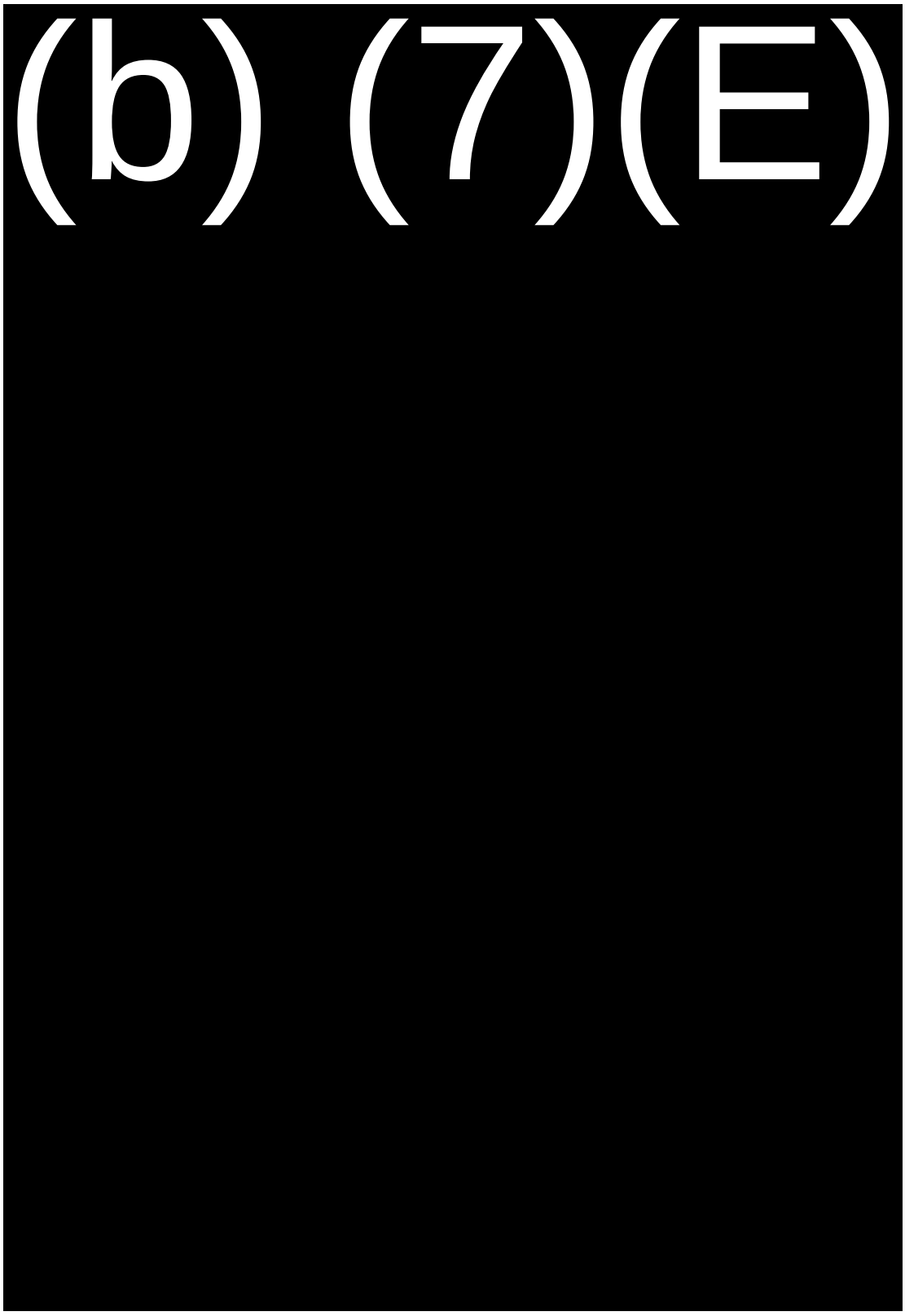

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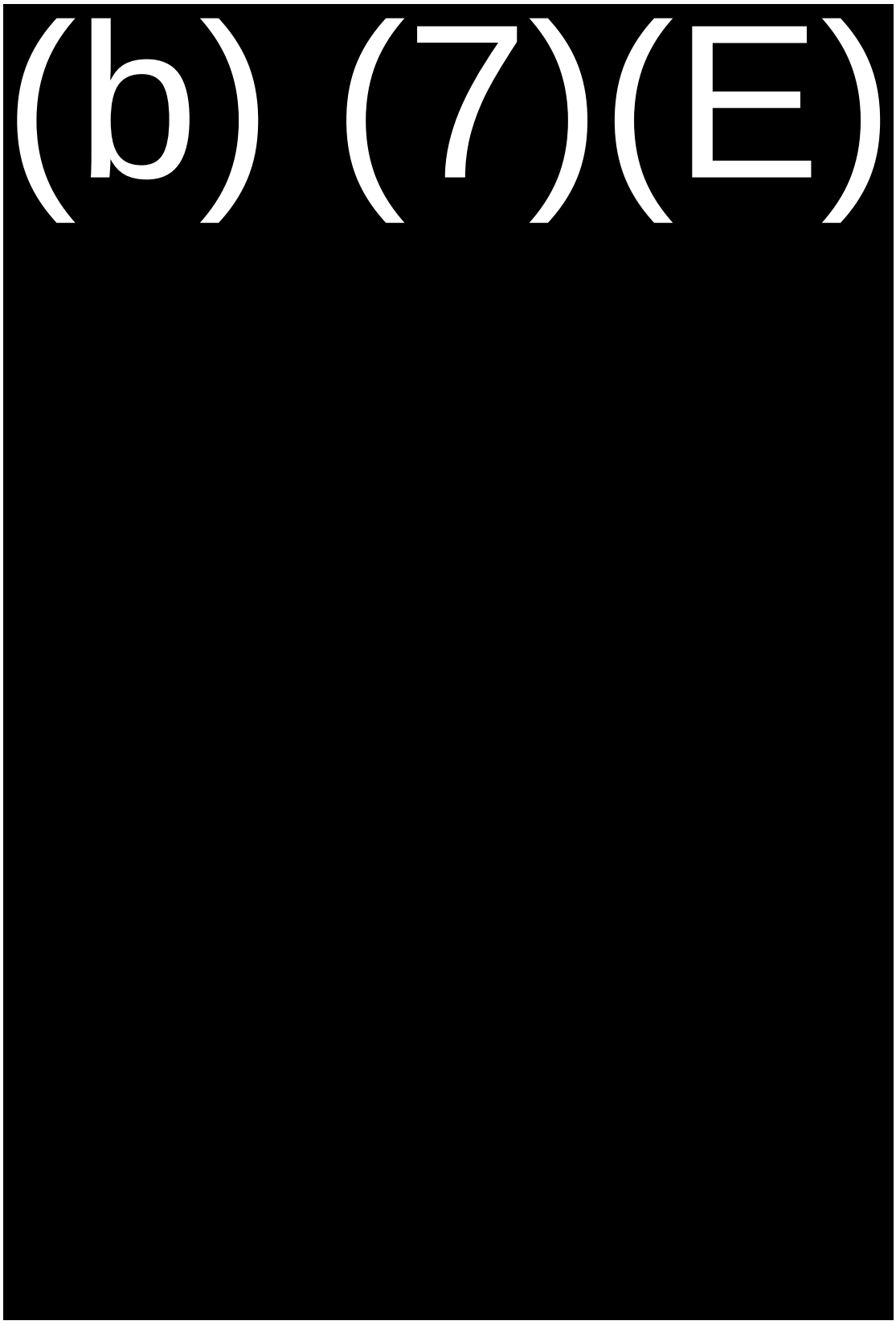

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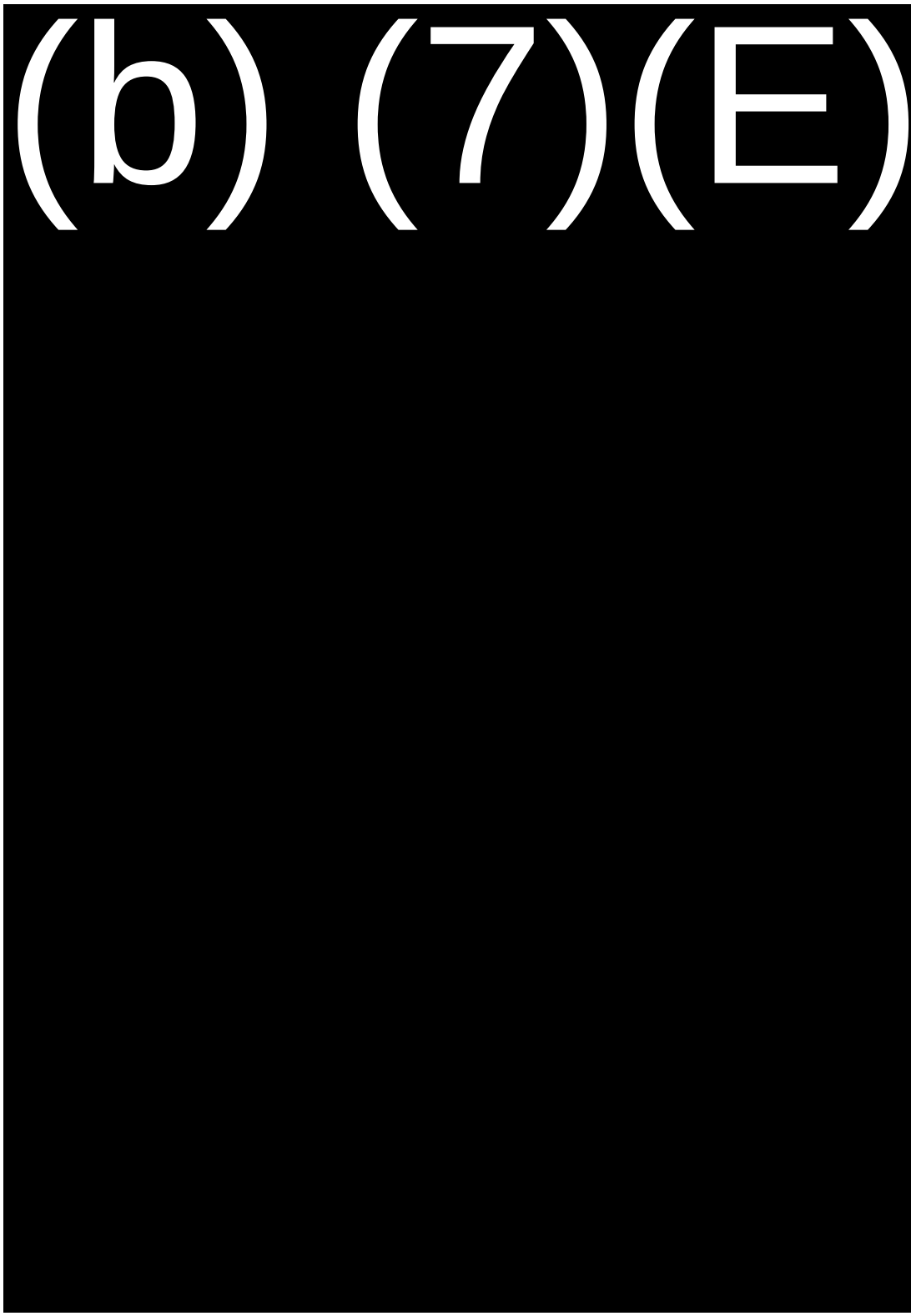

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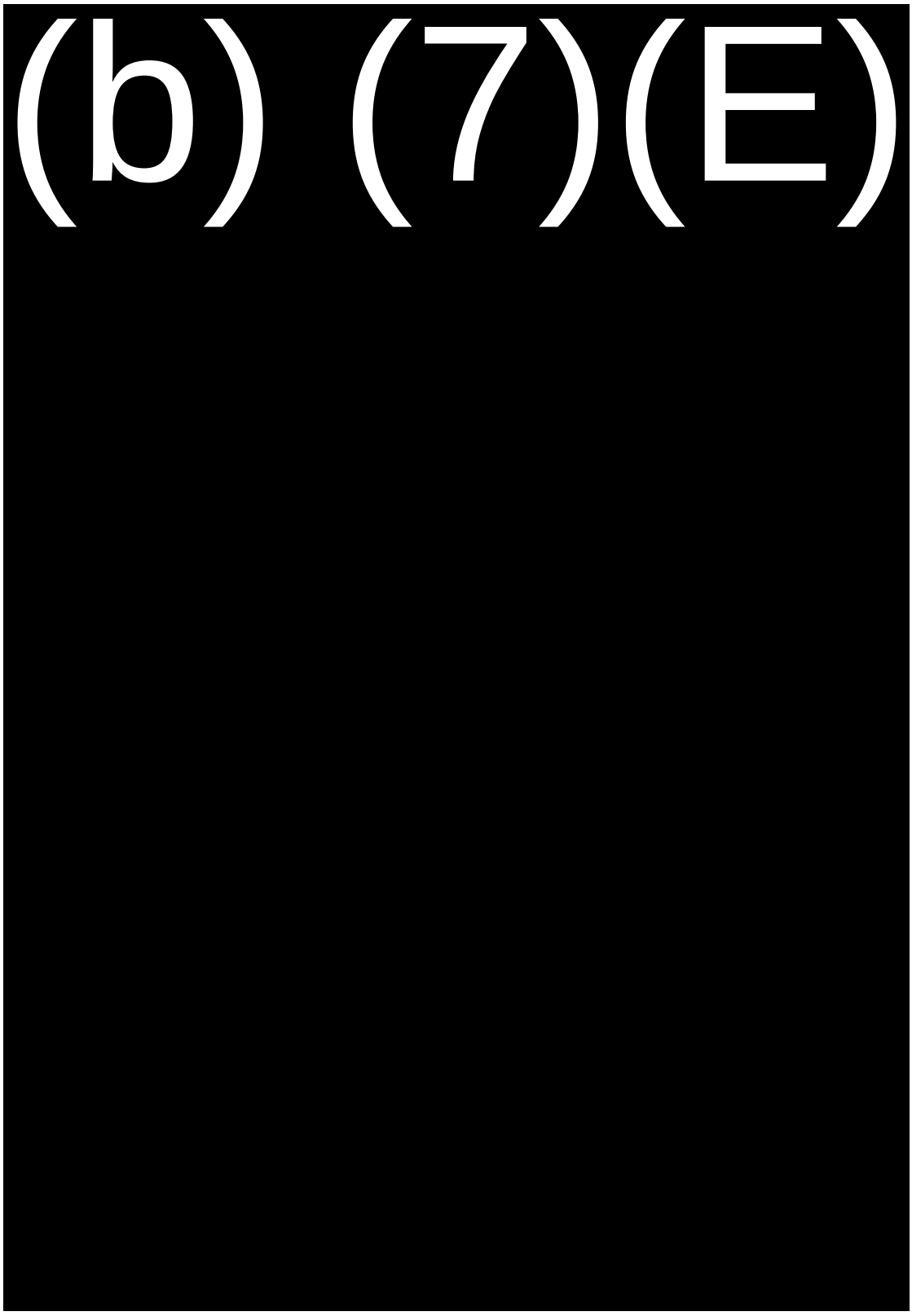

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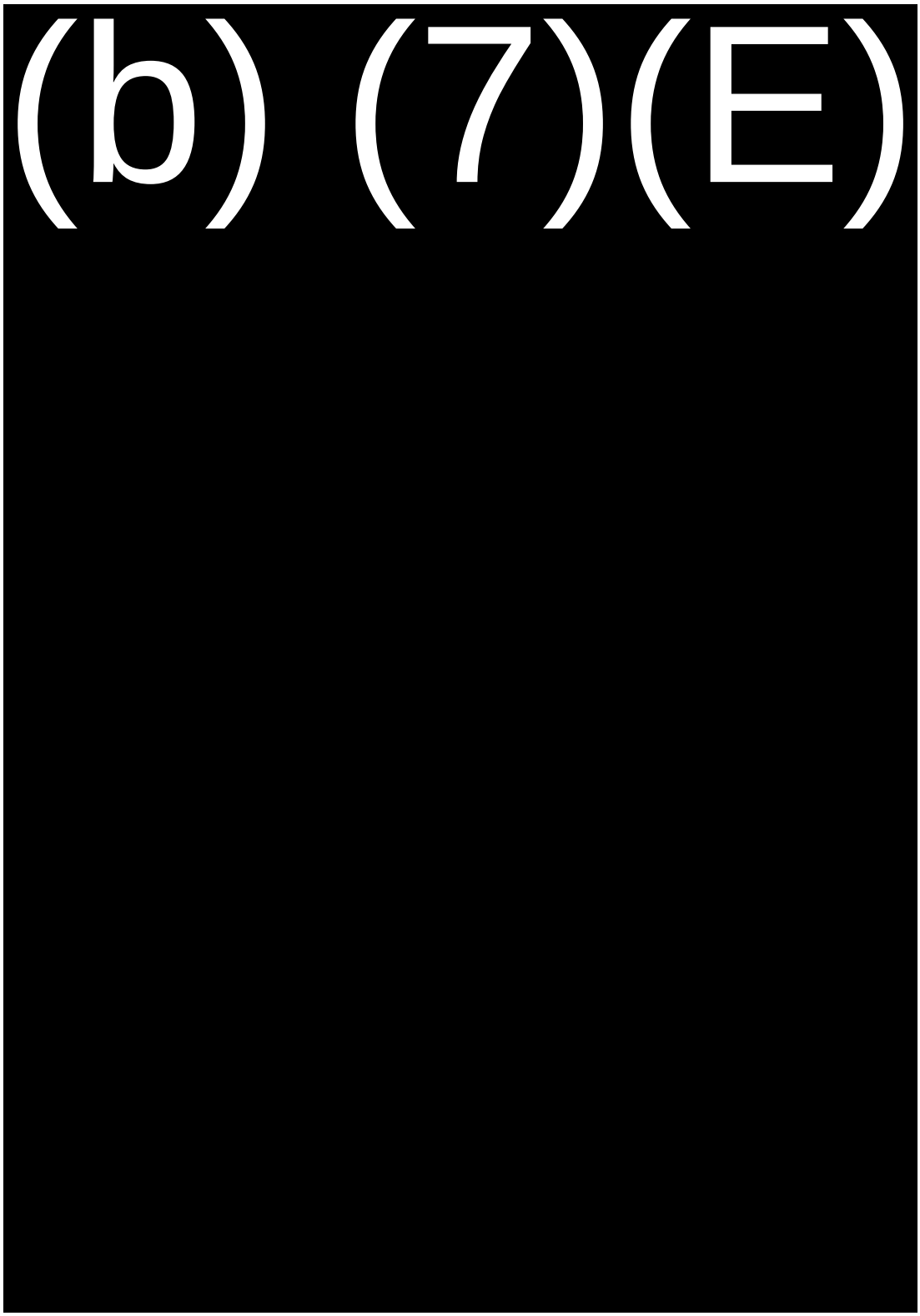

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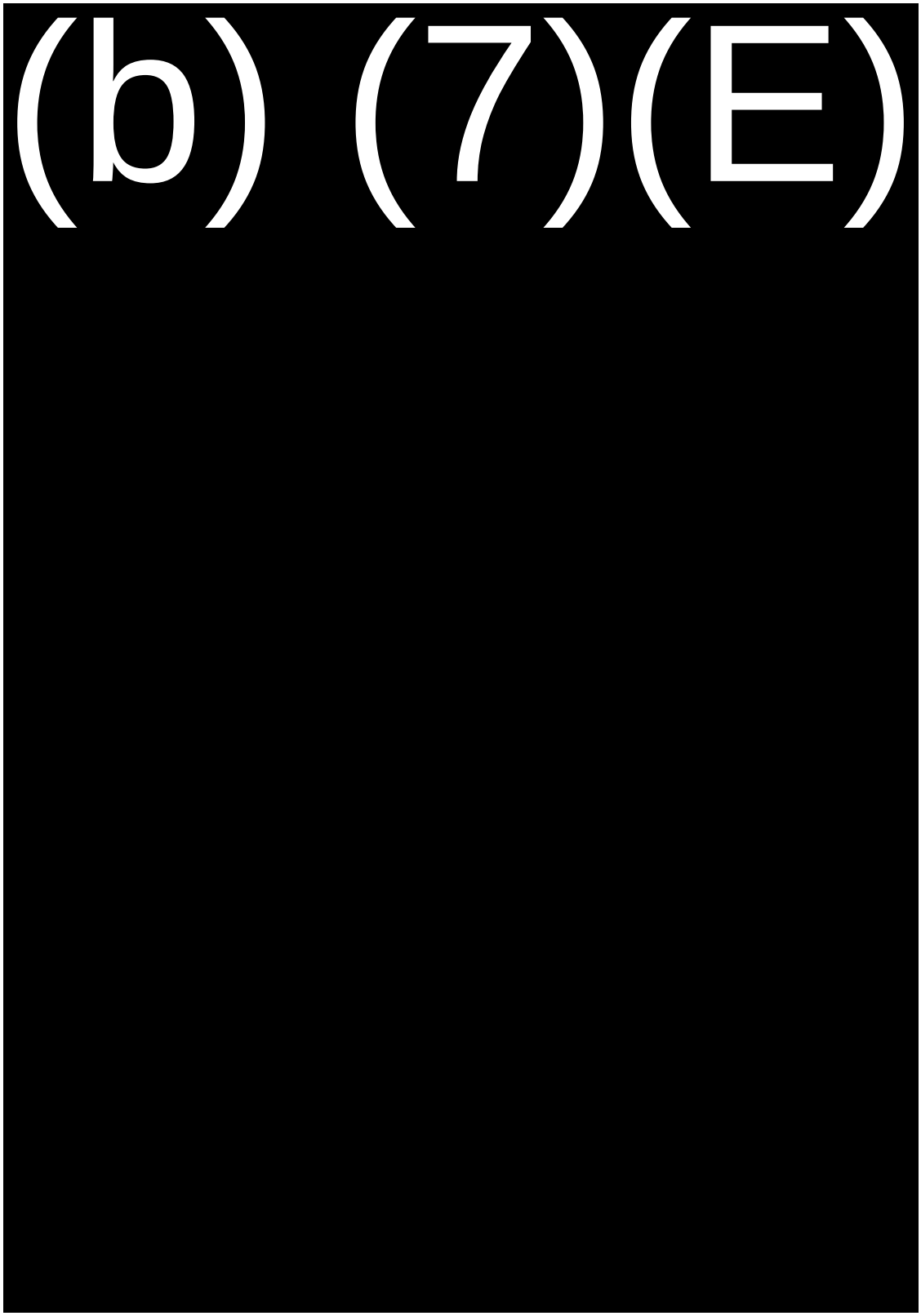

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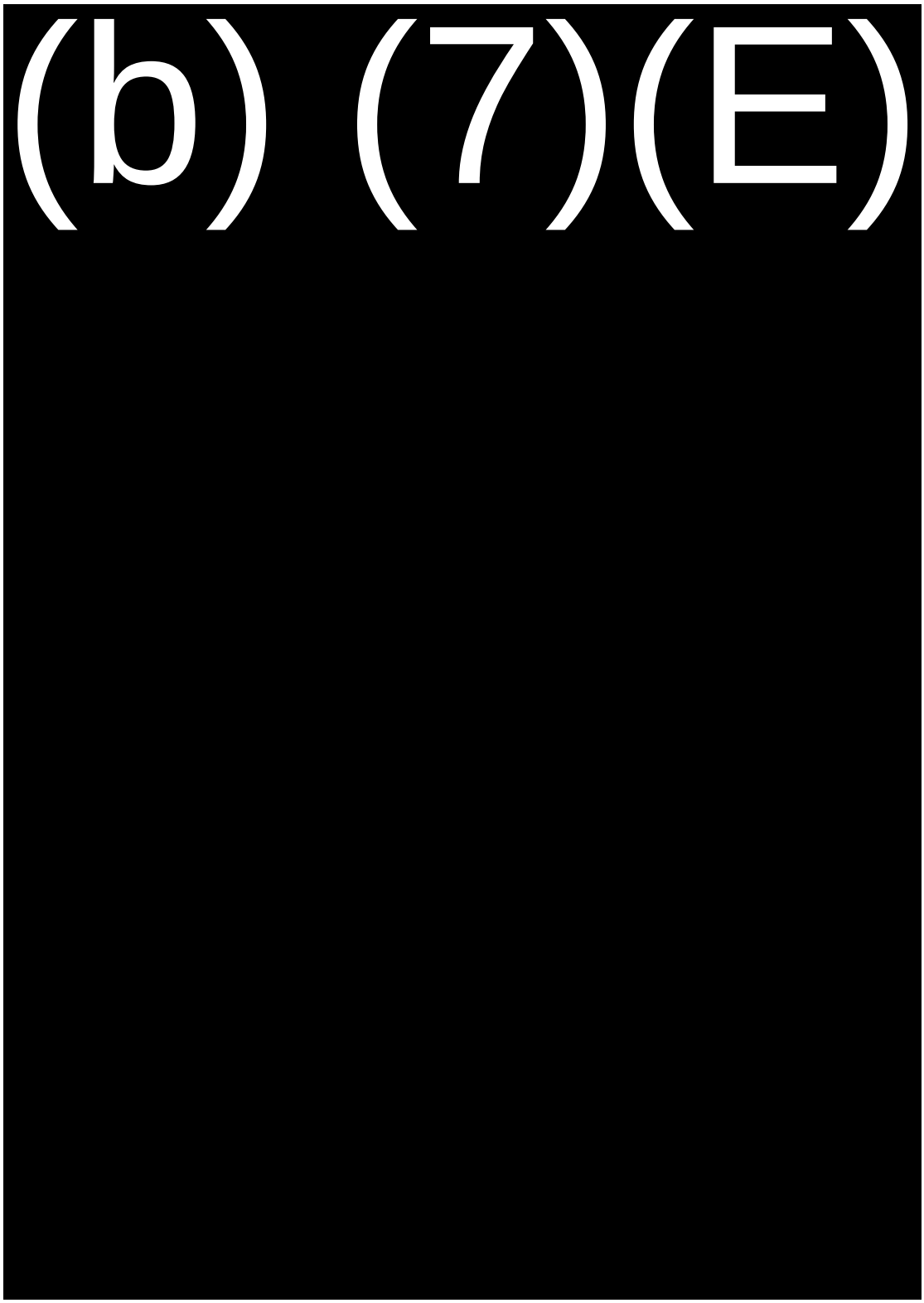

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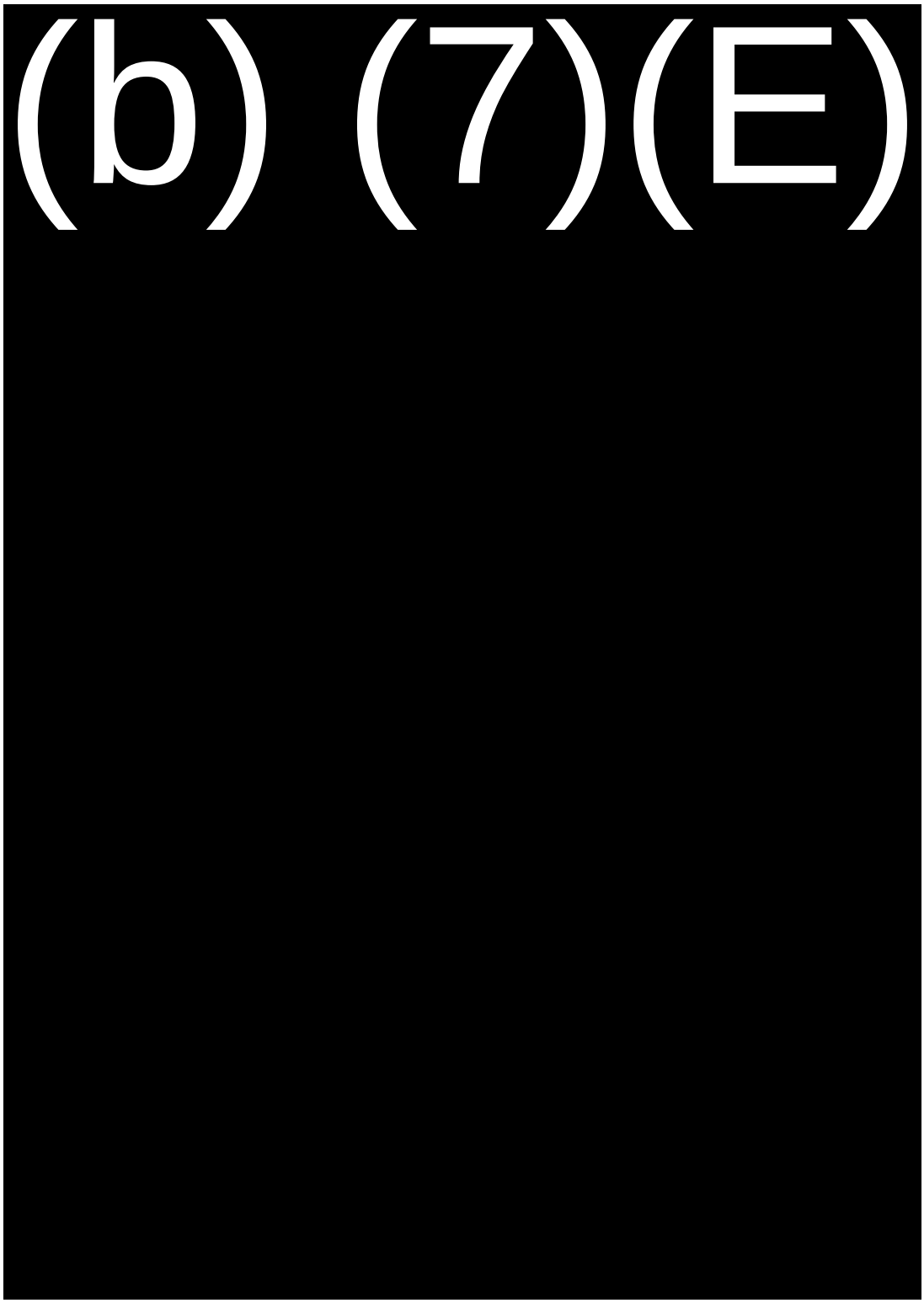

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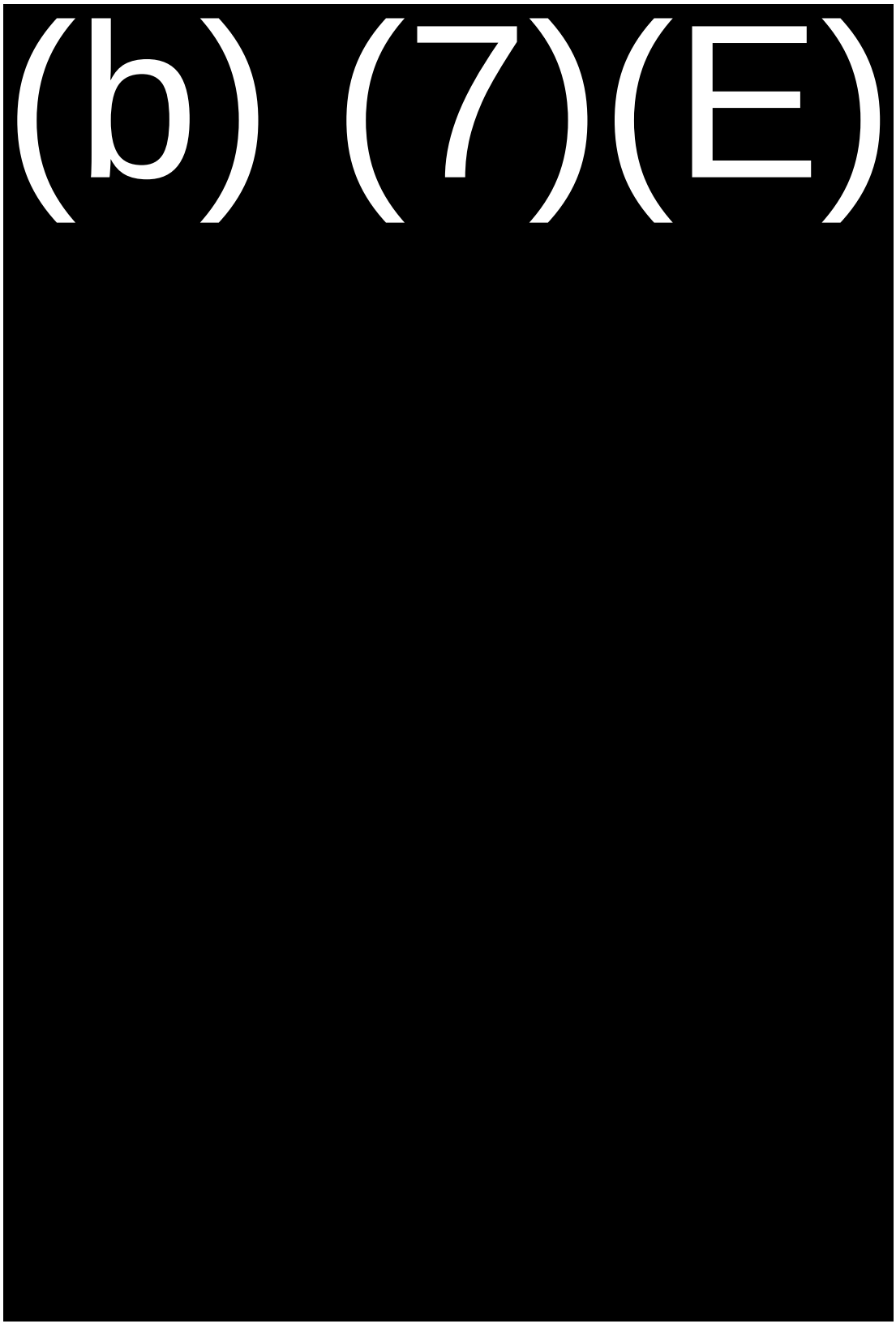

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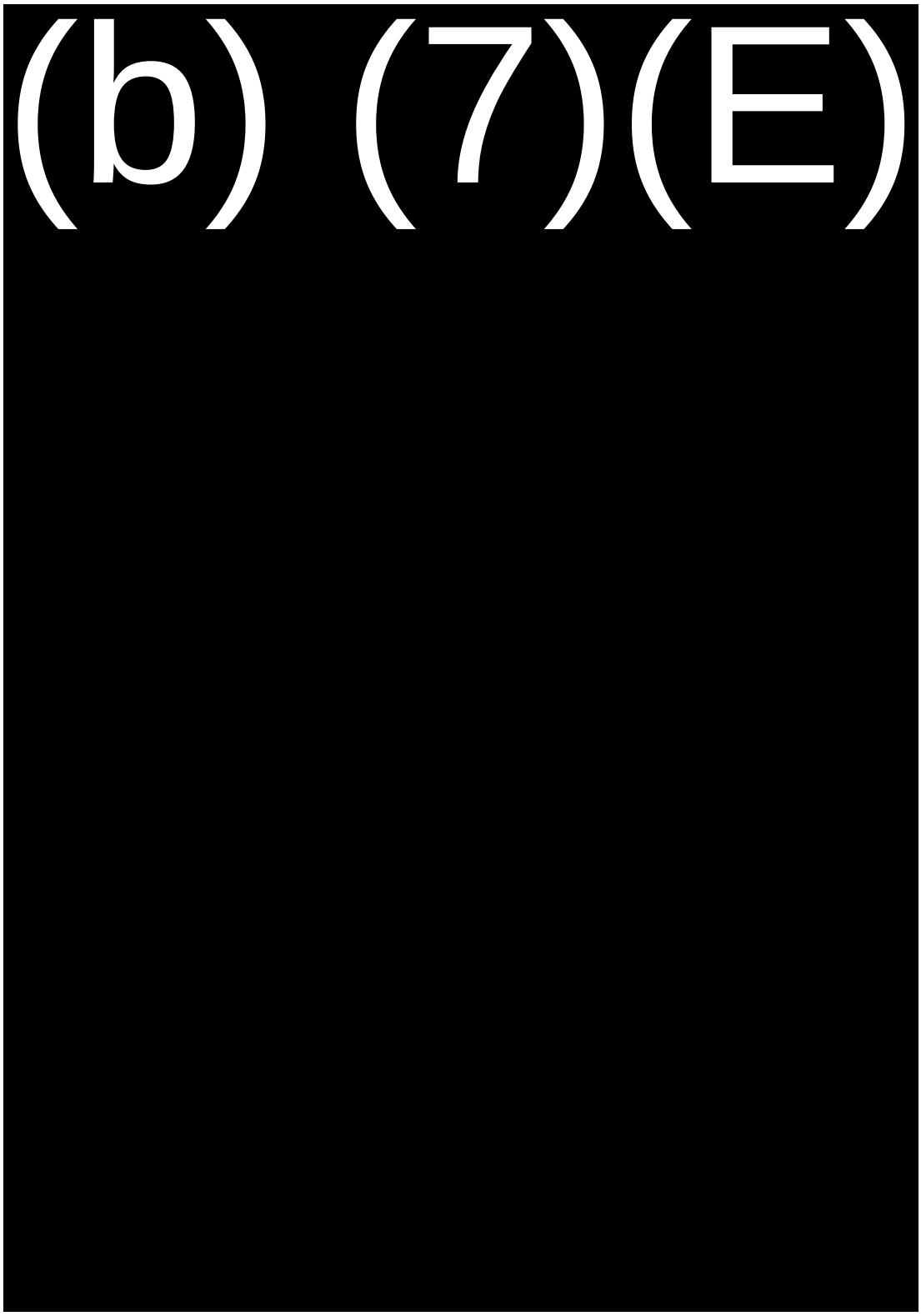

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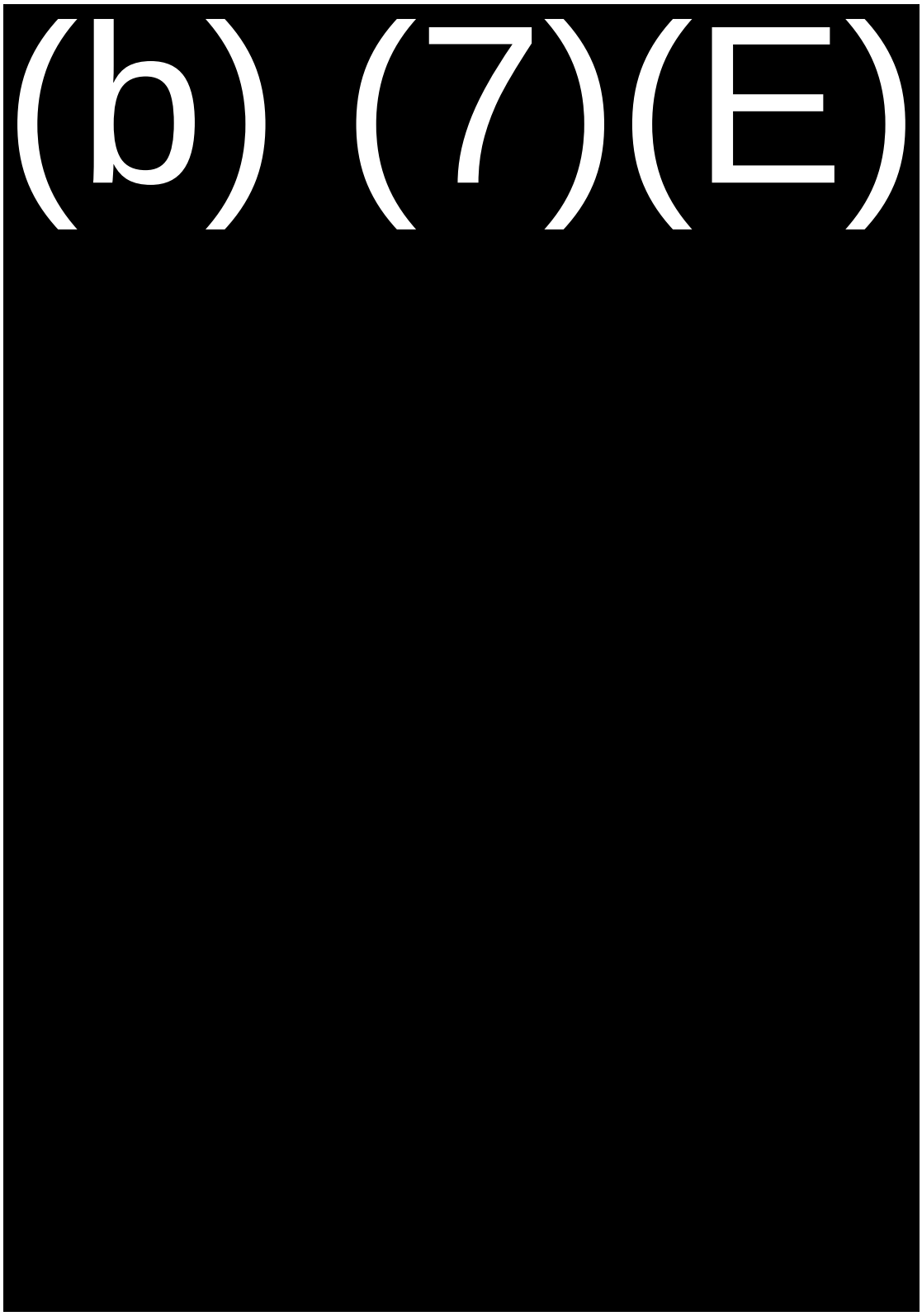

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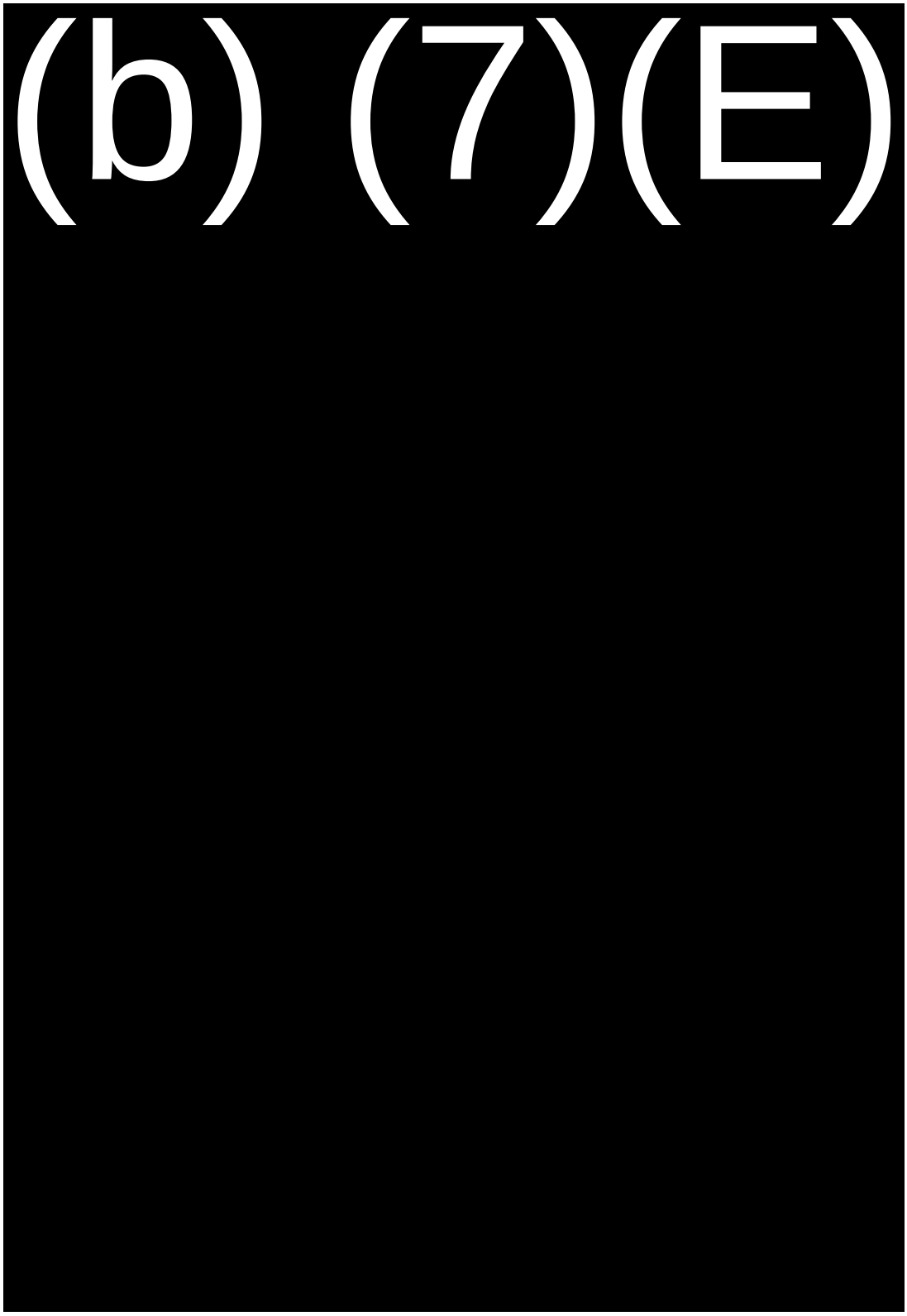

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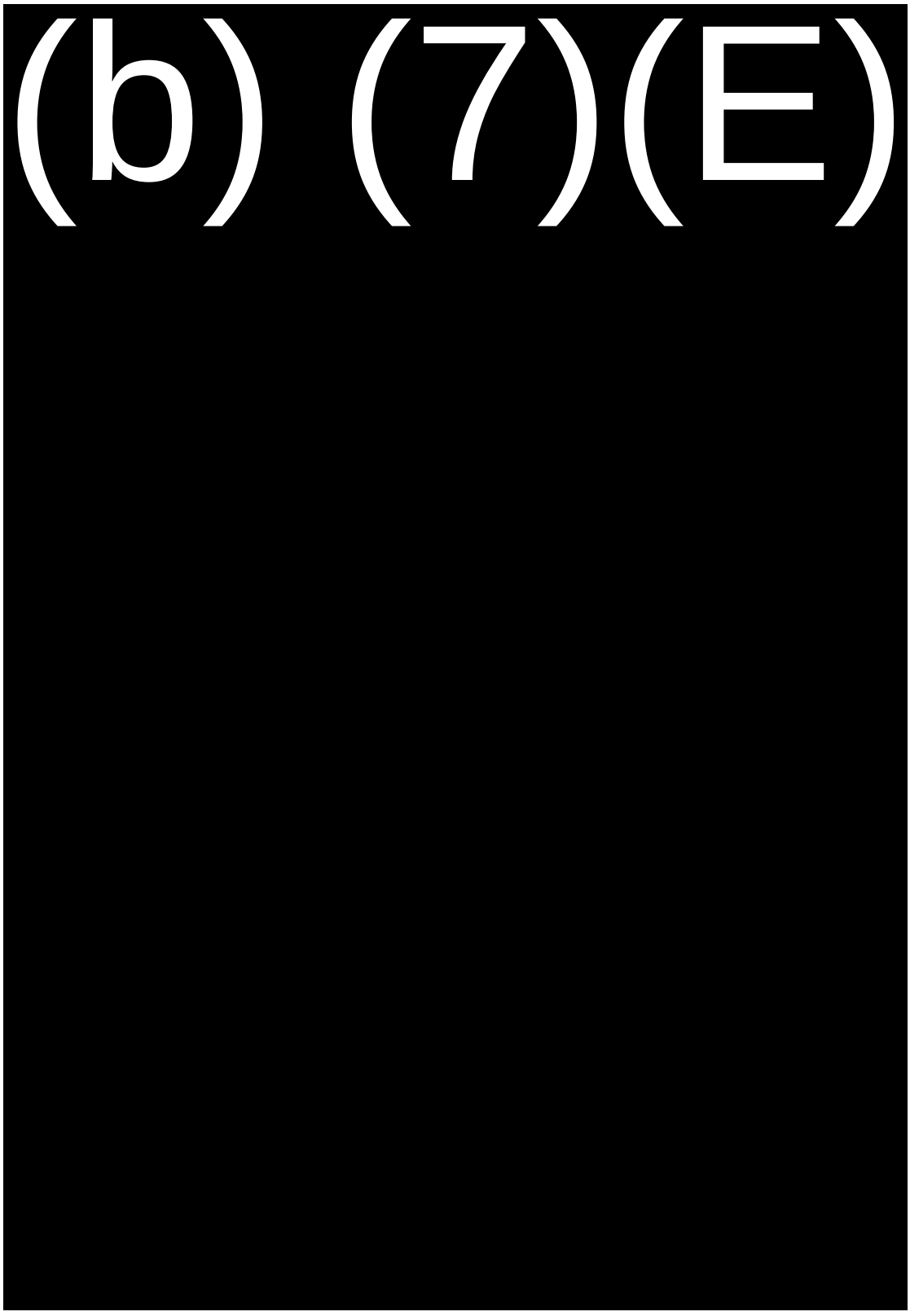

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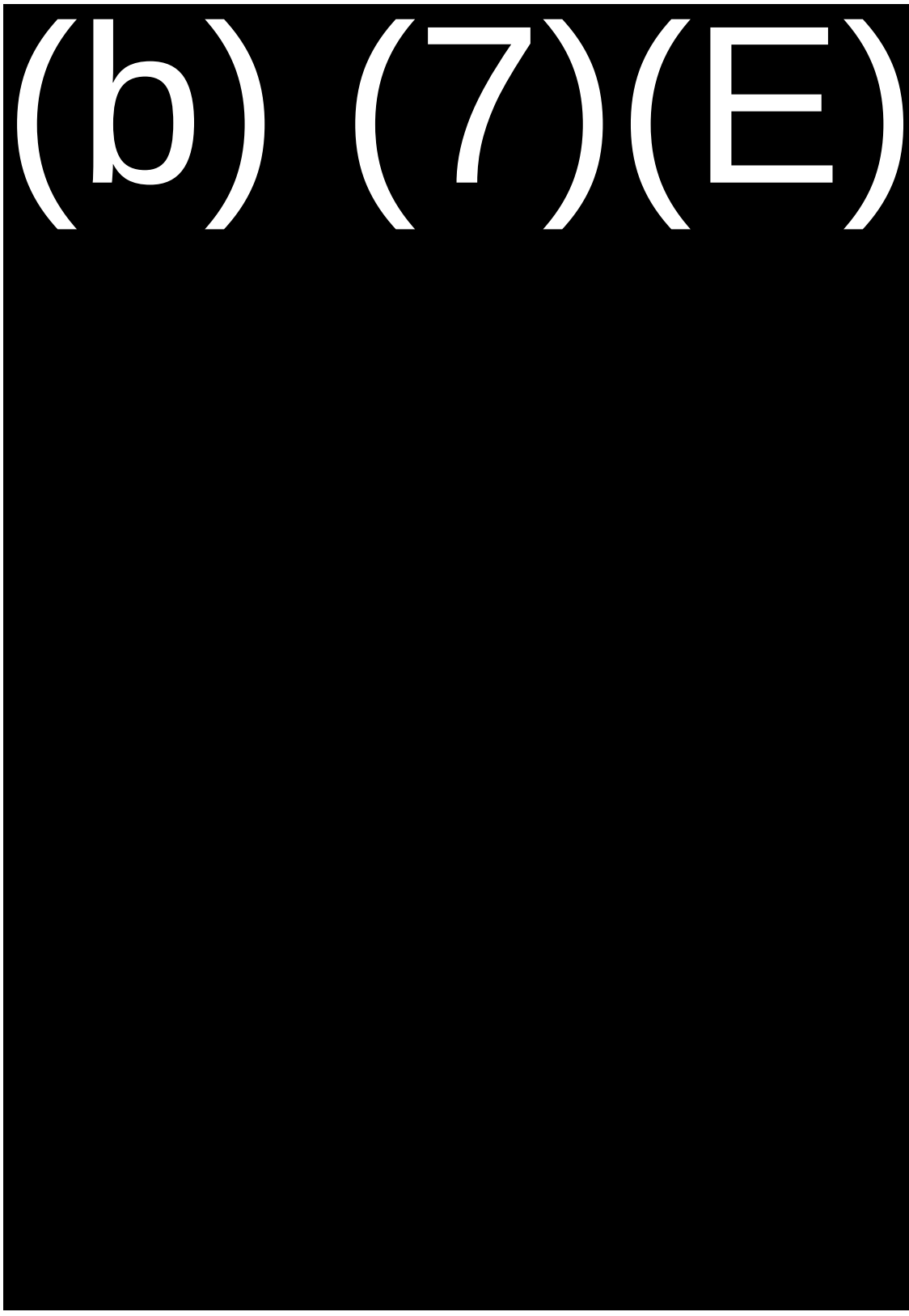

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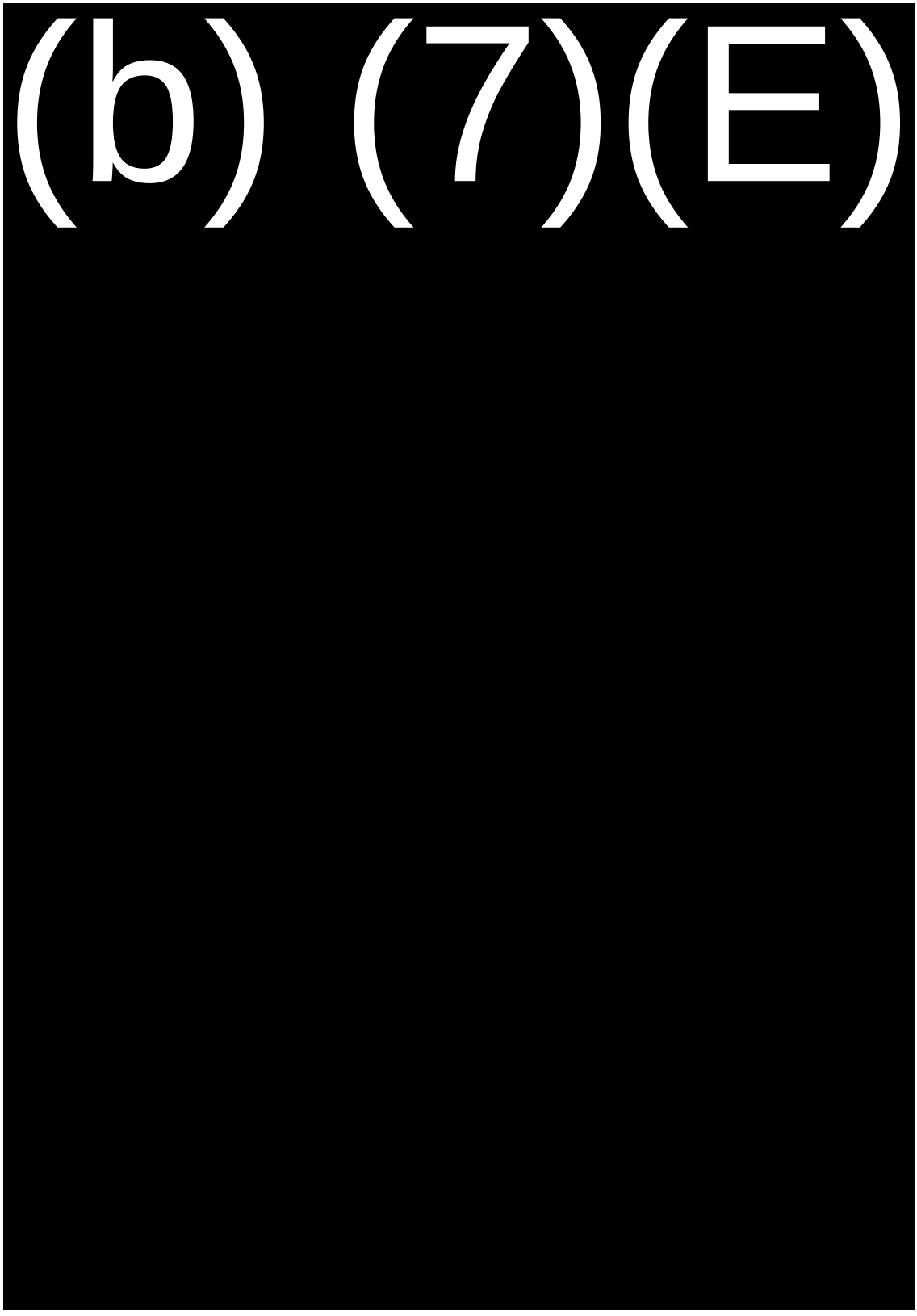

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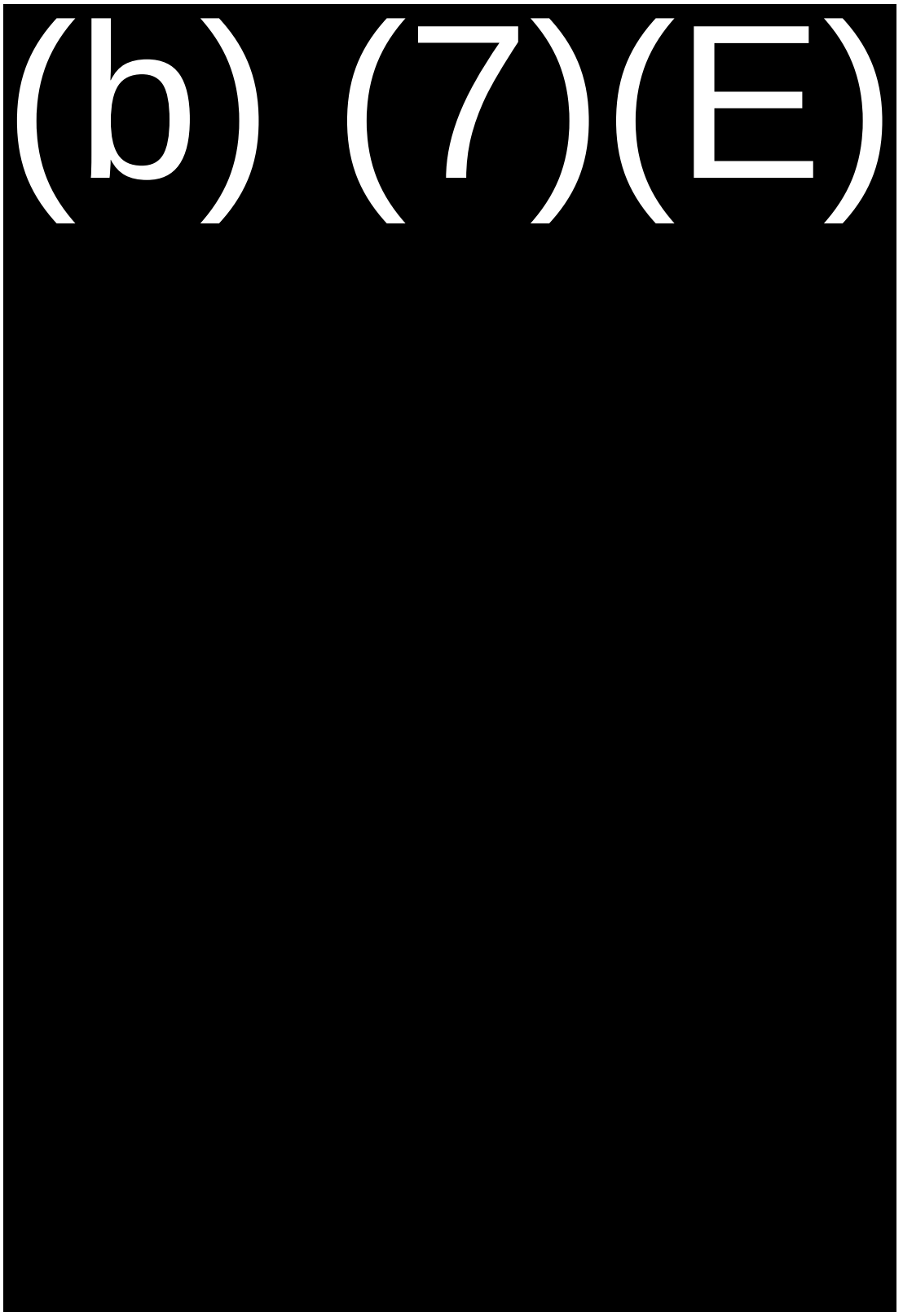

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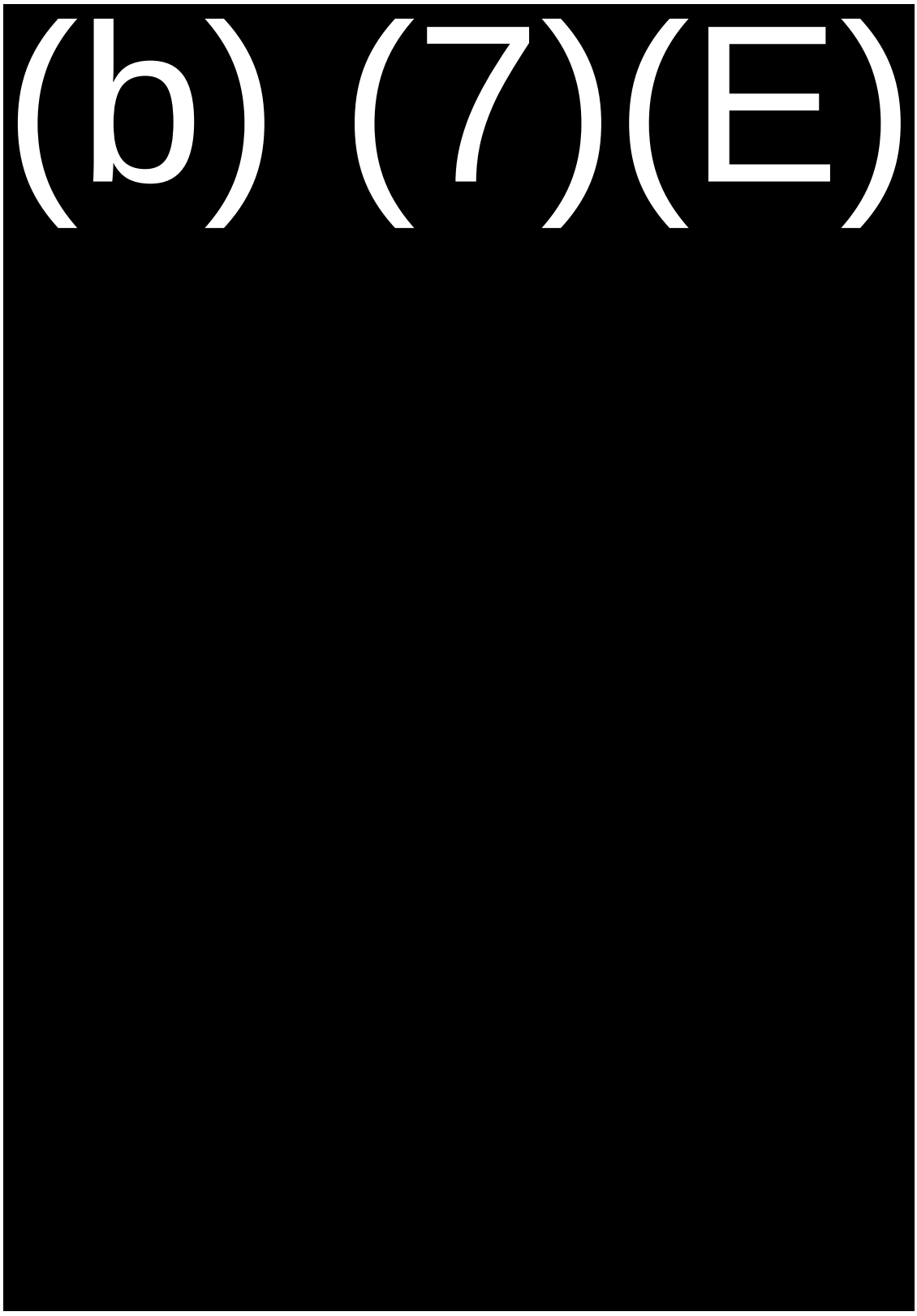

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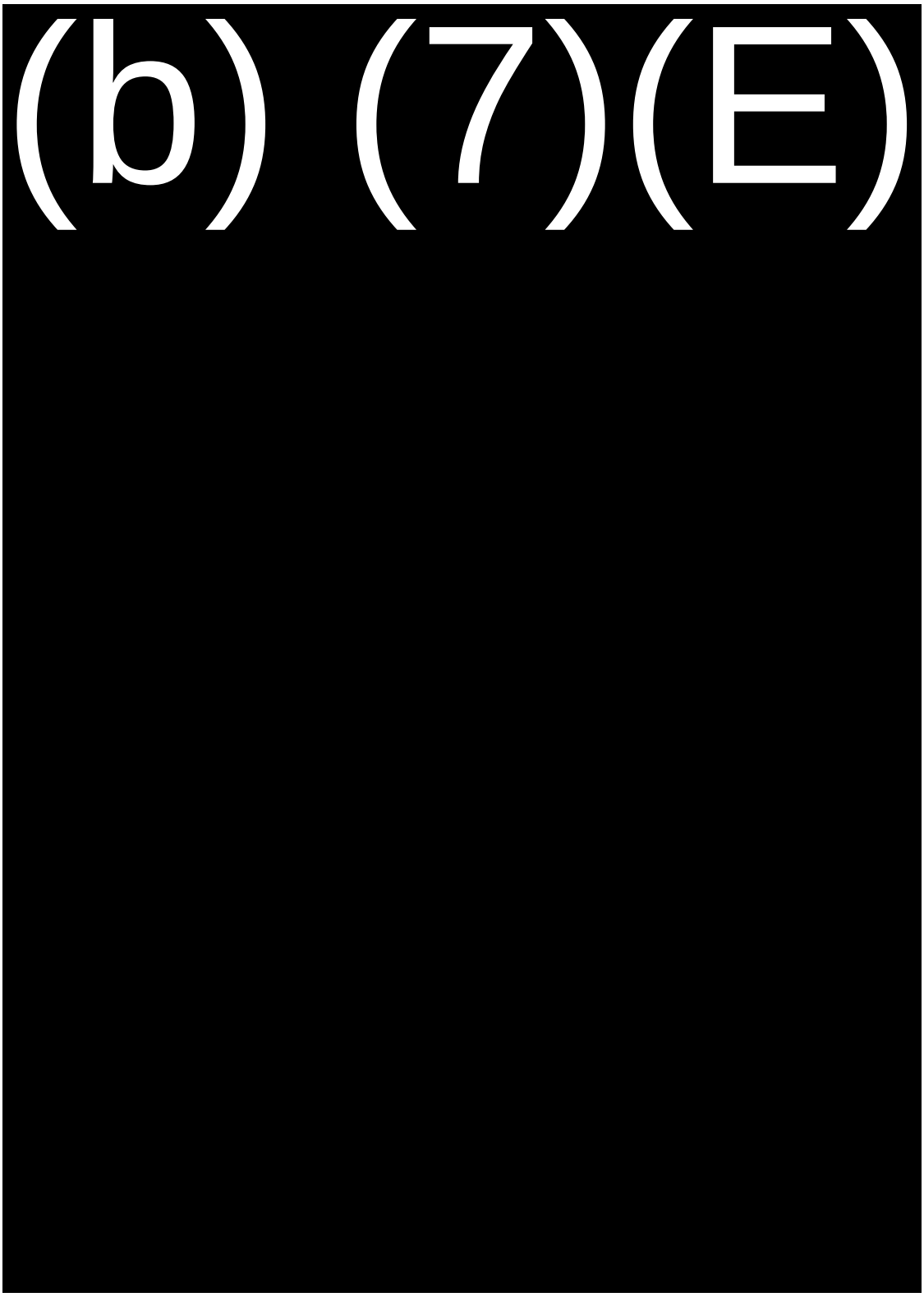

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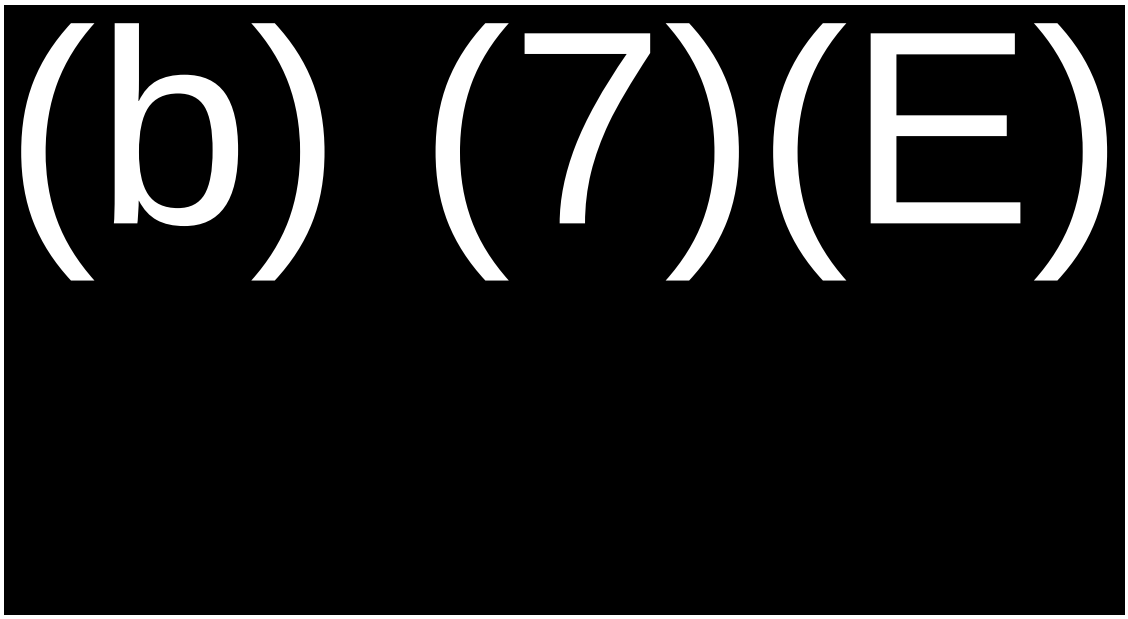

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Chapter Thirteen

Right To Financial Privacy Act of 1978

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13.000 Introduction

In *United States v. Miller*,[1] the Supreme Court held that there is no Fourth Amendment protected interest in microfilm copies of checks, deposit slips and other records relating to a person's bank account. Congress responded to this ruling by enacting the *Right to Financial Privacy Act of 1978* (RFPA), 12 U.S.C. §§ 3401-3422. The RFPA protects customers of financial institutions from unwarranted intrusion into their records by federal officers while allowing law enforcement agencies to obtain financial records pursuant to legitimate investigations. Before the RFPA, customers could not challenge government access to their financial records, nor did they have any way of knowing that their financial records were being turned over to a federal governmental authority. Customers now have greater privacy rights in their financial records and rights to object to their disclosure to federal law enforcement agencies since its enactment.

13.100 In General

A customer of a financial institution must receive a written notice of Customs and Border Protection's intent to obtain financial records, an explanation of the purpose for which the records are sought, and a statement describing procedures to use if the customer does not wish the records to be made available. Under certain circumstances (see § 13.700), a court may authorize delay of customer notification. In a couple of instances, the government does not have to provide customer notification at all. See § 13.1300 for a Quick Guide to Requesting Financial Records under the Right to Financial Privacy Act.

13.200 Definitions

13.210 Customer
13.220 Financial Record
13.230 Financial Institution
13.240 Government Authority
13.250 Law Enforcement Inquiry

13.210 Customer

A "customer" is any person or representative who has or is utilizing any service of a financial institution, or for whom the institution has or is acting as a fiduciary in an account maintained in the person's name. Under the RFPA, a corporation, a partnership of six or more individuals or other forms of business entities such as associations are not considered to be a "customer".[2] Thus,

[1] *United States v. Miller*, 425 U.S. 435 (1976).

[2] 12 U.S.C. §§ 3401(4), 3401(5). *Spa Flying Service, Inc. v. United States*, 724 F.2d 95 (8th Cir. 1984)(corporations not covered). *Ridgeley v. Merchants State Bank*, 699 F. Supp. 100 (N.D. Tex. 1988) (unincorporated associations not covered). *Chao v. Community Trust Co.*, 474 F.3rd 75 (3rd Cir. 2007) (the unambiguous definition of "customer" found in 12 U.S.C. § 3401(5) means that

information in a corporate account may reflect transactions by individuals but this information is not protected.

Where funds are being transmitted through various banks to accounts at a destination bank, obtaining information concerning the destination account from an intermediate bank does not implicate the RFPA because such account holders are not "customers" of the bank from which the information is obtained.[3]

Additionally, financial institutions are not themselves "customers" who can bring a cause of action against the government for vindication of the rights of their customers. Financial institutions do, however, have a valid defense to violation of the RFPA if they rely on a certification from the government that it has met the RFPA requirements.[4] See section 13.1200.

13.220 Financial Record

Financial records include an original, a copy or any information known to have been derived from any record, held by a financial institution and pertaining to a customer's relationship with the financial institution.

For a financial record to be protected, it must meet four tests:

- It must be held by a specific financial institution;
- It must reflect the transaction of a customer with that institution;
- It must relate to an account maintained by that customer with that institution; and
- It must relate to an account maintained by that customer in his true name.

Examples of records and information that would not be covered would be accounts in fictitious names, forged or counterfeited financial instruments, checks and money orders cashed for non-customers, bank surveillance photos, and records relating to functions not involving the account relationship, such as the exchange of cash for a cashiers check or obtaining the names of endorsers of checks or guarantors of loans.[5]

the protections of the RFPA are only applicable to accounts maintained in a customer's name where the customer holds both equitable and legal title).

[3] *United States v. Daccarett, et. al.*, 6 F.3d 37 (2nd Cir. 1993) *cert. denied*, 510 U.S. 1191 (1994).

[4] Beneficial Consumer Discount Company v. Poltonowicz, 47 F.3d 91 (3rd Cir. 1995).

[5] 12 U.S.C. § 3401(2). H.R. Rep. No. 1383, 95th Cong., 1st Sess. 49, reprinted in 1978 U.S.C.C.A.N. 9273, 9321.

13.230 Financial Institution

Financial institutions include the following:[6]

- Banks, Savings Banks or Associations, Building and Loans, Trust Companies;
- Credit Unions, Homestead Associations, including cooperative banks, and Industrial Loan Companies;
- Any person who issues a credit card; and
- Consumer Financial Institutions. This term means a consumer finance company, a sales finance company, a small loan company, a consumer discount company, or other similar institution.

Institutions are covered if located in any state or territory of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands.

13.240 Government Authority

"Government authority" means only agencies and departments of the United States government.[7] State agencies and departments are not regulated by the RFPA although states may have similar statutes that might restrict state agency access to financial records.

13.250 Law Enforcement Inquiry

A law enforcement inquiry is a lawful investigation or official proceeding inquiring into any violation of or failure to comply with any criminal or civil statute or regulation.[8] Even if the inquiry is oral and the bank responds orally without any display of the records, the Act still governs the disclosure.[9]

13.300 Requirements

13.310 Consent of the Customer
13.320 An Administrative Subpoena or Summons
13.330 A Search Warrant
13.340 A Judicial Subpoena
13.350 Formal Written Request

[6] 12 U.S.C. § 3401(1). H.R. Rep. No. 1383, 95th Cong., 1st Sess. 49, reprinted in 1978 U.S.C.C.A.N. 9273, 9321.
[7] 12 U.S.C. § 3401(3).
[8] 12 U.S.C. § 3401(8).
[9] *Anderson v. La Junta State Bank*, 115 F.3d 756 (10th Cir. 1997).

In order to obtain the financial records of a customer, the RFPA requires, with certain exceptions, that the government authority reasonably describe the records and first obtain one of the following:

13.310 Consent of the Customer

A customer may authorize access to financial records by executing an authorization, signed and dated by the customer, which identifies the records to be disclosed, the agency seeking them, the reasons the records are being sought and states the customer's rights under the RFPA. The authorization will not be effective for longer than three months and may be revoked at any time before the records are disclosed.[10]

13.320 An Administrative Subpoena or Summons

An administrative subpoena or summons can be used if there is "reason to believe" that the records sought are relevant to a legitimate law enforcement inquiry. If notice is not to be delayed (see § 13.700), a copy of the subpoena or summons along with statutory notice of how to challenge access is served on the customer on or before the date it is served on the institution.[11]

The term "reason to believe," as used in this section, does not mean any reason, no matter how theoretical or remote. On the other hand, it is considerably less than, and conceptually different from probable cause since the process would often be used in the early stages of an investigation, long before sufficient facts had been developed to establish probable cause.[12]

Although "law enforcement" is broadly defined, the purpose of the inquiry must be "legitimate." It is intended to prevent an agency from acting outside the scope of its statutory authority, such as investigating a violation over which it has no jurisdiction.[13]

The notice must state with reasonable specificity the nature of the investigation for which the records are sought and ten days must have expired from the date of service of the notice, or 14 days from the date of mailing the notice to the customer and the customer has not appropriately challenged the subpoena or summons.[14] See § 13.600.

Administrative subpoenas and summonses that are available to law enforcement officers within Customs and Border Protection include the Customs Summons

10 12 U.S.C. § 3404(a).
11 12 U.S.C. § 3405(2).
12 H.R. Rep. No. 1383, 95th Cong., 1st Sess. 219, reprinted in 1978 U.S.C.C.A.N. 9273, 9349.
13 H.R. Rep. No. 1383, 95th Cong., 1st Sess. 51, 219 reprinted in 1978 U.S.C.C.A.N. 9273, 9323, 9349.
14 12 U.S.C. § 3405(3).

(DHS Form 3115), the Customs Title 21 Controlled Substance Enforcement Subpoena (CF 389), the Customs Export Enforcement Subpoena (CF 337), an Immigration Subpoena (DHS Form I-138), and the *Bank Secrecy Act* summons, which is solely used for civil enforcement of the *Currency and Foreign Transactions Reporting Act.*[15]

The 19 U.S.C. § 1509 summons (DHS Form 3115) is limited to records required to be kept by 19 U.S.C. § 1508 or "regarding which there is probable cause to believe that they pertain to merchandise the importation of which into the United States is prohibited." Since banks are not required by § 1508 to keep any records, the Customs summons is enforceable only to the extent that the records fall under the alternative authority. Further, the prohibited merchandise must be something other than drugs since CBP policy prohibits the use of the Customs summons in drug smuggling investigations and requires the use of the Customs Title 21 subpoena. See Customs (CBP) Directive 4210-012, November 22, 1991. Thus, the Customs summons is enforceable only for bank records that relate to prohibited merchandise other than drugs such as intellectual property, improperly marked or stolen property.

13.330 A Search Warrant

As with all search warrants, there must be probable cause to believe that the records are evidence of a crime. Notice must be provided to the customer within 90 days of execution of the warrant unless the court authorizes a delay. While the initial delay granted may not exceed 180 days, the court may grant subsequent delays of up to 90 days each.[16]

13.340 A Judicial Subpoena

The same relevancy, specificity and notice requirements apply as for an administrative subpoena or summons, as described above.[17]

13.350 Formal Written Request

Since CBP law enforcement officers have administrative summons and subpoenas available for investigations involving drugs, civil or criminal violations of the INA, civil enforcement of CMIR requirements, export violations and prohibited importations of merchandise, the formal written request cannot be used in such investigations. For any other investigation, such as a fraud or money laundering case involving something other than prohibited merchandise, the formal written request may be used.[18]

15 31 U.S.C. § 5318(a)(1) and (4); 31 C.F.R. §§ 103.71 – 103.77 (2010); Treasury Directive 15-23, December 1, 1992, SUBJECT: Bank Secrecy Act -- U.S. Customs Service.
16 12 U.S.C. § 3406.
17 12 U.S.C. § 3407.
18 31 U.S.C. § 3408, 31 C.F.R. §§ 14.1-14.5 (2010).

A formal written request is not a coercive form of process like an administrative summons, subpoena or judicial subpoena, and a financial institution is in no way obligated to honor such a request.

If a formal written request is used, the customer must be provided timely notice and the opportunity to apply to an appropriate court to enjoin compliance with the request. A copy of the formal written request shall be served on the customer or mailed to his last known address on or before the date on which the request is served on the financial institution, together with the notice to the customer, stating the nature of the inquiry with reasonable specificity, a motion paper, and sworn statement. In cases where customer notice is delayed by court order, a copy of the court order shall be attached to the formal written request.[19]

13.400 Emergency Access

When there is reason to believe that delay in obtaining financial records from a financial institution is necessary to prevent imminent danger of physical injury to any person, serious property damage, or flight from prosecution, CBP may so certify to the financial institution. Within 5-days of obtaining access pursuant to this method, CBP must file with the appropriate court a sworn statement by the designated supervisory official which sets forth the grounds for the emergency access.[20] As soon as possible after the records have been obtained, unless a delay order has been obtained, CBP must serve the customer with a copy of the request together with the statutorily prescribed notice.[21]

13.500 Certification Requirements

A financial institution may not release the financial records of a customer until the government authority seeking such records certifies in writing that it has complied with the applicable provisions of the RFPA.[22] However, a financial institution is required to begin assembling the required information upon receipt of a summons or subpoena and must be prepared to deliver the records upon receipt of the written certificate of compliance.[23]

The financial institution is allowed to charge a reasonable fee for providing the requested information. The fee may include costs for assembling or providing records, reproduction and transportation costs.[24]

19 12 U.S.C. § 3409(b)(1).
20 12 U.S.C. §§ 3414(b)(1)-(3).
21 12 U.S.C. § 3409(c).
22 12 U.S.C. § 3403(b).
23 12 U.S.C. § 3411.
24 12 U.S.C. § 3415.

13.600 Challenge

In general, the RFPA provides that the individual whose financial records are being sought may challenge the government's access to his records. Within 10-days of service or 14-days of mailing a subpoena, summons, or formal written request, the customer must file in the appropriate federal court either a motion to quash the administrative summons or judicial subpoena or an application to enjoin CBP from obtaining access pursuant to a formal written request.

The notice provided by the government to the customer must include a motion paper and sworn statement, which the customer may use for his challenge. The customer is not required to use these forms and may submit his own.

If the customer files a motion which, in the opinion of the court, complies with the RFPA's procedural requirements relating to such filing, the court will order CBP, through the United States Attorney, to file a sworn response. The response may be filed in camera if it includes reasons that make in camera review appropriate. This should only be done if it is necessary to protect the investigation or to avoid improper discovery practices. The agency response should set forth the reason why the investigation is proper and why the records are relevant to it. Customs and Border Protection bears the burden of proving substantial compliance with the RFPA requirements for access to the customer record. If the court finds that there is a demonstrable reason to believe that the law enforcement inquiry is legitimate and that the records sought are relevant to that inquiry, it will deny the motion filed by the customer.

The RFPA contemplates that these motions will be decided within 7-calendar days from the date of the government's response.[25] A court ruling denying the motion is not a final order and an appeal may be taken only upon the entry of a final judgment in any legal proceeding using the records.[26] If no legal proceeding is to be commenced against the customer, an appeal may be taken within 30-days of a notification to that effect. If no such determination is made within 180-days, a certification to that effect must be filed in court. At reasonable intervals thereafter, further certifications may be required by the court until the investigation is concluded. These certifications must be made by the appropriately designated official.[27]

13.700 Delayed Notice Requirements

The notices required by the RFPA may be delayed by a court order under certain circumstances. Customer notice can be delayed for periods up to 90 days if CBP can convince the court that giving notice would result in endangering the life or physical safety of any person; flight from prosecution; destruction of or tampering with evidence; intimidation of potential witnesses; or otherwise

25 12 U.S.C. § 3410(b).
26 Borer v. U.S. Department of Veterans Affairs, 197 F.3d 232 (6th Cir. 1999).
27 12 U.S.C. § 3410(d).

seriously jeopardizing or unduly delaying an investigation, trial or official proceeding.

While the RFPA includes an automatic 90-day delay for customer notification following the execution of a search warrant for financial records,[28] the government may apply for an additional 180-day delay in notification, which can be potentially extended for 90 days at a time.[29]

In the case where delay is authorized, the court will also order the institution to not disclose that a customer's records are being sought or have been obtained.[30]

Because of unique challenges faced by the Office of Foreign Assets Control, an indefinite delay of notice is permitted if the records have been sought under the *Trading With the Enemy Act* (12 U.S.C. § 95a, 50 U.S.C. App. § 5(b)), the *International Emergency Economic Powers Act* (50 U.S.C. § 1701) or the *United Nations Participation Act* of 1945 (22 U.S.C. § 287c), and the court finds that there is reason to believe that notice may endanger the customer or group of persons associated with the customer. This provision is intended to permit an indefinite delay of notice to customers living in certain foreign countries in which a notice may be intercepted by a foreign government and result in physical harm to the customer.[31]

13.800 Exception to Notice and Certification Requirements

13.810 Grand Jury Subpoena
13.820 Financial Control Over Foreign Accounts
13.830 Notification of Suspected Illegal Activity
13.840 Litigation
13.850 Perfecting a Security Interest, Bankruptcy or Debt Collection
13.860 Miscellaneous

13.810 Grand Jury Subpoena

With the exception of cost reimbursement and the requirements noted hereafter, the RFPA does not apply to a subpoena issued on behalf of a grand jury.[32] Thus, no notice to the customer is required. Further, a court order can be obtained prohibiting the financial institution from disclosing the request to its customer under the delayed notification provision discussed above. The RFPA explicitly prohibits a financial institution from disclosing the existence of a grand jury subpoena with respect to investigations involving controlled substance violations, money laundering, Title 31 reporting violations or violations of 26 U.S.C. § 6050I (tax).[33]

28 12 U.S.C. § 3406(b).
29 12 U.S.C. § 3406(c).
30 12 U.S.C. § 3409(b)(1).
31 § 3409(b)(1).
32 12 U.S.C. § 3420.
33 12 U.S.C. § 3420(b)(1).

The RFPA also imposes certain restrictions and requirements on the government when a grand jury subpoena is used. First, the records must actually be presented to the grand jury and may only be used for grand jury purposes, i.e., considering whether to return an indictment, use in prosecuting any indictment so returned, or other purpose authorized by Rule 6(e) of the Federal Rules of Criminal Procedure (FED. R. CRIM. P.). Second, the records must be returned or destroyed if they are not so used. Finally, the records shall not be maintained, nor a description of their contents maintained, other than in the sealed records of the grand jury, or if used in the prosecution based on a grand jury indictment or a purpose authorized by Rule 6(e) of the Federal Rules of Criminal Procedure.[34]

13.820 Financial Control Over Foreign Accounts

This provision is written to allow disclosure of basic account information concerning one or all transactions through a bank connected with a particular foreign country. Such transactions may be unlawful or subject to regulation under the *Bank Secrecy Act*, the *Currency and Foreign Transactions Reporting Act*, the *Trading with the Enemy Act*, the *International Emergency Economic Powers Act*, or the *United Nations Participation Act*. In addition, it permits identification of customers to the Office of Foreign Assets Control on the sole basis that they are associated with a particular foreign country.

With reference to this section the legislative history states

> "[t]his is necessary because the blocking orders for accounts owned or controlled by nationals of nations unfriendly to the interests of the United States which must be issued under the last three acts mentioned above do not depend upon the occurrence or nature of any particular transactions in those accounts."[35]

13.830 Notification of Suspected Illegal Activity

Notwithstanding any state law to the contrary, a financial institution is permitted to disclose the name or other identifying information pertaining to an individual, corporation, or account involved, and the nature of any suspected illegal activity. Thus, a bank may volunteer information or respond to requests initiated by law enforcement officers for this information. As long as the disclosed information is limited to the above, the disclosing entity is immune from any Federal or state liability for doing so.[36] This is the "safe harbor" provision under which financial institutions submit their Suspicious Activity Reports (SARs). Again, the protection exists only to the extent the disclosure is limited to the matters stated.

34 12 U.S.C. §§ 3420(a)(1)-(4).

35 12 U.S.C. § 3413(g); H.R. Rep. No. 1383, 95th Cong., 1st Sess. 227, reprinted in 1978 U.S.C.C.A.N. 9273, 9357.

36 12 U.S.C. § 3403(c); *Puerta v. United States*, 121 F.3d 1338 (9th Cir. 1997).

Example: In May 1996, the United States filed an in rem complaint against $200,000 in accounts at Coutts and other financial institutions. The accounts at Coutts were controlled by Villalba and her relatives. The Government's complaint alleged that the funds in the accounts were obtained from money laundering. The District Court issued a civil arrest warrant for the funds, and the warrant was faxed to Coutts. The warrant ordered Coutts to "arrest, attach and seize the Property until further order of the Court."
A day or two after these warrants were executed, according to a deposition of the Assistant U.S. Attorney ("AUSA") handling the forfeiture action, "someone" at Coutts told the AUSA that Villalba had unsuccessfully attempted to wire transfer money out of her account at Coutts; the AUSA "believed the number given was $500,000." In July 1996, Villalba and several of her relatives filed this civil action, alleging that Coutts's disclosure of the alleged $500,000 withdrawal attempt violated the RFPA, and other laws.

Coutts sought summary judgment on the ground that, even if the alleged disclosure of an attempted $500,000 wire transfer had occurred, it is protected from liability by 12 U.S.C. § 3403(c), which provides:

Nothing in this chapter shall preclude any financial institution, or any officer, employee or agent of a financial institution, from notifying a Government authority that such institution, or officer, employee or agent has information that may be relevant to a possible violation of any statute or regulation. Such information may include only the name or other identifying information concerning any individual, corporation, or account involved in and the nature of any suspected illegal activity. . . . Any financial institution, or officer, employee, or agent thereof, making a disclosure of information pursuant to this subsection, shall not be liable to the customer under any [federal or state law].[37]

Once receiving notification under this section, CBP will be required to comply with the RFPA with respect to obtaining additional records or any information contained in them.[38]

13.840 Litigation

If CBP and the customer are parties to a suit, records obtained under the Federal Rules of Civil and Criminal Procedure are exempt from the requirements of the RFPA.[39]

37 *Villalba v. Coutts & Co.*, 250 F.3d 1351 (11th Cir.2001).
38 H.R. Rep. No. 1383, 95th Cong., 1st Sess. 50, reprinted in 1978 U.S.C.C.A.N. 9273, 9322.
39 12 U.S.C. § 3413(e).

13.850 Perfecting a Security Interest, Bankruptcy or Debt Collection

A financial institution may submit copies of financial records to any court or agency when perfecting a security interest, proving a claim in bankruptcy, or collecting a debt for itself or a fiduciary.[40]

13.860 Miscellaneous

Financial institutions may also disclose (a) information that is not individually identifiable with a particular customer; (b) records to supervisory agencies; (c) information authorized under the *Tax Reform Act of 1976*; (d) information required to be reported by federal statute or regulation; and (e) records sought by the Government Accountability Office (GAO).[41]

13.900 Exception to Notice Requirements But Where Certification Is Required

13.910 Law Enforcement Inquiry Respecting Name, Address, Account Number and Type of Account Associated with Certain Transactions
13.920 Investigation of a Financial Institution
13.930 Foreign Intelligence and Certain Secret Service Activities
13.940 Miscellaneous

13.910 Law Enforcement Inquiry Respecting Name, Address, Account Number and Type of Account Associated with Certain Transactions

If the request is for only the name, address, account number, and type of account of any customer or ascertainable group of customers associated with a financial transaction or class of financial transactions, no notice is required and the customer does not have the right to challenge a request by CBP but one of the authorized means of obtaining financial information (consent, administrative summons, search warrant, judicial subpoena or a formal written request) must be used.[42]

This is intended to allow the government to learn the identity of a customer whose account was involved in what appears to be a suspicious transaction. For example, CBP learns that more than $10,000 was imported and deposited in the bank without a report being filed, which would clearly be a violation of law. In order to investigate further, the agency would need to know the name and address of the customer and the account number and type of account involved. This section would allow that information to be obtained without giving notice as would be otherwise required, so long as one of the authorized means is used.[43]

40 12 U.S.C. § 3403(d)(1).
41 12 U.S.C. §§ 3413(a)-(d), (j).
42 12 U.S.C. § 3413(g).
43 *Inspector General v. Great Lakes Bancorp*, 825 F.Supp. 790 (E.D. Mich. 1993).

13.920 Investigation of a Financial Institution

The RFPA has limited application to financial records sought where a financial institution rather than a customer is being investigated or where a federal agency is seeking access to customer records respecting government loans. In each case the agency must provide the financial institution with a certification of compliance.[44] Also, the civil penalties and injunctive relief sections apply.[45]

13.930 Foreign Intelligence and Certain Secret Service Activities

No notice is required and the customer does not have the right to challenge any access where the government is engaging in authorized foreign intelligence activities; where the Secret Service is seeking information relative to its protective functions; or a Government authority authorized to conduct investigations of, or intelligence or counterintelligence analyses related to, international terrorism for the purpose of conducting such investigations or analyses.[46] A certificate of compliance must be furnished to the institution.[47]

13.940 Miscellaneous

Records may also be without notice provided incidental to processing a government loan, loan guaranty, loan insurance agreement or default upon a government-guaranteed or insured loan but certification is required.[48] Also, the Securities and Exchange Commission can obtain customer records after certain procedures are followed and a certificate of compliance has been obtained.[49]

13.1000 Use of Information Obtained

Once financial records have been obtained under the RFPA, there is a prohibition against transferring them to agencies other than the Justice and Treasury departments, unless the transferring agency certifies in writing that there is reason to believe that the records are relevant to a legitimate law enforcement inquiry by the receiving agency. When transferred, the transferring agency must so certify and notify the customer within 14 days.[50]

Transfers to Justice and Treasury are permitted with certification by a supervisory official of the transferring agency that:

- There is reason to believe that the records may be relevant to a violation of federal criminal law; and

44 12 U.S.C. §§ 3413(h)(1)(A), 3403(b).
45 12 U.S.C. §§ 3417, 3418.
46 12 U.S.C. § 3414(a)(1)(A)-(C).
47 12 U.S.C. § 3414(a)(2).
48 12 U.S.C. §§ 3413(h)(1)(B), 3403(d)(2).
49 12 U.S.C. §§ 3422, 3409.
50 12 U.S.C. §§ 3412(a) and (b).

- The records were obtained in the exercise of the agency's supervisory or regulatory functions.

These records can only be used for forfeitures under 18 U.S.C. §§ 981, 982 and only for criminal investigative purposes relating to money laundering and other financial crimes. The records must be returned to the transferring agency upon completion of the investigation or prosecution.[51]

Nothing in the RFPA would prohibit the transfer of records to foreign governments although the foreign government should probably certify that the transfer is for legitimate law enforcement purposes.[52]

13.1100 Civil Liability

Any government agency that obtains, or any financial institution or employee of the institution who discloses information in violation of this RFPA is liable for:

- ✓ Actual damages;
- ✓ $100, regardless of the volume of records involved;
- ✓ Court costs and reasonable attorney's fees; and
- ✓ Such punitive damages as the court may allow for willful or intentional violations.

The remedies listed above are exclusive, and courts are not required to suppress evidence obtained as a result of the government's unauthorized access to a defendant's financial records. An action can be brought up to three years after the date of violation or the date of its discovery.[53]

A financial institution that relies in good faith upon the certificate of compliance provided by the requesting officer cannot be held liable to a customer for the disclosure of financial records.[54] The government employee who submits a false certificate, however, could be subject to criminal prosecution or administrative sanctions under other provisions of law, as well as the mandatory disciplinary proceeding.

51 12 U.S.C. § 3412(f).

52 *Botero-Zea v. United States* 915 F.Supp. 614 (S.D.N.Y. 1996)

53 12 U.S.C. § 3416.

54 *Beneficial Consumer Discount Company v. Poltonowicz*, 47 F.3d 91 (3rd Cir. 1995). James v Heritage Valley Fed. Credit Union, 197 Fed. Appx. 102, 106 (3rd Cir. 2006) *cert. denied*, 549 U.S. 897 (2006).

13.1200 Disciplinary Proceedings

The RFPA mandates that the Office of Personnel Management shall institute proceedings against any government employee if a court finds that the employee may have acted willfully or intentionally and such actions have led to a successful suit against the government.[55]

[55] 12 U.S.C. § 3417(b).

13.1300 A Quick Guide to Requesting Financial Records Under the Right to Financial Privacy Act

Method Used to Obtain Records	Must the Gov't Provide Prior Notice to Customer?	Can Customer Notice be Delayed?	Can the Financial Institution be Ordered to Not Notify Its Customer of the Request?	Must the Gov't Provide the Financial Institution with Certification of Compliance with RFPA?	Must the Records be Relevant to a Legitimate Law Enforcement Inquiry?	Must the Government Reimburse the Financial Institution for Costs?	Special RFPA or Other Requirements
Grand Jury Subpoena – 3413(i)	NO – 3413(i)	N/A	YES – 3413(i), Sometimes automatically. 3420(b)(1), 18 USC 1510(b)	NO – 3413(i)	YES, but not because of RFPA – 3413(i)	It Depends – 3413(i), 3415	Doc handling must comply w/ 3420(a). GJ subpoena must comply w/ FRCrP 17
Administrative Subpoena – 3405(1)	YES – 3405(2),(3) and 3410	YES – 3409	YES – 3409(b)	YES – 3403(b)	YES – 3405(1)	It Depends – 3415	Admin. Subp. must be authorized – 3405
Formal Written Request – 3408	YES – 3408(4)	YES – 3409	YES – 3409(b)	YES – 3403(b)	YES – 3408	It Depends – 3415	Admin. Subp. Must not be available. FWR must be authorized by regs: 3408((1),(2)
Judicial Subpoena (customer a party to litigation) – 3413(e)	NO – 3413(e)	N/A	Maybe under F.R.Crim. or Civil Proc.	NO – 3413(e)	YES, but not because of RFPA.	NO – 3413(e), 3415	Jud. Subp. Must be authorized by law – 3407(1)
Judicial Subpoena (customer not a party) – 3407(1)	YES – 3407(2),(3)	YES – 3409	YES – 3409(b)	YES – 3403(b)	YES – 3407(1)	It Depends – 3415	Jud. Subp. Must be authorized by law – 3407(1)
Search Warrant – 3406(a)	NO, must give Notice w/in 90 days of search3406(b)	YES – 3409	YES – 3409(b)	YES – 3403(b)	YES, but not because of RFPA.	It Depends – 3415	Warrant must comply w/ FRCrP 41 and 4th Amendment
Customer's Written Consent - 3404	N/A – Actual Notice Provided with Consent	N/A	N/A	YES – 3403(b)	YES, 3404(a)(4) by Implication	It Depends – 3415	Consent must comply with 3404(a)

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Chapter Fourteen

Information Retrieval and Disclosure

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14.000 Introduction to the Privacy Protection Act

On April 9, 1971, nine police officers in California responded to Stanford University Hospital to disperse a large group of demonstrators. The demonstrators resisted, and they ultimately attacked and injured all nine officers. Two days later, on April 11, *The Stanford Daily*, a student newspaper, carried articles and photographs devoted to the student protest and the clash between these protestors and the police. Believing that *The Stanford Daily* might possess additional photographs that would identify other protestors, the police sought and obtained a search warrant to search the newspaper's offices.

A month after the search, *The Stanford Daily* brought a civil action alleging violations of the First, Fourth and Fourteenth Amendments. In support of their claims, the plaintiffs alleged that (1) the Fourth Amendment forbade the issuance of search warrants for evidence in the possession of those not suspected of criminal activity; and, (2) the First Amendment prohibited the use of search warrants against members of the press and, instead, required the use of subpoenas *duces tecum*. The Supreme Court disagreed with both claims, holding that the use of a search warrant, even for the pursuit of "mere evidence," was permitted on both nonsuspect third parties and members of the news media.[1]

In response to this Supreme Court decision Congress passed the *Privacy Protection Act of 1980*, 42 U.S.C. § 2000aa (PPA). The purpose of this legislation, as stated in the Senate Report, is to afford "the press and certain other persons not suspected of committing a crime with protections not provided currently by the Fourth Amendment."[2] As the legislative history indicates,

> The purpose of this statute is to limit searches for materials held by persons involved in First Amendment activities who are themselves not suspected of participation in the criminal activity for which the materials are sought, and not to limit the ability of law enforcement officers to search for and seize materials held by those suspected of committing the crime under investigation.[3]

The PPA protects two classes of materials--"work product materials" and "documentary materials"--by imposing restrictions on when government agents can get warrants to search for or seize such items.

[1] *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

[2] S. Rep. No. 874, 96th Cong., 2d Sess. 4 (1980).

[3] The Justice Department had previously promulgated regulations on issuing subpoenas directly to members of the news media or indirectly for their telephone toll records. The regulations also addressed interrogating, indicting, or arresting members of the press. See 28 C.F.R. § 50.10 (2001). S. Rep. No. 874, 96th Cong., 2d Sess. at 11 (1980).

Since the purpose of the statute is to protect third parties not involved in criminal activity, victims of a search that violates the PPA may not move to suppress the results. The statute does create civil remedies available to innocent third parties against the government of actual damages but not less than $1,000, plus attorneys' fees. Moreover, the PPA specifically precludes the government from asserting a good faith defense to civil claims. In this respect § 2000aa is a strict liability statute.[4]

14.100 Work Product Materials

In general terms, the first category of protected material, work product materials, covers original work in the possession of anyone (including authors and publishers) reasonably believed to have a purpose to disseminate it to the public.[5] In construing this statute the exact language of the definitions is important. Specifically, "work product materials" are defined as

> materials, other than contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used, as the means of committing a criminal offense, and--
>
> (1) In anticipation of communicating such materials to the public, are prepared, produced, authored, or created, whether by the person in possession of the materials or by any other person;
>
> (2) Are possessed for the purposes of communicating such materials to the public; and
>
> (3) Include mental impressions, conclusions, opinions, or theories of the person who prepared, produced, authored, or created such material.[6]

There are three situations in which government agents may search for or seize with a warrant "work product materials" without running afoul of the statute. First, the definition itself specifically excludes contraband or the fruits or instrumentalities of a crime.[7] As the drafting committee noted,

> [t]hese kinds of evidence are so intimately related to the commission of a crime, and so often essential to securing a conviction, that they should be available for law enforcement purposes, and, therefore, must fall outside the no search rule that is applied to work product.[8]

4 42 U.S.C. § 2000aa-6.
5 42 U.S.C. § 2000aa (a).
6 42 U.S.C. § 2000aa-7(b).
7 *Id.*; *United States v. Any and All Radio Station Transmission Equipment*, 218 F.3d 543 (6th Cir. 2000).
8 S. Rep. No. 874, 96th Cong., 2d Sess. 17 (1980).

In bulletin board (BBS), internet mainframe and other computer cases, the most common objects of the warrant--stolen access codes, child pornography, and illegally copied software--would clearly fall within the contraband exclusion, so the PPA would not affect a warrant drawn for these materials.

In addition, the PPA creates two exceptions to the general prohibition against seizing "work product." One excepts situations in which immediate seizure is necessary to prevent death or serious injury.[9] The other applies when the person who possesses evidentiary materials probably committed the crime. This second exception was intended to

> codify a core principle of this section, which is to protect from search only those persons involved in First Amendment activities who are themselves not implicated in the crime under investigation, and not to shield those who participate in crime.[10]

To search for or seize work product under the "participant" exception law enforcement officials are held to a stringent requirement: they must show probable cause to believe the person who holds the evidentiary materials is a suspect in the crime--the same showing of cause required for an arrest warrant.[11]

Even so, this latter exception has a receiving-stolen-property exemption that makes the "participant" exception inapplicable if the particular crime "consists of the receipt, possession, communication or withholding of the evidentiary material . . ." *unless* the material was classified or restricted, and the offense is specifically listed in the PPA.[12]

The receiving-stolen-property exemption--which prevents agents from using the "participant" provision when the crime is receipt, possession, communication, or withholding of the same work product materials--was included to prevent law enforcement officials from classifying work product as "stolen goods" to justify seizing it. The Committee report gave as its primary example the case of a reporter who receives an under-the-table copy of a corporate memo discussing a defective product. Knowing the report to be stolen, the reporter might be guilty of receiving or possessing stolen property and thus unprotected by the PPA.

The Committee believed that it would unduly broaden the suspect exception to use the reporter's crime of simple "possession" or "receipt" of the materials (or the similar secondary crimes of "withholding" or "communicating" the materials) as a vehicle for invoking the exception when the reporter himself

9 42 U.S.C. § 2000aa (a)(2) and (b)(2); *Bergland v. City of Maplewood,* 173 F. Supp. 2d. 935 (D. Minn. 2001).
10 H.R. Rep. No. 1064, 96th Cong., 2d Sess. 7 (1980).
11 S. Rep. No. 874, 96th Cong., 2d Sess. 11 (1980), *DePugh v. Sutton*, 917 F.Supp. 690 (W.D. Mo. 1996), *aff'd* 104 F.3d 363 (8th Cir. 1996).
12 42 U.S.C. §§ 2000aa (a)(1) and (b)(1).

had not participated in the commission of the crimes through which the materials were obtained.[13]

In light of Congress' stated concern, perhaps this counter-exception does not apply when anything more than simple possession is involved: that is, when facts are developed that possession is combined with the *mens rea* necessary to constitute some other offense, such as possession with intent to defraud.[14]

14.200 Documentary Materials

In addition to protecting work product, the PPA covers a second, larger class of items called "documentary materials." The statute defines this term in extraordinarily broad fashion--a definition which covers almost all forms of recorded information which are "possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication..."[15] Specifically, "documentary materials" encompass

> materials upon which information is recorded, and includes, but is not limited to, written or printed materials, photographs, motion picture films, negatives, video tapes, audio tapes, and other mechanically, magnetically or electronically recorded cards, tapes, or discs, but does not include contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used as, the means of committing a criminal offense.[16]

For example, corporate records that were not prepared for publication would not be "work product" even though in the hands of a magazine who intended to print them in an upcoming article because they were not actually prepared in anticipation of communication to the public. However, they would be "documentary materials."

As with "work product materials," the statute excludes from the definition of "documentary materials" any items that are contraband or the fruits or instrumentalities of a crime.[17] Further, the two exceptions to the work-product search prohibition, discussed above, also apply to searches for documentary materials: they may be searched and seized under warrant in order to

13 H.R. Rep. No. 1064, 96th Cong., 2d Sess. 7 (1980).

14 See 18 U.S.C. § 1029 (a)(3) (making it a crime to possess fifteen or more devices which are counterfeit or unauthorized access devices "knowingly and with intent to defraud"); 18 U.S.C. § 1030 (a)(6) (making it a crime to traffic in any password or similar information through which a computer may be accessed without authorization "knowingly and with intent to defraud").

15 42 U.S.C. § 2000aa (b).

16 42 U.S.C. § 2000aa-7(a).

17 *Id.*

(1) prevent death or serious injury; or

(2) to search for evidence of crime held by a suspect of that crime. (This last exception includes all its attendant internal restrictions, examined above, relating to crimes of possession or receipt.)

Additionally, the PPA allows agents to get a warrant for documentary materials under two more circumstances found at 42 U.S.C. § 2000aa (b):

(3) there is reason to believe that the giving of notice pursuant to a subpoena *duces tecum* would result in the destruction, alteration, or concealment of such materials; or

(4) such materials have not been produced in response to a court order directing compliance with a subpoena *duces tecum*, and--

(A) all appellate remedies have been exhausted; or

(B) there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpoena would threaten the interests of justice.

In drawing these additional exceptions, Congress anticipated some of the factors a court might consider in determining whether relevant documentary materials could be lost to the government. These factors include whether there is (1) a close relationship (personal, family, or business) between the suspect and the person who holds the material; or, (2) evidence that someone may hide, move, or destroy it.[18]

These statutory exceptions need not be alleged in the application for the search warrant in order to excuse compliance with the PPA.[19]

14.300 Computer Searches and the *Privacy Protection Act*
14.310 The Reasonable Belief Standard
14.320 Similar Form of Public Communication
14.330 Unique Problems: Unknown Targets and Commingled Materials

The PPA only applies to situations where law enforcement officers are searching or seizing work product or other documentary materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication.[20] Before the computer revolution, the statute's most obvious application was to traditional publishers, such as newspaper or book publishers. The legislative history makes clear, however, that the PPA was not intended to apply solely to the

18 S. Rep. No. 874, 96th Cong., 2d Sess. 13, (1980).
19 *Citicasters v. McCaskill*, 89 F.3d 1350 (8th Cir. 1996).
20 42 U.S.C. §§ 2000aa (a) and (b).

traditional news media but was meant to have a more sweeping application. As then-Assistant Attorney General for the Criminal Division Phillip B. Heymann testified:

> While we considered the option of a press-only bill, this format was rejected partially because of the extreme difficulties of arriving at a workable definition of the press, but more importantly because the First Amendment pursuits of others who are not members of the press establishment are equally as important and equally as susceptible to the chilling effect of governmental searches as are those of members of the news media.[21]

With the widespread proliferation of personal computers, desktop publishing, and internet services, virtually anyone with a personal computer and modem can disseminate to other members of the public (especially those who have appropriate hardware and software) a "newspaper . . . or other similar form of public communication." Thus, the scope of the PPA may have been greatly expanded as a practical consequence of the revolution in information technology--a result that may not have been envisioned by the Act's drafters.

14.310 The Reasonable Belief Standard

When addressing work product materials, the statute, by its terms, only applies when the materials are possessed by a person "*reasonably believed* to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication."[22] In noncomputer contexts, the courts have concluded that it is not enough just to possess materials a professional reporter might possess. In addition, there must be some indication the person intended to disseminate them. In *Lambert v. Polk County, Iowa*, 723 F. Supp. 128 (S.D. Iowa 1989), for example, the plaintiff Lambert captured a fatal beating on videotape. Police investigating the incident seized the tape from Lambert and, shortly thereafter, Lambert contracted to sell the tape to a local television station. After the police refused to relinquish the tape, the television station and Lambert sued for injunctive relief claiming, among other things, a violation of 42 U.S.C. § 2000aa. While the district court granted relief on other grounds, it held that neither the television station nor Lambert was likely to prevail on the 42 U.S.C. § 2000aa claim. The television station was not the aggrieved party, and "there was nothing about the way Lambert presented himself [to the officers] that would have led them to reasonably believe that Lambert's purpose was to make a dissemination of the videotape to the public."[23]

21 H.R. Rep. No. 1064, 96th Cong., 2d Sess., Transcript of Statement on File, at 4.

22 42 U.S.C. § 2000aa (a)(emphasis added).

23 *Lambert v. Polk County Iowa*, 723 F. Supp. 128, 132 (S.D. Iowa 1989). Compare *Minneapolis Star & Tribune Co. v. United States*, 713 F. Supp. 1308 (D. Minn. 1989) (plaintiffs from whom videotapes were seized at robbery scene were successful in PPA claim because agents apparently had independent knowledge

The reasonable belief standard was also important in the district court opinion in *Steve Jackson Games v. United States*.[24] To understand the scope of this opinion, it is important to put it in the context of its facts. In early 1990, the United States Secret Service began investigating potential federal computer crimes under 18 U.S.C. § 1030. The Secret Service learned that a Bell South computer system had been invaded, and that a sensitive proprietary computer document relating to Bell's "911 program" had been made available to the public on a computer bulletin board in Illinois.

During the course of this investigation, the Secret Service received information implicating an individual who was employed by Steve Jackson Games, a Texas company that published books, magazines, box games, and related products. Steve Jackson Games used computers for a variety of business purposes, including operating an electronic bulletin board system ("BBS"). The Secret Service was informed that the suspect was one of the users of the Steve Jackson Games BBS, and that he could delete any documents or information in the Steve Jackson Games computers and bulletin board. Even so, none of the other users nor the company itself was ever a suspect in the investigation.

On February 28, 1990, the Secret Service obtained a federal warrant to search the offices of Steve Jackson Games and to seize various computer materials. The warrant covered:

> Computer hardware . . . and computer software . . . and written material and documents relating to the use of the computer system, documentation relating to the attacking of computers and advertising the results of computer attacks. . . and financial documents and licensing information relative to the computer programs and equipment at [the company's offices] which constitute evidence, instrumentalities and fruits of federal crimes, including interstate transportation of stolen property (18 U.S.C. § 2314) and interstate transportation of computer access information (18 U.S.C. § 1030(a)(6)). This warrant is for the seizure of the above described computer and computer data and for the authorization to read information stored and contained in the above described computer and computer data.

The Secret Service executed the warrant on March 1, 1990. The agents seized two of thirteen functioning computers, and one other computer that was disassembled for repair. The Secret Service also seized a large number of floppy disks, a printer, other computer components, and computer software documentation. Steve Jackson Games immediately requested the return of the seized materials, but the agency retained most of the materials for several months before returning them. No criminal charges were brought as a result of this investigation.

that plaintiffs represented the established media).

24 *Steve Jackson Games v. United States*, 816 F. Supp. 432 (W.D. Tex. 1993), *aff'd. on other grounds* 36 F.3d 457 (5th Cir. 1994).

In May 1991, plaintiffs (Steve Jackson Games; the company's owner and sole shareholder, Steve Jackson; and several individual users of the company's BBS) filed suit against the Secret Service and the United States, alleging violations of the PPA. They also claimed violations of the *Electronic Communications Privacy Act of 1986* (discussed in Chapter Twelve).

Following a bench trial, the court determined that the defendants had violated the PPA. The court held that the materials seized by the Secret Service (in particular, the draft of a book about to be published) included "work product materials" and "documentary materials" protected by the PPA. The court decided that seizing these materials did not immediately violate the statute, however, because at the time of the seizure, the agents did not (in the language of the statute) "reasonably believe" that Steve Jackson Games "ha[d] a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication."[25] This was true even though "only a few hours of investigation" would have revealed it.[26] However, the court held that a violation did occur *on the day after the search* when at least one agent learned the materials were protected by the statute and failed to return them promptly.

14.320 Similar Form of Public Communication

As noted above, the PPA applies only when the materials are possessed by a person reasonably believed to have a purpose to disseminate to the public "a newspaper, book, broadcast, *or other similar form of public communication.*"[27] Not every BBS or Internet web site will satisfy this standard. For example, a BBS or web site that supplies unauthorized access codes to a small group of people is not disseminating information to the public, nor is it engaging in a form of public communication similar to a newspaper. Of course, the contraband exception will probably also apply to allow seizure in such a case.[28]

The exact scope of the PPA remains uncertain, and the opinion in *Steve Jackson Games* does not clarify the issue. There the court found a cognizable PPA violation arising from the Secret Service's search and prolonged seizure of the successive drafts of a book Steve Jackson was soon to publish. But, just as important, the court did not hold that seizing the Steve Jackson BBS was also a violation. Indeed, one of the attorneys who represented Steve Jackson Games (SJG) put it this way:

25 *Steve Jackson Games*, 816 F. Supp. at 440.

26 *Id.* at 440 n.8.

27 42 U.S.C. § 2000aa (emphasis added).

28 See *Guest v. Leis,* 255 F. 3d. 325 (6th Cir. 2001)(police seized BBS system during obscenity investigation; users sued claiming government also read private e-mails; court upheld seizure on contraband exception, but emphasized this gave government no right to read private e-mails; since no evidence protected materials were searched, no PPA liability).

> Though the results in the SJG case were very good on balance, a couple of major BBS issues were left for better resolution on another day . . . [One issue] is the finding that SJG was a 'publisher' for purposes of the PPA. This holding . . . leaves the applicability of the PPA largely undetermined for other BBS'. Steve Jackson Games was a print publisher, and its computers were used to support the print publishing operation. What about BBS' that publish their information in electronic form only? What about BBS' that do not publish anything themselves in the traditional sense, but host public conferences? The SJG case simply does not give guidance on when a non-printing BBS qualifies as a publisher or journalistic operation for purposes of PPA protection.[29]

Before searching any BBS or computer hosting web sites or email accounts, agents must carefully consider the restrictions of the PPA, along with its exceptions, as well as the ECPA. Additionally, they should include any information bearing on the applicability of this statute (and its many exceptions and sub-exceptions) in the warrant affidavit. That said, it is also important to recognize that not every person who possesses information necessarily has an intent to disseminate it to the public. Nor is every BBS or web site engaged in a "similar form of public communication."

14.330 Unique Problems: Unknown Targets and Commingled Materials

Applying the PPA to computer searches is especially difficult for two reasons. First, early in an investigation, it is often impossible to tell whether the system operator is involved in the crime under investigation. But unless agents have probable cause to arrest the operator at the time of the search, the "participant" exception in 42 U.S.C. § 2000aa would not apply.

Second, because most computers store thousands of pages of information, targets can easily mix contraband with protected work product or documentary materials. For example, a system trafficking in illegally copied software (which, along with the computers used to make the copies, is subject to forfeiture) may also be publishing a newsletter on stamp collecting. If agents seized the computer (or even all the data), the seizure would necessarily include *both* the pirated software and the newsletter. Assuming the stamp-collectors' newsletter was completely unrelated to the criminal copyright violations and also that it qualified as a "similar form of public communication," under the statute the seizure might violate the plain wording of the PPA.

In *Guest v. Leis,* the Sixth Circuit reasoned that if the statute were interpreted to prevent the seizure of a computer every time some protected materials were also present, computers might never be seizable, which would frustrate legitimate investigations of illegal activities.[30] The court emphasized that although the

29 Rose, *Steve Jackson Games Decision Stops the Insanity*, Boardwatch, May 1993, at 53, 57.

30 *Guest v. Leis,* 255 F. 3d. 325, 341-42 (6th Cir. 2001).

computer can be seized and the contraband examined, this does not mean the government can search any material which is protected by the PPA.[31] In construing the Fourth Amendment in non-PPA settings, other courts have recognized that there is sometimes no practical alternative to seizing nonevidentiary items and sorting them out later.[32]

14.400 Approval of Deputy Assistant Attorney General Required

All applications for a warrant issued under 42 U.S.C. § 2000aa(a) must be authorized by the appropriate Deputy Assistant Attorney General of the Criminal Division upon the recommendation of the U.S. Attorney or (for direct Department of Justice cases) the supervising Department of Justice attorney. These would be warrants issued for "work product" or "documentary materials," where an exception would nevertheless permit search and seizure.[33]

There are emergency procedures for expediting approval in cases that require it. All requests for authorization--emergency or routine--should be directed to the appropriate AUSA.

CBP officers or agents who are planning a search and seizure of electronic evidence to which the PPA may apply (in other words, a search not based on border authority) should contact the appropriate AUSA immediately. The AUSA in turn, should contact the DOJ Computer Crime Unit (202) 514-1026 to discuss the investigation and any new legal developments in this area.

14.500 Guidelines on Methods of Obtaining Documentary Materials Held by Third Parties

14.510 Provisions Governing the Use of Search Warrants Generally

As required by the PPA, the Attorney General has issued guidelines for the procedures to be used by federal agents to obtain documentary materials that are not contraband or fruits or instrumentalities of an offense in the private possession of a person not reasonably believed to be a suspect or related by blood or marriage to a suspect.[34] Failure to comply with these guidelines

31 *Id.* at 342.

32 *See*, *National City Trading Corp. v. United States*, 635 F.2d 1020 (2d Cir. 1980) (space used by a law office and by a targeted business operation was so commingled that the entire suite, really being one set of offices, was properly subject to search); *United States v. Hillyard*, 677 F.2d 1336, 1340 (9th Cir. 1982) (if commingling of stolen goods prevents on site inspection, and no practical alternative exists, the entire property may be seizable, at least temporarily); *United States v. Tropp*, 725 F. Supp. 482, 487-88 (D. Wyo. 1989) (search warrant comported with the mandate of the Fourth Amendment; search where some documents not relevant were commingled with relevant documents and seized, but later returned, was not unreasonable).

33 United States Attorneys' Manual 9-19.221; See 28 C.F.R. § 59.4 (a)(2)(2001).

34 42 U.S.C. § 2000aa-11.

subjects the agent to appropriate administrative discipline, but the failure may not be litigated nor may it be the basis for suppression or exclusion of evidence.[35]

14.510 Provisions Governing the Use of Search Warrants Generally

14.511 Provisions Governing the Use of Search Warrants Which May Intrude Upon Professional, Confidential Relationships

14.512 Considerations Bearing on Choice of Methods

A search warrant should not be used to obtain documentary materials believed to be in the private possession of a disinterested third party unless it appears that the use of a subpoena, summons, request, or other less intrusive alternative means of obtaining the materials would substantially jeopardize the availability or usefulness of the materials sought, and the application for the warrant has been authorized by an attorney for the government. In an emergency situation, the application may be authorized by a supervisory law enforcement officer of the agency. However, the U.S. Attorney must be notified of the authorization and the basis for justifying such authorization within 24 hours.[36]

14.511 Provisions Governing the Use of Search Warrants Which May Intrude Upon Professional, Confidential Relationships

A search warrant should not be used to obtain documentary materials believed to be in the private possession of a disinterested third party physician,[37] lawyer, or clergyman, under circumstances in which the materials sought, or other materials likely to be reviewed during the execution of the warrant, contain confidential information on patients, clients, or parishioners which was furnished or developed for the purposes of professional counseling or treatment, unless—

(i) It appears that the use of a subpoena, summons, request or other less intrusive alternative means of obtaining the materials would substantially jeopardize the availability or usefulness of the materials sought;

(ii) Access to the documentary materials appears to be of substantial importance to the investigation or prosecution for which they are sought; and

35 42 U.S.C. § 2000aa-12.

36 28 C.F.R. §§ 59.4(a)(1), (2) (2001).

37 Documentary materials created or compiled by a physician, but retained by the physician as a matter of practice at a hospital or clinic, shall be deemed to be in the private possession of the physician, unless the clinic or hospital is a suspect in the offense. 28 C.F.R. § 59.4 n. 2 (2001).

(iii) The application for the warrant must be recommended by the U.S. Attorney and authorized by an appropriate Deputy Assistant Attorney General.

If there is an immediate need to seize materials, the U.S. Attorney may authorize the warrant, but notice is required within 72 hours to the appropriate Deputy Assistant Attorney General.[38]

The application must be in writing and include the application for the warrant and a brief description of the facts and circumstances advanced as the basis for recommending authorization of the application. If the application is made orally or in an emergency situation, notice must be given to an appropriate Deputy Assistant Attorney General within seven days.[39]

Any authorized search must be executed in such a manner as to minimize, to the greatest extent practicable, scrutiny of confidential materials.[40] Other doctor-like therapeutic relationships which involve the furnishing or development of private information, (such as psychologists or psychiatric social workers or nurses) could implicate special privacy concerns and require agents to follow the procedures set forth here.[41] Officers should consult with the appropriate Associate/Assistant Chief Counsel or an AUSA.

14.512 Considerations Bearing on Choice of Methods

In determining whether, as an alternative to the use of a search warrant, the use of a subpoena or other less intrusive means of obtaining documentary materials would substantially jeopardize the availability or usefulness of the materials sought, the following issues, among others, should be considered:

a. Whether it appears that the use of a subpoena or other alternative that gives advance notice of the government's interest in obtaining the materials would be likely to result in the destruction, alteration, concealment, or transfer of the materials sought. Factors bearing on this issue may include:

 (i) Whether a suspect has access to the materials sought;
 (ii) Whether there is a close relationship of friendship, loyalty, or sympathy between the possessor of the materials and a suspect;
 (iii) Whether the possessor of the materials is under the domination or control of a suspect;
 (iv) Whether the possessor of the materials has an interest in preventing the disclosure of the materials to the government;

38 28 C.F.R. §§ 59.4(b)(2), (3) (2001).
39 28 C.F.R. § 59.4(b)(3) (2001).
40 28 C.F.R. § 59.4(b)(4) (2001).
41 28 C.F.R. § 59.4(b)(5) (2001).

(v) Whether the possessor's willingness to comply with a subpoena or request by the government would be likely to subject him to intimidation or threats of reprisal;
(vi) Whether the possessor of the materials has previously acted to obstruct a criminal investigation or judicial proceeding or refused to comply with or acted in defiance of court orders; or
(vii) Whether the possessor has expressed an intent to destroy, conceal, alter, or transfer the materials;

b. The immediacy of the government's need to obtain the materials. Factors bearing on this issue may include:

(i) Whether the immediate seizure of the materials is necessary to prevent injury to persons or property;
(ii) Whether the prompt seizure of the materials is necessary to preserve their evidentiary value;
(iii) Whether delay in obtaining the materials would significantly jeopardize an ongoing investigation or prosecution; or
(iv) Whether a legally enforceable form of process, other than a search warrant, is reasonably available as a means of obtaining the materials.

The fact that the disinterested third party possessing the materials may have grounds to challenge a subpoena or other legal process is not in itself a legitimate basis for the use of a search warrant.[42]

14.600 Border Searches of Work Product Materials, Documentary Materials, or Documentary Materials Held by Third Parties

The PPA does not prevent or restrict border searches for merchandise of work product materials, documentary materials or documentary materials held by third parties.[43] In applying the border search exception, refer to the discussion of border searches of documents and electronic information found in Chapter 3.

14.700 Sanctions

A person aggrieved by a search or seizure in violation of the PPA by a CBP officer has a civil suit against the United States.[44] Actual damages but not less than $1,000 may be recovered, plus attorneys' fees.[45]

Any CBP officer who violates the Attorney General's guidelines is subject to appropriate administrative disciplinary action.[46]

[42] 28 C.F.R. § 59.4(c) (2001).
[43] 42 U.S.C. § 2000aa-5.
[44] 42 U.S.C. § 2000aa-6: *Davis v. Gracey*, 111 F.3d 1472 (10th Cir. 1997).
[45] 42 U.S.C. § 2000aa-6(f).
[46] 42 U.S.C. § 2000aa-12.

14.800 Freedom of Information Act

14.810 Freedom of Information Act
14.820 Statutory Exemptions
14.830 Exclusions

The Freedom of Information Act (FOIA) was enacted into law in 1966 as a mechanism for the government to disclose information to the public. FOIA is codified at 5 U.S.C. § 552, and interpreting regulations may be found under 19 C.F.R. Pt. 103, subpart A. Under the thrust and structure of FOIA, records must be made available by the Agency to the public in one form or another, unless it is specifically exempted from disclosure under the discretion of the Agency or specifically excluded from disclosure altogether.[47] FOIA generally provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exemptions or by one of three special law enforcement record exclusions. President Obama issued a memorandum requiring all agencies to adopt a presumption in favor of disclosure.[48]

14.810 Definitions

FOIA defines "records" as anything created by the agency, or obtained by the agency and under the control of the agency at the time of the request, whether in paper or electronic form.[49] However, FOIA does not require an agency to create a record. Further, there is no requirement that oral questions be answered. An agency need not re-create destroyed or lost records and there is usually no need to search for records outside the agency.[50] Requests for records held by a third party should be referred to the record owner for determination. All requests should be forwarded and handled by the FOIA processor in your area.

14.820 Statutory Exemptions

FOIA provides nine statutory exemptions from disclosure which allow the agency discretion to withhold records:

1. FOIA protects from disclosure all national security information concerning the national defense or foreign policy that has been properly classified in accordance with the substantive and procedural requirements of a Presidential Executive Order. The Executive Order would delineate which

47 *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132 (1975).
48 Presidential Memorandum for the Heads of Executive Departments and Agencies, dated January 21, 2009.
49 5 U.S.C. § 552(f).
50 *Id.*

records should be withheld from disclosure; the current order is Executive Order 12958, as amended, signed on March 25, 2003.[51]

2. Also protected from disclosure are records related solely to the internal personnel rules and practices of the agency. This encompasses two distinct categories of information: internal matters of a relatively trivial nature (e.g., name lists and home addresses, performance standards, leave practices), and more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement (e.g., law enforcement manuals, critical infrastructure information). [52]

3-5. Further exemptions include any records that cannot be disclosed under other statutes, such as grand jury information and information that constitutes trade secrets or is privileged or confidential, including information subject to attorney-client privilege or that constitutes attorney work product.[53]

6. FOIA also protects from disclosure personnel and medical (or similar) files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy (e.g., criminal history records, date of birth, religious affiliation, social security numbers, financial status, home address and telephone number).[54]

7. FOIA protects from disclosure records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source; (E) would disclose techniques and procedures for law enforcement investigations or prosecution if such disclosure could reasonably be expected to risk circumvention of the law; or (F) could reasonably be expected to endanger the life or physical safety of any individual.[55]

8-9. Finally, the act protects any information related to regulation of financial institutions and geological information regarding the location of wells.[56]

14.830 Exclusions

Exclusions are a mechanism for protecting certain especially sensitive law enforcement matters and expressly authorize federal law enforcement agencies

51 *Id.* at § 552(b)(1); Executive Order 12958, as amended, 68 F.R. 15315 (2003).
52 *Id.* at § 552(b)(2).
53 *Id.* at § 552(b)(3,4,5).
54 *Id.* at § 552(b)(6).
55 *Id.* at § 552(b)(7).
56 *Id.* at § 552(b)(8,9).

to treat certain records as not subject to FOIA. The requestor will be told that no records exist, and the agency has no obligation to acknowledge the existence of such records.

1. c(1) exclusion: authorizes federal law enforcement agencies, under specified circumstances, to shield the very existence of records of ongoing investigations or proceedings by excluding them entirely from FOIA.

2. c(2) exclusion: relates to threatened identification of confidential informants in criminal proceedings, and allows agencies to bar a requestor from finding out whether a source is an important confidential informant.

3. c(3) exclusion: relates to certain law enforcement records maintained by the FBI, connected with foreign intelligence, counter-intelligence or terrorism.[57]

FOIA also provides for judicial review of agency non-disclosure decisions. United States District Courts are vested with exclusive jurisdiction of such suits.[58] Review is *de novo* and the agency bears the burden of sustaining claimed exemptions or exclusions.[59] Counsel may submit to the courts its *Vaughn* index (a detailed affidavit explaining why the items are not disclosable), but the court may require an *in camera* review of the actual documents.[60]

14.900 Disclosure of Information under the Privacy Act (5 U.S.C. § 552a)

14.910 Definitions and General Information
14.920 Right of Access of Individuals under the Privacy Act
14.930 Requests for Disclosure When there is No Pending Legal Proceeding
14.940 Subpoenas or Requests for Disclosure When there is a Judicial or Administrative Proceeding
14.950 Disclosure to Joint Terrorism Task Force
14.960 Restrictions on Disclosure of Information
14.970 Redacting Documents
14.980 General Public Information

The purpose of the Privacy Act is to balance the government's need to maintain information about individuals with the rights of individuals to be protected against unwarranted invasions of their privacy stemming from federal agencies' collection, maintenance, use, and disclosure of personal information about them. The Privacy Act is a withholding statute. The policy objectives of the Privacy Act are: (1) to restrict disclosure of personally identifiable records

57 *Id.* at § 552(c)(1,2,3).
58 *Id.* at § 552(a)(4)(B).
59 *Id.*
60 *Id.*; see *Vaughn v. Rosen,* 484 F.2d. 820, (D.C. Cir. 1973), *cert. denied,* 415 U.S. 977 (1974).

maintained by agencies; (2) to grant individuals increased rights of access to agency records maintained on themselves; (3) to grant individuals the right to seek amendment of agency records maintained on themselves upon a showing that the records are not accurate, relevant, timely, or complete; (4) to establish a code of "fair information practices" which requires agencies to comply with statutory norms for collection, maintenance and dissemination of records.[61] The general rule that governs application of the Privacy Act is that there shall be no disclosure of a record which is contained in a system of records by any means to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains (subject to twelve exceptions discussed later).[62]

14.910 Definitions and General Information

The Privacy Act defines "individuals" as encompassing only United States citizens and lawful permanent residents of the United States; "record" as any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph; and "system of records" as a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.[63]

Like FOIA, discussed above, the Privacy Act does not require an agency to create records or a system of records, and any requests for records held by a third party should be referred to that agency for their determination for disclosure.
As noted above, there are twelve exceptions to the general rule that there can be no disclosure without the consent of the individual to whom the record pertains. The exceptions include an allowance for intra-agency disclosure for necessary official purposes, or where disclosure is required by FOIA.[64] Additionally, the Federal Register publishes routine uses that are permitted and there can be disclosure for census purposes, statistical research and to the National Archives.[65] One important exception allows disclosure to federal law enforcement agencies and permits an agency, upon receipt of a written request, to disclose a record to another agency or a unit of state or local government for a civil or criminal law enforcement activity.[66] A related exception exists when there is a showing of compelling circumstances affecting the health or safety of an

61 U.S. Department of Justice FOIA and Privacy Act Overview, May 2004, at p. 892.
62 5 U.S.C. § 552a(b).
63 5 U.S.C. § 552a(a)(2-5).
64 5 U.S.C. § 552a(b)(1,2).
65 5 U.S.C. § 552a(b)(3,4,5,6).
66 5 U.S.C. § 552a(b)(7).

individual if upon such disclosure notification is transmitted to the last known address of the individual.[67] The remaining exceptions apply to disclosures to Congress, the General Accounting Office (GAO), credit bureaus, or subject to an order of court.[68]

14.920 Right of Access of Individuals under the Privacy Act

The Privacy Act permits an individual to seek access to his own record and provides that agencies must permit an individual to view or copy any record pertaining to him/her which is contained in a system of records, but it allows the agency to exempt certain systems of records from its requirements.[69] The exemptions are published in full in the federal register, and include: information compiled in anticipation of a civil proceeding; law enforcement files maintained by law enforcement agencies; and investigatory material.[70]

An individual may request amendment or expungement of their records by making a written request, describing the records in question, explaining why they are inaccurate, untimely, irrelevant or otherwise appropriate for the requested change. Any supporting documentation must be furnished if it is available.[71]

Each agency must publish information about its system of records in the Federal Register, which usually occurs twice yearly. Records must be kept of requests received and disclosures made, with some exceptions for intra-agency and FOIA disclosures. Both civil and criminal penalties may be imposed for improper or unauthorized disclosure.[72]

14.930 Requests for Disclosure when there is no Pending Legal Proceeding

CBP may receive requests for disclosure of records when there are no pending judicial or administrative proceedings. This usually arises in a situation when a foreign, federal, state or local law enforcement agency is seeking CBP information pursuant to an investigation and no type of judicial proceeding has been initiated. If this occurs, forward the request to Disclosure Law Branch: Disclosure Law Branch, U.S. Customs and Border Protection, Office of Regulations & Rulings, 1300 Pennsylvania Ave., N.W. (MINT ANNEX), Washington, D.C. 20229, Telephone Number (202) 572-8720, Fax Number (202) 572-8727.

67 5 U.S.C. § 552a(b)(8).
68 5 U.S.C. § 552a(b)(9-12).
69 5 U.S.C. § 552a(d).
70 5 U.S.C. §§ 552a(d)(5), (j)(2) and (k).
71 5 U.S.C. § 552a(d)(2).
72 5 U.S.C. §§ 552a(g),(i).

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14.941 Touhy Regulations—Background

All federal agencies have promulgated regulations that govern when, and under what circumstances, agency personnel may provide testimony or produce government records, but this does not authorize the agency to deny the request for disclosure. Regulations provide that a federal employee is generally prohibited from disclosure without obtaining approval from an appropriate agency official. These regulations apply to subpoenas in both criminal and civil cases, and are authorized by a federal "housekeeping" statute.[73]

The United States Supreme Court affirmed the legality of such "housekeeping" regulations in 1951.[74] The *Touhy* case involved a habeas corpus proceeding where an FBI agent refused to comply with a subpoena *duces tecum* to produce records. The refusal was based on agency instructions, since Touhy had failed to comply with Department of Justice regulations on obtaining disclosure of records. The Court held that the DOJ regulations were a valid exercise of legal authority. Government employees would not be held in contempt for failing to comply where the agency has not authorized disclosure. (See also the discussion of *Touhy* in Chapter 1 of the *Law Course for Customs and Border Protection Officers*).

14.942 CBP Touhy Regulations

The Touhy regulations for CBP may be found at 19 C.F.R. Pt. 103, Subpart B (19 C.F.R. § 103.21, *et seq.*) and the DHS Touhy regulations are published at 6 C.F.R. § 5.41, *et seq.*

CBP Touhy regulations establish the "procedures to be followed with respect to the production or disclosure of any documents contained in Customs files, any information relating to material contained in Customs files, any testimony by a Customs employee, or any information acquired by any person as part of that person's performance of official duties as a Customs employee or because of that person's official status," in all federal state, state, local and foreign proceedings

73 5 U.S.C. § 301.

74 *United States ex. rel. Touhy v. Ragen,* 340 U.S. 462 (1951).

when a subpoena, notice of deposition, order or demand, by a court, administrative agency, or other authority is issued for such information.[75]

14.943 Circumstances where Touhy Regulations would not Impede Disclosure

The Touhy regulations as set forth in the Subpart do not cover those situations where the United States is a party to the action. In those situations, CBP employees are instructed to follow internal CBP policies and procedures.[76] Further, the regulations are not intended to impede disclosure to government law enforcement or regulatory agencies.[77] Similarly, disclosure may be made to the Court of International Trade, the Department of Justice, the United States Attorneys offices and in federal legal proceedings.[78] Finally, the regulations do not impede disclosure when there is non-CBP information held by CBP employees in any proceeding where the employee is a party or witness solely in a personal capacity, such as for traffic citations or private automobile accidents.[79]

14.944 Requests for Disclosure in Civil or Administrative Proceedings in which the United States is Not a Party

Requests for disclosure should come to Chief Counsel for processing, response, and if necessary counsel would handle disclosure and the issuance of instructions. Any employee is prohibited from complying until they have received instructions from Chief Counsel.[80] The issuing party is required to provide a demand, a copy of the summons and complaint, and provide an affidavit or statement that sets forth a summary of the documents or testimony requested.[81] In addition, any request must be presented at least 10(ten) working days prior to the scheduled date of the production of documents or testimony, and the agency need not comply if the request fails to meet the deadline.[82] The factors Chief Counsel will consider in reviewing a request may also be found in the regulations.[83]

14.945 Requests for Disclosure in State or Local Criminal Proceeding

When CBP receives a request for disclosure in a state or local criminal prosecution, there are different regulations applicable.[84] When the prosecution seeks testimony or information, such as in a routine turnover case for state

75 19 C.F.R. § 103.21(a)(1).
76 19 C.F.R. § 103.21(a)(2).
77 19 C.F.R. § 103.21(e).
78 19 C.F.R. § 103.21(f).
79 19 C.F.R. § 103.21(g).
80 19 C.F.R. § 103.22(a).
81 19 C.F.R. § 103.22(c).
82 19 C.F.R. § 103.22(d).
83 19 C.F.R. § 103.23.
84 19 C.F.R. § 103.26.

prosecution, a Port Director, Chief Patrol Agent of the Border Patrol, or a Chief of Field Laboratory, may authorize disclosure. However, if it is the defense seeking disclosure, they must comply with the procedures under 19 C.F.R. § 103.22 outlined above.[85]

14.946 Additional Information

If CBP receives a request for disclosure in a foreign proceeding, it should be forwarded to Chief Counsel for processing.[86] If the United States is a party, notification to Chief Counsel will result in the issuance of instructions for disclosure.[87] When a third party has failed to comply with the Touhy regulations and moves to enforce their subpoena, the United States Attorney's Office may need to become involved to quash the subpoena, and an action in state court may be removed to federal court.[88] Service may be accepted by either DHS Office of General Counsel in Washington, D.C., or on CBP Office of Chief Counsel (Washington, D.C.) for any summonses, complaints and subpoenas served on DHS and CBP employees in their official capacity.[89]

14.950 (b) (7)(E)

(b) (7)(E)

14.960 Restrictions on Disclosure of Information

There are statutory and regulatory restrictions on disclosure of information that apply to CBP personnel as well. The Trade Secrets Act generally prohibits disclosure of entry documentation (import documents) and data contained in the

85 *Id.*
86 19 C.F.R. § 103.27.
87 Customs Directive No. 3810-013A (October 15, 2001).
88 19 C.F.R. § 103.24, § 103.25. See also 6 C.F.R. § 5.46, § 5.47.
89 6 C.F.R. § 5.42, § 5.43.
90 (b) (7)(E)
(b) (7)(E)
91 (b) (7)(E)
(b) (7)(E)

Automated Commercial System (ACS).[92] Similarly, Shipper's Export Declarations (SED's) are generally prohibited from being disclosed.[93] Any requests for SED's from a foreign law enforcement agency should be coordinated with the Department of Commerce. There are also restrictions on disclosure of material covered by the Bank Secrecy Act.[94] Information obtained through TECS and passenger name record (PNR) information is also considered sensitive and any disclosure must comply with agency policies and regulations.[95] Canine records, including detector dog training records, certification memorandum, evaluation sheets, manual and directives are also restricted from disclosure absent instructions from Chief Counsel.

14.970 Redacting Documents

When reviewing a document for redaction of sensitive information, there are additional considerations applicable. As a general practice, do not disclose information which would constitute an unwarranted invasion of personal privacy (such as information regarding uninvolved third parties), system computer codes, and employee personnel data not relevant to disclosure (such as social security numbers).

14.980 General Public Information

Some information encountered in the workplace may be generally considered to be public information, including some types of public records, manifest information, and records of entry and clearance of vessels. Even in those areas, there are exceptions contained in the regulations which would bar disclosure.[96]

92 18 U.S.C. § 1905.
93 13 U.S.C. § 301(g); 15 C.F.R. § 30.91.
94 31 U.S.C. § 5311.
95 See,e.g., 5 U.S.C. § 552a; 5 C.F.R. § 2635.703 (use of nonpublic information)
96 See,e.g., 19 U.S.C. § 1431(c); 19 C.F.R. § 103.11; 19 C.F.R. § 4.95.

Chapter Fifteen

Forfeiture

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15.000 Introduction to Forfeiture Law

15.010 General

15.011 Purpose

A doctrine with ancient historical roots, forfeiture today is the process by which the sovereign (government) acquires title to property that has been used in a way that a particular forfeiture statute forbids. The forfeiture process can be administrative, civil or criminal[1], depending on the interplay between (1) the nature of the property to be forfeited, (2) the desires of any claimant to such property, and (3) the desires of the government. Once forfeited, property can be placed into government service or sold, with the seizing department retaining the benefit of the proceeds. Moreover, the proceeds may be shared with other departments, including state and local police agencies, in proportion to the role the particular agency played in the investigation and seizure of the property forfeited.[2]

The purposes behind vesting title with the government, or forfeiture, are numerous. Forfeiture is used: as a law enforcement tool against criminal and criminal organizations, to seized contraband property (that which is illegal to possess), to abate nuisances, to take the profit out of crime and return property to victims, and to deter crime.[3]

15.012 History

"Civil forfeiture has a long history that is based on the legal fiction that an inanimate object can itself be 'guilty' of wrongdoing, regardless of whether the object's owner is blameworthy in any way."[4] "That is no longer true. Although the property is named as the defendant in a civil forfeiture case, it is not because the property did anything wrong. Things do no commit crimes. People commit crimes using or obtaining things that consequently become forfeitable to the state. The *in rem* structure of civil forfeiture is simply procedural convenience. It is a way for the government to identify the thing that is subject to forfeiture and the grounds therefore, and to give everyone with an interest in the property the opportunity to come into court at one time and contest the forfeiture action."[5]

[1] Stefan D. Cassella, "Overview of Asset Forfeiture Law in the United States," *United States Attorneys' Bulletin, Vol. 55, No. 6,* (U.S. Dep't of Justice, Executive Office for U.S. Attorneys) Nov. 2007, at 12.
[2] See Department of Treasury, "Guide to Equitable Sharing for Foreign Countries and Federal, State and Local Law Enforcement Agencies," (April 2004); 18 U.S.C. § 981(e); 19 U.S.C. § 1616a(c); 31 U.S.C. §§ 9703(a)(1)(G) and 9703 (h).
[3] 106 H.Rpt. 192, Civil Asset Forfeiture Reform Act (1999); Cassella, at 8.
[4] 106 H.Rpt. 192.
[5] Cassella, at 15.

Our modern civil forfeiture law traces its most immediate ancestry to English admiralty law.[6] "Soon after the creation of the United States, ships and cargo violating customs laws were made subject to federal civil forfeiture. Such forfeiture was vital to the federal treasury for, at that time, customs duties constituted over 80% of the federal revenues."[7]

And the revenues from federal civil forfeitures have not stopped since that time. In their consideration of a the Civil Asset Forfeiture Reform Act (CAFRA)[8], Congress noted that by "the end of 1998, a total of 24, 903 seized assets valued at $1 billion were on deposit: 7, 799 cash seizures valued at $349 million, 1, 181 real properties valued at $205 million, 45 businesses valued at $49 million, and 15, 878 other assets valued at $398 million."[9]

As the revenue for the government increased, the concern over the government's free use of forfeiture proceedings increased. Congress began investigating the use of government forfeiture by conducting hearings beginning in 1993.

In 1999, Congress began earnestly reviewing the civil forfeiture laws under H.R. 1658, CAFRA. "H.R. 1658 is designed to make federal civil forfeiture procedures fair to property owners and to give owners innocent of any wrongdoing the means to recover the property and make themselves whole after wrongful government seizures."[10] Congress passed CAFRA and President Bill Clinton signed it into law in 2000.

On December 1, 2006, new procedures for civil forfeitures went into effect. These new procedures were considered by many in the field to be the most comprehensive change in civil forfeiture since the passage of CAFRA. The rules of civil forfeiture were officially separated from admiralty and maritime rules. The *Supplemental Rules for Certain Admiralty and Maritime Claims* became *Supplemental Rules for Admiralty or Maritime and Asset Forfeiture Claims* in the *Federal Rules of Civil Procedure.* Rules C and E of the *Federal Rules of Civil Procedure* were repealed and replaced by Rule G. The new Rule G encompasses the new procedures for civil judicial forfeitures.

15.013 Terminology

To understand forfeiture, one must understand certain concepts, including the distinction between *in rem* and *in personam* proceedings and the nature of "title" to property. Underlying the concept of civil forfeiture is the principle that the

6 106 H.Rpt. 192.
7 106 H. Rpt. 192, citing the Act of July 31, 1789, secs. 12, 36, 1 Stat. 39, 47; citing Piety, "Scorched Earth: How the Expansion of Civil Forfeiture Doctrine has Laid Waste to Due Process," 45 U. Miami L. Rev. 911, 940 n. 137 (1991).
8 18 U.S.C. § 983.
9 106 H.Rpt. 192, citing National Drug Control Strategy: Budget Summary 1999, at 108.
10 *Id.*

prohibited use of property makes the property itself "guilty" and subject to forfeiture Thus, civil forfeitures are "*in rem*" proceedings, *i.e.*, "against the thing" as opposed to criminal forfeitures which are "*in personam*," proceedings *i.e.*, "against the person."

For this reason, the style of a civil forfeiture complaint against a 19-foot wood boat, for example, might read, "*United States v. One 19 foot Wood Boat*," or in the case of a seizure of money, "*United States v. $542,100 in U.S. Currency*." Historically, the property to be forfeited is the defendant and the only issue before the court is whether the property itself is subject to forfeiture. Innocence or guilt of the owner or of anyone else is irrelevant to the question of whether the property in question was used in a way that would subject it to forfeiture. Only recently, and only with respect to certain forfeiture statutes, has innocence of an owner become relevant to the forfeitability of property. The innocent owner defense is discussed in detail in section 15.124.

Criminal forfeiture is an *in personam* action. The forfeiture itself is part of the criminal sentence following a criminal conviction. In the *in personam* action, the judge may order the convicted defendant to pay a money judgment or forfeit substitute assets if the forfeitable property cannot be located. These forfeiture options are not available for *in rem* forfeiture actions.[11]

As noted above, forfeiture is the process by which the government acquires title to forfeitable property. Title to property is nothing more than the right of ownership and may or may not be evidenced by a document or title instrument. Commonly, one owns, *i.e.*, has the right of ownership to clothes, pets, lawnmowers, tools and various other types of property without any documentary evidence of that fact. On the other hand, one's right of ownership in one's house or automobile is commonly evidenced by a "certificate of title" or a "deed."[12]

The term "legal title" refers to a right of ownership that is recognized in law.[13] If one goes to a hardware store and exchanges the full price in cash for a wheelbarrow, then one has acquired legal title to that wheelbarrow, *i.e.*, a right of ownership that is recognized in law. Similarly, if one trades in his old car for a new one, tendering the full price for the difference, then he has acquired *legal title* to the new car and transferred to the car dealer *legal title* to the old one.

If, however, one did not have sufficient funds to pay the difference between the value of the old and new cars, and borrowed the difference from a bank, then one would acquire legal title to the new car, but the lending bank would acquire "equitable title" to the new car to the extent of its loan. Equitable title is the

11 Stefan D. Cassella, "Overview of Asset Forfeiture Law in the United States," *United States Attorneys' Bulletin, Vol. 55, No. 6,* (U.S. Dep't of Justice, Executive Office for U.S. Attorneys) Nov. 2007, at 14.
12 *Black's Law Dictionary,* (6th Ed.), 1485.
13 *Id.*, 897.

right to acquire legal title under certain circumstances.[14] In this case, should the new owner default on the repayment of his loan, the bank would have the right to foreclose on the loan and acquire legal title to the car from the purchaser. Again, this equitable title may or may not be evidenced by a particular document. In the case of loans on real estate such title is commonly evidenced by a mortgage deed or a deed to secure debt. In the case of automobiles it is common for a lien holder notation to be put on the certificate of title. These title concepts operate throughout the civil forfeiture process.

At the moment that a given property is used in violation of a law with a forfeiture provision, equitable title, that is, the right to acquire legal title, vests in the United States. Just as a lender with equitable title has only the inchoate (imperfect; not completely formed) right to acquire legal title to property, the government merely has the right to seek legal title to illegally used property. It has no legal title in fact at this point. Upon the development of probable cause to believe that the particular property has become subject to forfeiture, the government may seize the property and institute the forfeiture proceeding by which it seeks to acquire legal title. At the conclusion of the forfeiture proceeding a declaration of forfeiture is entered if the government has established its right to acquire legal title.

15.014 Distinguish civil and criminal forfeitures

15.014a Civil Forfeiture -18 U.S.C. § 981

"Civil forfeitures are *in rem* proceedings, based on the theory that since the property itself was used in an illegal fashion, the property is guilty and the action is filed against the thing itself. In a civil forfeiture case, the government files a . . . civil action *in rem* against the property itself, and then proves, by a preponderance of the evidence, that the property was derived from, or was used to commit, a crime. Because civil forfeiture does not depend on a criminal conviction, the forfeiture action may be filed before indictment, after indictment, or if there is no indictment at all."[15]

Title 18 U.S.C. § 981 has become the preeminent forfeiture statute for property involved in a host of violations. Originating as the civil forfeiture authority for property involved in money laundering activities, it now authorizes forfeiture of property connected to certain foreign and federal offenses independent of any money laundering activity.[16]

14 *Black's Law Dictionary*, (6th Ed.), 539 under "equitable ownership."
15 Stefan D. Cassella, "Overview of Asset Forfeiture Law in the United States," *United States Attorneys' Bulletin, Vol. 55, No. 6,* (U.S. Dep't of Justice, Executive Office for U.S. Attorneys) Nov. 2007, at 15; Note also that the procedures for *in rem* civil forfeitures are found in Fed. R. Civ. P. (Supp. R.G, 2007).
16 See 18 U.S.C. § 981 for a complete list of offenses.

Section 981 also authorizes CBP to transfer, in its discretion, such portion of forfeited property as the agency equitably determines to state or local law enforcement agencies participating directly in any of the acts that led to the seizure and forfeiture of the property.[17]

(1) "Anti-Terrorist" Civil Forfeitures

All assets, foreign or domestic, of any entity, individual or group, engaged in planning or carrying out any act of domestic or international terrorism, as defined in 18 U.S.C. § 2331(1) against any U.S. person or interest, are subject to civil (and criminal) forfeiture.[18]

The "anti-terrorist" forfeiture provision is very broad in scope. In addition to providing for the forfeiture of the proceeds of a terrorism offense, or property involved in, or used to commit, support, or plan such terrorist offenses, the statute authorizes the forfeiture of all assets of any individual, entity or organization, or any property affording a defendant a "source of influence" over the entity or organization.[19] "This statute is designed to incapacitate the terrorist completely, by leaving no assets, whatsoever, to perpetrate further acts of violence against governments, their citizens, or their property."[20]

Statutes 18 U.S.C. §§ 981 and 1956 may also be used to reach certain terrorist assets. "For example, Customs could seize for forfeiture any funds transported or transferred across the border with the intent to promote terrorism offenses designated as 'specified unlawful activities' . . . under the money laundering statutes. Customs could also use its traditional statutes to seize for forfeiture terrorist-related funds or property imported or exported in violation of law. This would include smuggled items, articles imported or exported in violation of Arms Export Control Act. Customs could also employ the Bank Secrecy Act to seize for forfeiture any currency or other monetary instruments physically transported into or out of the United States without the required CMIR report or where a false report has been filed."[21]

As a result of the enactment of the USA PATRIOT Act[22], specific authority now exists to forfeit terrorist assets. This authority is under 18 U.S.C. § 981(a)(1)(G) and is patterned after the RICO (Racketeer Influenced and Corrupt Organizations) forfeitures.[23] Thus, case law interpreting RICO forfeitures are relevant to § 981(a)(1)(G) forfeitures.

17 18 U.S.C. § 981(e).
18 18 U.S.C. § 981(a)(1)(G).
19 *Id.*
20 Cassella, at 15.
21 Chief Counsel Memorandum, "Forfeiture of Assets of Terrorist Organizations," EN-2001-0422; CC:SB/EMc/KD/AD, dated Nov. 28, 2001.
22 Pub. L. 107-56 (2001).
23 18 U.S.C. § 1963(a).

Generally, CAFRA civil forfeiture procedures apply to "anti-terrorist" civil forfeitures. However, "anti-terrorist" forfeitures are exempt from the burden of proof provision in CAFRA in some circumstances.[24]

On the other hand, any owner of property confiscated "under any provision of law relating to the confiscation of assets of suspected international terrorists" may file a claim asserting an *affirmative defense* that (1) the property is not subject to forfeiture, or (2) the CAFRA innocent owner provisions of section 983(d) apply. This will remain true even if the property is also forfeitable under Customs laws and that approach is taken rather than section 981(a)(1)(G).[25] Also, in such cases the court may admit hearsay evidence concerning the claim if doing so is necessary to protect the national security interests of the United States.[26]

Finally, the extent to which "anti-terrorist" forfeitures will apply to conduct committed before October 26, 2001, (effective date of the USA PATRIOT Act), is unclear. Any criminal forfeiture for prior conduct will be barred by the *ex post facto* clause of the Constitution.[27] Some courts have held, however, that civil forfeiture provisions may be applied to conduct occurring before the effective date of the forfeiture statute if there is a clear expression of legislative intent, or where the statute deprives a person of property he had no legitimate right to possess before the enactment of the law.[28] The USA PATRIOT Act clearly was meant to address the terrorist acts of September 11, 2001. CBP officers are advised to consult with their Associate/Assistant Chief Counsel before commencing any civil forfeiture action based on § 981(a)(1)(G).

(2) Certain Predicate Offenses

Title 18 U.S.C. § 981 also provides that the proceeds of crimes or conspiracies to commit offenses listed in 18 U.S.C. § 1956(c)(7) (specified unlawful activities or "SUAs") are subject to forfeiture without the necessity of proving any money

24 18 U.S.C. § 987.

25 *Id.*

26 *Id.*

27 An "ex post facto" law "provides for the infliction of punishment upon a person for an act done which, when it was committed, was innocent; a law which aggravates a crime or makes it greater than when it was committed; a law that changes the punishment or inflicts a greater punishment that the law annexed to the crime when it was committed . . ." Art. I, § 9 of the United States Constitution prohibits Congress from passing ex post facto laws. See *Black's Law Dictionary*, (6th Ed.), 580.

28 *United States v. Certain Funds (Hong Kong and Shanghai Banking Corporation),* 96 F.3d 20 (2d Cir. 1996); See Cassella, "The Civil Asset Forfeiture Reform Act of 2000," *Journal of Legislation*, Notre Dame Law School (January 2001), at 109-111; *United States v. Four Tracts ... on the Waters Of Leiper's Creek,* No. 96-6533, 1999 U.S. App. LEXIS 10666 (6th Cir. May 19, 1999).

laundering activities. For CBP, the SUAs which may result in a direct forfeiture of proceeds include: [29]

- 18 U.S.C. § 541 (Entry of goods falsely classified);
- 18 U.S.C. § 542 (Entry of goods by means of false statements);
- 18 U.S.C. § 545 (Smuggling goods into the United States);
- 18 U.S.C. § 549 (Removing goods from Customs custody; breaking seals);
- 18 U.S.C. § 2319 (Criminal infringement of a copyright);
- 18 U.S.C. § 2320 (Trafficking in counterfeit goods and services);
- 19 U.S.C. § 1590 (Aviation smuggling);
- 22 U.S.C. § 2778(c) (Control of Arms exports and imports; criminal violations);
- 50 U.S.C. App. § 2410 (Violations; *Export Administration Act of 1979*);
- 50 U.S.C. § 1705 (Penalties; *International Emergency Economic Powers Act*); and
- 50 U.S.C. App. § 16 (Offenses, punishment, forfeitures of property; of the *Trading with Enemy Act*).

(3) Foreign Offenses

Section 981 also provides for the forfeiture of property within the jurisdiction of the United States that is derived from or traceable to proceeds obtained directly or indirectly from certain offenses against a foreign nation.[30] If the foreign offense involves conduct described by any money laundering predicate offense[31] and is punishable by the foreign nation by death or imprisonment for more than one year[32], forfeiture is authorized by the provision.

(4) Correspondent Bank Accounts

Section 981(k) authorizes the government to seize and forfeit money in a domestic correspondent account of a foreign bank if funds forfeitable under U.S. law were deposited into an account in that foreign bank overseas. Thus, when foreign criminals deposit money derived from crimes committed in the United States into bank accounts in a foreign bank which maintains an account at a correspondent bank in the United States, equivalent proceeds may be seized from the correspondent account in the United States.

In limiting the availability of foreign banks as a safe haven for money launderers, § 981(k) provides as follows:

- Forfeitable funds deposited into an account in a foreign bank shall be deemed to have been deposited into the correspondent account of that bank in the United States;

29 18 U.S.C. § 981(a).
30 18 U.S.C. § 981(a)(1)(B).
31 18 U.S.C. § 981(a)(1)(B)(i).
32 18 U.S.C. § 981(a)(1)(B)(ii).

- The government may seize, arrest, or restrain the forfeitable funds in the correspondent account "up to the value of the funds deposited" in the foreign bank;
- The government is not required to establish that such forfeitable funds are directly traceable to the such deposited funds, nor shall it be necessary for the Government to rely on the application of 18 U.S.C. § 984(see below);
- Unless the foreign bank is the wrongdoer, or the forfeitable funds have already been withdrawn from the foreign bank, only the person who deposited the funds into the foreign bank, *i.e.* the "owner," can challenge the forfeiture. The foreign bank or any other intermediary involved in the transfer of the funds cannot challenge the forfeiture.

(5) Fungible Property – 18 U.S.C. § 984

Historically, in order to forfeit funds currently on deposit in an account on a "proceeds" theory, it was necessary to link the funds to a specific violation using conventional accounting principles. For example, if $100,000 was currently on deposit in an account into which forfeitable proceeds had once been deposited, the current deposit was immune from forfeiture unless the government could show, in addition to tracing the money into the account, that the current balance represented some portion of the illegal deposit. Moreover, if the account holder could show a legitimate source for the particular funds on deposit, the forfeiture would be defeated. Similarly, if the account had been drawn down to zero after the illegal deposit, any current balance would be immune from forfeiture. These limits to forfeiture have changed, however.

Title 18 U.S.C. § 981 allows civil forfeiture pursuant to 18 U.S.C. § 984. The purpose of § 984 is to authorize forfeiture of fungible assets in all civil cases when the property traceable to the laundered proceeds has been dissipated. Therefore, this section permits the seizure and forfeiture of the funds currently on deposit up to the amount traced into the account without the necessity of showing any connection with the original illegal proceeds. To take advantage of this provision, however, the seizure must commence within one year of the identified illegal deposit.[33] Simply stated, if the action commences within one year of the illegal transaction (deposit), it is not necessary to identify and seize the particular "guilty" property. Even if the funds on deposit are indeed "innocent," that portion up to the equivalent amount of the "guilty" funds deposited can be seized and forfeited.[34]

15.014b Criminal Forfeiture

In contrast with civil forfeitures, criminal forfeitures are *in personam* in nature (*i.e.*, against the person, rather than against the property). Therefore, the defendant in the proceeding is the person accused of a criminal act and

[33] 18 U.S.C. § 984(c).
[34] 18 U.S.C. § 984(a)(1)(B)(2).

forfeiture depends upon a conviction of that person. The interest in the property subject to forfeiture is the defendant's proprietary interest in property used in a way that the particular criminal forfeiture statute proscribes, and such interest must be alleged in the indictment.

(1) Criminal Forfeitures – 28 U.S.C. § 2461(c)

When CAFRA was passed, 28 U.S.C. § 2461(c) was amended to "authorize criminal forfeiture whenever an offense has civil forfeiture authority, even though no specific criminal forfeiture statute exists for that offense."[35] This statute requires the procedures in 21 U.S.C. § 853 be used for criminal forfeitures.

(2) Criminal Forfeiture – 18 U.S.C. § 982

This statute encompasses a list of violations which will lead to criminal forfeiture.[36] The procedures for a criminal forfeiture under this statute can be found at 21 U.S.C. § 853.[37]

The "relation back" provision of 21 U.S.C. § 853(c), (*i.e.*, all right, title and interest in forfeitable property vests in the United States as of the act giving rise to the forfeiture) is applicable to criminal forfeitures under 18 U.S.C. § 982. This statutory "relation back" provision is not applicable to an interest acquired by a *bona fide* purchaser (BFP) who was reasonably without cause at the time of purchase to believe that the property was subject to forfeiture.[38] Thus, if a money launderer being prosecuted under 18 U.S.C. §§ 1956 or 1957, for example, were to have purchased an aircraft with the laundered unlawful proceeds (or fees from laundering such), the aircraft would be subject to civil and/or criminal forfeiture. If the aircraft were to then be sold to a *bona fide* purchaser, (sold in an "arms length" transaction to one who reasonably has no knowledge as to the source of the funds used by the seller), the government would be statutorily prohibited from forfeiting the aircraft criminally under § 982.

(3) Criminal Forfeiture – 21 U.S.C. § 853

A person convicted of an applicable violation of Title 21, which is punishable by imprisonment of more than one year, shall forfeit to the United States: (1) any property constituting, derived from or proceeds of (directly or indirectly) such

35 Craig Gaumer, "Criminal Forfeiture," *United States Attorneys' Bulletin, Vol. 55, No. 6*, (U.S. Dep't of Justice, Executive Office of U.S. Attorneys) Nov., 2007, at 22. See also, *United States v. Razmilovic*, 419 F.3d 134, 136 (2d Cir. 2005).
36 See 18 U.S.C. § 982(a) for a complete list of applicable violations.
37 18 U.S.C. § 853(b).
38 21 U.S.C. § 853(c).

violation[39]; (2) property used or intended to be used to violate; (3) if convicted of a continuing criminal enterprise (CCE) violation under 21 U.S.C. § 848, also forfeit interest in, claims against, and property or contractual rights affording a source of control over the CCE.[40] The word "property" includes: (1) real property, including things growing upon it and fixtures, and (2) tangible and intangible personal property.[41]

As in the case with civil declarations of forfeiture, once declared forfeit, title to property vests in the government as of the date of the violation. Property transferred to a *bona fide* purchaser (BFP) subsequent to the criminal act, however, although subject to a special verdict of forfeiture, shall be returned if the BFP establishes at the ancillary proceeding that he was reasonably without cause to believe the property was subject to forfeiture at the time of his purchase.[42]

Also, certain property of a person convicted of a felony under applicable provisions of Title 21 may be forfeitable if the government establishes by a preponderance of the evidence that (1) the property was acquired during the violation or a reasonable time thereafter; and (2) there was no likely source of the property other than violations.[43]

Title 21 U.S.C. § 853 authorizes a court to order a defendant to repatriate any property subject to forfeiture to the United States.[44] Failure to comply with a repatriation order imposed either as part of the pre-trial restraining order or as part of his sentence, can lead to increased sentences under the obstruction of justice provisions of the sentencing guidelines or by holding the defendant in contempt of court.[45]

(4) Substitute Assets

In RICO[46], drug, money laundering, Customs fraud and smuggling prosecutions, property other than that actually used in or derived from the criminal activity may be forfeited under certain circumstances.[47]

39 *See*, *e.g., United States v. Betancourt*, 422 F.3d 240 (5th Cir. 2005) (defendant purchased lottery ticket with drug proceeds and, therefore, his lottery winnings were derived from his illegal activities; no violation of 8th Amendment excessive fines clause to forfeit all of winnings).
40 21 U.S.C. § 853(a).
41 21 U.S.C. § 853(b).
42 21 U.S.C. § 853(c).
43 21 U.S.C. § 853(d).
44 21 U.S.C. §§ 853(e)(4) and (p)(3).
45 21 U.S.C. § 853(e)(4).
46 *Racketeer Influenced and Corrupt Organizations* Act, 18 U.S.C. § 1963.
47 *See* 18 U.S.C. § 982 and 21 U.S.C. 853.

These "substitute assets," (*i.e.*, property of a defendant not otherwise subject to seizure and forfeiture), may be forfeited if the defendant, by any act or omission, causes or renders other property subject to forfeiture to be unavailable for seizure for any of the following reasons:[48]

- The property subject to forfeiture cannot be located upon the exercise of due diligence;
- The property subject to forfeiture was transferred or sold to, or deposited with, a third party;
- The property subject to forfeiture was placed beyond the jurisdiction of the court;
- The property subject to forfeiture was substantially diminished in value; or
- The property subject to forfeiture was commingled with other property that cannot be divided without difficulty.

Upon a proper showing, the court shall order the forfeiture of other property of the defendant up to the value of the property rendered unavailable for any of the above reasons.[49]

The practical benefit of the substitute assets provision is that the government can, in effect, obtain a general judgment against the defendant. It is important, therefore, to identify the *value* of all property involved in prohibited drug, money laundering or RICO violations, so that if such property, or any of it, is unavailable for forfeiture upon conviction, a judgment for substitute assets, both current and future, in an equivalent amount can be obtained. In many states, filing this judgment of record entitles the government to execute on property located or acquired by the defendant for the next twenty years.

Substitute assets of a money laundering defendant, however, may not be forfeited if the defendant acted only as an intermediary who merely handled and did not retain the property involved in the money laundering transaction. A useful "exception to the exception" exists, however, if the defendant conducted three or more separate transactions as an intermediary that involved an aggregate of at least $100,000 in any twelve-month period.[50]

(5) Pre-conviction seizures

In criminal forfeitures pursuant to RICO,[51] the drug and money laundering statutes[52] and other laws that incorporate 21 U.S.C. § 853 by reference, a court may issue such orders as necessary to preserve the availability of the property for forfeiture. Such orders may include: (1) restraining orders or injunctions, (2)

48 21 U.S.C. § 853(p).
49 *Id.*
50 18 U.S.C. § 982 (b)(2).
51 18 U.S.C. § 1963(d).
52 21 U.S.C. § 853(e); 18 U.S.C. § 982(b)(1).

requirements of a defendant or others to execute a performance bond, or (3) such other mandates as the court may deem necessary to ensure preservation of the property.[53]

If such orders are sought before the actual filing of an indictment or information, then all persons who appear to have an interest in the property must be given notice and an opportunity for a hearing. At the hearing, the court must determine that there is a substantial likelihood that the government will prevail on the forfeiture issue and that the order is necessary to prevent the destruction, removal or other dissipation of the property that would make it unavailable for forfeiture. Furthermore, the court must find that the need to preserve the property outweighs any hardship upon any party against whom the order would be entered.[54]

From a practical perspective, two issues exist with seeking a protective order before indictment. First, the government will be required to disclose in an adversarial proceeding as much of its case to establish the forfeiture as is necessary to obtain the order. The implications of this and any potential impact on the subsequent trial of the defendant should be considered carefully in weighing the merits of seeking pre-indictment protective orders. Second, such protective orders are effective for only 90 days unless extended for good cause shown or an indictment or information has been filed.[55]

The impact of the foregoing requirement for notice and hearing may be lessened somewhat by seeking a temporary restraining order (TRO). A TRO may be obtained *ex parte*[56] when the government can demonstrate probable cause to believe that the property in question would be subject to forfeiture upon conviction and that notice will jeopardize the availability of the property for forfeiture. The downside is that a TRO may not be entered for a period longer than fourteen (14) days unless extended by good cause shown. Moreover, a party has a right to an adversarial hearing to dissolve any TRO entered.[57]

The hearing and determination, described in the pre-indictment procedures above, are not required for a protective order or a TRO once an indictment or information is filed with a forfeiture count for the property to be protected.[58] Thus, if an application for a TRO is made within 10 days of an anticipated indictment, the adversarial hearing noted above may be avoided.

An exception to the general rule against pre-conviction seizures exists where the government establishes probable cause to believe that the property would be

53 21 U.S.C. § 853(e)(1).
54 21 U.S.C. § 853(e)(1)(B).
55 *Id.*
56 *Ex parte* includes any procedure done by one party, for the benefit of one party, and typically without notice to any other interested parties in the matter.
57 21 U.S.C. § 853(e)(2).
58 21 U.S.C. § 853(e)(1)(A).

subject to forfeiture upon conviction and that a protective order may not be sufficient to assure the availability of the property for forfeiture following conviction. In such an event, a court "shall" issue a warrant authorizing the seizure of the property.[59] The procedure to follow for such an order is that prescribed for search warrants under Rule 41 of the *Federal Rules of Criminal Procedure.*

The circuits are split on the issue of whether substitute assets are subject to the foregoing provisions for pre-conviction seizures. The Second, Third, Fifth, Eighth and Ninth circuits hold that pre-conviction seizures are unavailable for substitute assets because 21 U.S.C. § 853(e) specifically states that the procedure is available for "property described in subsection (a)" whereas substitute assets are described in subsection (p) of § 853. [60] This reasoning would seem to apply as well to forfeitures pursuant to 18 U.S.C. § 982 (Criminal Forfeiture) since this section incorporates by reference the forfeiture of substitute assets provision in 21 U.S.C. § 853.

Currently, only the Fourth Circuit permits pre-conviction seizures of substitute assets.[61] The Seventh Circuit, however, without addressing the merits of the issue, has acknowledged with apparent approval a district court's pre-conviction seizures of substitute assets under 18 U.S.C. § 982.[62]

(6) Proving Criminal Forfeitures

Property to be forfeited in a criminal action must be described in the indictment or information and a connection with the criminal conduct must be established.[63] The government must prove not only that the defendant is guilty of the crime but also that the property named is subject to forfeiture. As with any criminal case, the exclusionary rule applies.[64]

Although the Supreme Court has yet to directly rule on the appropriate standard for criminal forfeitures, it nonetheless observed in *Libretti v. United States*[65] that criminal forfeitures under the drug and racketeering statutes are elements of sentencing, and, therefore, impact punishment, not guilt. It would seem to

59 21 U.S.C. § 853(f).
60 *United States v. Gotti*, 155 F.3d 144 (2d Cir. 1998); *United States v. Field*, 62 F.3d 246 (8th Cir. 1995) (§ 982); *United States v. Ripinsky*, 20 F.3d 359 (9th Cir. 1994) (§ 982); *In re Assets of Martin*, 1 F.3d 1351 (3d Cir. 1993) (RICO); *United States v. Floyd*, 992 F.2d 498 (5th Cir. 1993) (§ 853).
61 *United States v. Farmar,* 274 F.3d 800 (4th Cir. 2001).
62 *United States v. Strang*, 80 F.3d 1214 (7th Cir. 1996). See also, *United States v. Kirschenbaum,* 156 F.3d 784 (7th Cir. 1998); *United States v. Scardino*, 956 F.Supp. 774 (N.D. Ill. 1997).
63 28 U.S.C. § 2461.
64 *See* Chapter 2, *Search and Seizure*, for more information on the exclusionary rule.
65 *Libretti v. United States*, 516 U.S. 29 (1995).

follow that the appropriate standard should be a preponderance of the evidence. Thus, after a criminal conviction the government would have to prove a causal connection between the forfeited property and the criminal violation by a preponderance of the evidence. Indeed, all circuits addressing this issue after *Libretti* have held, at least with respect to 21 U.S.C. § 853, that the standard of proof required to establish a criminal forfeiture following conviction is a preponderance of the evidence. The circuits so holding are the D.C., Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth and Eleventh.[66]

In addition, the Third and Eighth Circuits have held that the same reasoning applies to forfeitures under 18 U.S.C. § 982.[67] The Third Circuit, contrary to its determination under § 853 and § 982, has held that the standard for RICO forfeitures is beyond a reasonable doubt.[68] Finally, at least two circuit courts to date have held that RICO forfeitures may be established by a preponderance of evidence.[69]

Prior to the amendment of RICO and the drug and money laundering forfeiture statutes to provide for substitute assets, several courts had held that where criminal proceeds had been commingled with untainted property or funds, it was unnecessary for the government to trace the property sought to be forfeited to a tainted source.[70] The "logic" of these cases was that Congress could not have meant what it said in providing for criminal forfeiture of property "traceable to" the illegal act, since crooks could then avoid forfeiture through clever commingling.

With the advent of the substitute assets provision, however, this "logic" has been rendered moot. Since the statute plainly requires tracing and substitute assets now may be forfeited where tracing is frustrated by an act or omission of the defendant, the need to protect the government from clever commingling seems to have evaporated.[71] Thus, although these older cases may not have been

66 *United States v. DeFries*, 129 F.3d 1293, 1312 (D.C.Cir. 1997); *United States v. Tanner*, 61 F.3d 231, 234-235 (4th Cir. 1995); *United States v. Bieri*, 21 F.3d 819 (8th Cir. 1994); *United States v. Elgersma*, 971 F.2d 690 (11th Cir. 1992); *United States v. Smith*, 966 F.2d 1045, 1050-1053 (6th Cir. 1992); *United States v. Patel*, 131 F.3d 1195, 1200 (7th Cir. 1997); *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1576-1577 (9th Cir. 1989); *United States v. Sandini*, 816 F.2d 869, 875-876 (3rd Cir. 1987); *United v. Bellomo*, 176 F.3d 580, 595 (2d Cir. 1999).

67 *United States v. Voigt*, 89 F.3d 1050 (3rd Cir. 1996); *United States v. Myers*, 21 F.3d 826, 829 (8th cir. 1994).

68 *Voigt*, at 1083; *United States v. Pelullo*, 14 F.3d 881 (3rd Cir. 1994).

69 *United States v. Corrado,* 227 F.3d 543 (6th Cir. 2000); *United States v. DeFries*, 129 F.3d 1293 (D.C. Cir. 1997).

70 *See* generally, *United Stats v. Robilotto*, 828 F.2d 940 (2d Cir. 1987); *United States v. Ginsburg*, 773 F.2d 798 (7th Cir. 1985); *United States v. Conner*, 752 F.2d 566 (11th Cir. 1985).

71 *See, e.g.*, *United States v. Gotti*, 155 F.3d 144 (2d Cir. 1998).

explicitly overruled, the reasoning behind them has been undermined. The prudent investigator, therefore, will trace to the fullest extent possible to ensure the viability of both the criminal prosecution and subsequent forfeiture.[72]

In drug prosecutions, the government may establish a rebuttable presumption that certain property is subject to forfeiture.[73] Although unable to trace the acquisition of a particular piece of property to proceeds of drug transactions, the government may offer proof that the property was acquired during the time in which drug transactions occurred, or shortly thereafter, and also show that there is no other likely source for the acquisition but drug proceeds.[74] If the defendant fails to offer proof sufficient to rebut the resulting presumption of forfeitability by a preponderance of the evidence, then the jury may return a verdict of forfeiture.[75]

(7) Forfeiture Judgment

Once the jury returns its special verdict of forfeiture in a given case, the court may immediately issue a preliminary order of forfeiture.[76] This permits the government to seize the property and to hold the ancillary proceeding (described below) before the defendant is sentenced.

(8) Ancillary Proceeding

An ancillary proceeding is a proceeding in which interested parties can present such claims as they might have with respect to property subject to the preliminary judgment of criminal forfeiture. After hearing all the claims and evidence bearing upon the truth of those claims, the court may then enter its final judgment of forfeiture against the property deemed forfeitable to the United States.[77]

(9) Defenses to Criminal Forfeiture

A third party who wishes to challenge a criminal forfeiture may do so based on the fact that the third party is the true owner of an interest in all or part of the property. The third party may make this claim based on one of two categories set forth in statute[78]:

72 *See*, *e.g.*, *United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997).
73 21 U.S.C. § 853.
74 *See*, *.e.g., United States v. $30,670,* 403 F.3d 448 (7th Cir. 2005) (trained canine alert entitled to probative value in connecting seized currency to illegal narcotics activity).
75 21 U.S.C. § 853(d).
76 Fed. R. Crim. P. 32.3(b)(2).
77 21 U.S.C. § 853(n).
78 *See* 18 U.S.C. § 1963(l)(6) or 21 U.S.C. § 853(n)(6).

- The third party holds a superior interest to that of the convicted defendant and the third party interest vested prior to the crime subjecting the property to forfeiture; or
- The third party is a bona fide purchaser for value who had no knowledge that the property was subject to forfeiture.[79]

(10) Fugitive Disentitlement Doctrine

A person who is in a fugitive status in a criminal case cannot contest the civil forfeiture of his property in a related forfeiture case.[80] CAFRA (Civil Asset Forfeiture Reform Act) identified five prerequisites that, when present, indicate a court may disallow a fugitive from using federal judicial resources to recover property sought for forfeiture: (1) A warrant or process has been issued for the fugitive in a criminal prosecution; (2) The fugitive has knowledge/notice of such warrant or process; (3) The civil forfeiture is related to the criminal prosecution; (4) With knowledge and intent, the fugitive leaves the United States or refuses to enter the United States and does so in order to evade criminal prosecution; and (5) The fugitive is not confined or in custody which would prevent him from entering the United States.[81]

Moreover, 28 U.S.C. § 2466 provides that the fugitive disentitlement doctrine applies to claims filed by corporations "if any majority shareholder, or individual filing the claim on behalf of the corporation" is otherwise disqualified from contesting forfeiture.[82] Furthermore, the disentitlement doctrine applies to those individuals who do not actually flee, but choose to remain outside the United States as long as the claimant has adequate notice to the forfeiture proceeding and is not barred from entering the United States.[83]

(11) Other Criminal Forfeiture Statutes

Congress has enacted many criminal forfeiture statutes. The following are pertinent examples:

- 18 U.S.C. § 1963 - Criminal penalties; *The Racketeer Influenced and Corrupt Organizations Act* (RICO)
- 18 U.S.C. § 2318 -Trafficking in counterfeit labels, illicit labels, or counterfeit documentation or packaging

79 Craig Gaumer, "Criminal Forfeiture," *United States Attorneys' Bulletin, Vol. 55, No. 6,* (U.S. Dep't of Justice, Executive Office for the U.S. Attorneys) Nov. 2007, at 29.
80 28 U.S.C. § 2466.
81 *Id.;* See *United States v. One 1988 Chevrolet Cheyenne Half-ton Pickup Truck et al.*, 357 F.Supp.2d 1321 (S.D.Ala. 2005) (court found all five factors present and that fugitive disentitlement applied to defendant who was a fugitive in Mexico).
82 28 U.S.C. § 2466(b).
83 *Collazos v. United States*, 368 F.3d 190 (2d Cir. 2004).

- 18 U.S.C. § 2319A - Unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances
- 18 U.S.C. § 2253 - Criminal forfeiture; Sexual exploitation and other abuse of children
- 21 U.S.C. § 848 - Continuing Criminal Enterprise; The *Controlled Substances Act*

In addition, criminal forfeiture may be imposed in any criminal case where the associated acts would support a civil forfeiture of the property involved with those acts.[84]

15.014c Civil versus Criminal Forfeiture

"The best way to appreciate the differences between civil and criminal forfeiture ... may be to run through the checklist of tactical considerations that a federal prosecutor takes into account when deciding whether to pursue the forfeiture civilly or criminally. It is entirely appropriate (and commonplace) for the prosecutor to commence parallel civil and criminal cases in order to keep all options open"[85]:

Advantages of Civil Forfeiture:

- "The lower burden of proof. In a civil case, the government is only required to prove the forfeitability of the property by a preponderance of the evidence . . .
- There is no need for a criminal conviction . . . Thus, civil forfeiture is an essential tool when the government seeks to forfeit the property of fugitives, defendants who have died, or where it can prove that the property was involved in a crime, but cannot prove who the wrongdoer was. . .
- The forfeiture is not limited to property related to a particular transaction . . . [C]ivil forfeiture actions *in rem* may be brought against any property derived from either a specific offense or from a course of conduct. . .
- Forfeiting the property of third parties . . . [P]roperty belonging to third parties is not subject to criminal forfeiture. On the other hand, anyone with an interest in the property can contest a civil forfeiture. Therefore, if the government establishes the required nexus between the property and the offense in a civil forfeiture case, and it has given proper notice of the forfeiture to all interested parties, it is able to obtain a judgment of forfeiture against property regardless of who the owner of the property is."[86]

84 28 U.S.C. § 2461(c).
85 Stefan D. Cassella, "Overview of Asset Forfeiture Law in the United States," *United States Attorneys' Bulletin, Vol. 55, No. 6,* (U.S. Dep't of Justice, Executive Office for U.S. Attorneys) Nov. 2007, at 17.
86 *Id.*, at 17-18.

Disadvantages of Civil Forfeiture:

- "Filing deadlines. If property is initially seized for the purpose of civil forfeiture, the government must file its complaint against the property within ninety days of the filing of any claim contesting the administrative forfeiture proceeding. If the government fails to comply with this deadline, and no exceptions apply, [*e.g.,* customs "carve out" provisions] civil forfeiture of the property in connection with the offense for which it was seized is forever barred.
- Unless stayed by the court, a parallel civil case can interfere with a criminal investigation or trial. . .
- The forfeiture is limited to property traceable to the offense. The most serious limitation of civil forfeiture is that, as an *in rem* action, the government must prove that the defendant property is directly traceable to the underlying criminal offense. The court may not, in other words, order the forfeiture of a money judgment or substitute assets. . .
- A successful claimant is entitled to attorneys fees."[87]

Advantages of Criminal Forfeiture:

- "A single proceeding takes care of the forfeiture of the defendant's interest. . .
- The court can order the forfeiture of money judgment and/or substitute assets . . .
- There are no statutory time limits on filing an indictment following seizure of the property . . .
- Third parties have no right to recover attorney's fees."[88]

Disadvantages of Criminal Forfeiture:

- "Property of third parties cannot be forfeited in a criminal case . . . Any person who establishes that he or she was the true owner of the property at the time the crime was committed, or that acquired it later as bona fide purchaser for value, is entitled to have the forfeiture declared void in a post-trial ancillary proceeding. See 21 U.S.C. § 853(n). Most important, a third party challenging a criminal forfeiture on the ground that the property belonged to him, not to the defendant, when the crime occurred, does not have to be innocent. He or she must establish *superior* ownership, not *innocent* ownership. . .
- Bifurcation of trial and additional jury instructions and special verdicts add to the length of the criminal trial. . .
- Criminal forfeiture requires a criminal conviction . . .

87 Stefan D. Cassella, "Overview of Asset Forfeiture Law in the United States," *United States Attorneys' Bulletin, Vol. 55, No. 6,* (U.S. Dep't of Justice, Executive Office for U.S. Attorneys) Nov. 2007, at 18-19.
88 *Id.*, at 20.

- Delay in disposing property. If property is forfeited in a criminal case, it cannot be disposed of until the criminal case is over and all potential third parties have had their chance to contest the forfeiture. This may be years after the property was seized at the outset of the case."[89]

15.020 Due Process

15.021 Venue

As a general proposition, property subject to forfeiture must be seized and brought within the territorial jurisdiction of the court before the forfeiture proceedings can begin.

Although the place of seizure generally determines venue, (*i.e.*, the judicial district in which the forfeiture action can be brought), a forfeiture action also may be brought in: (1) any district into which the property is brought post-seizure, or (2) any district in which any act giving rise to the forfeiture occurred.[90] In the latter case, a court may issue such process as may be necessary to bring the property before the court where the property to be seized is in some other district.[91] This latter basis for venue is of particular value when the property subject to forfeiture is located in a foreign country.[92] In such a case, a district court may exercise *in rem* jurisdiction over the property located in a foreign country under a constructive possession theory where it has been seized for that purpose by the foreign government.[93]

After seizure under the Customs laws and for the convenience of the government, the property can be stored outside the federal district where it was seized. This does not deprive the court of jurisdiction over the forfeiture.[94] Similarly, a court is not deprived of jurisdiction, once established, if the property is sold, deposited, liquidated or otherwise converted.[95]

15.022 Immovable Property Must Be "Served"

The power to forfeit land, buildings and other immovable property belongs to the court having jurisdiction over the territory where the property is located. Immovable property is usually brought under the control of the court by affixing certain legal documents to the property in a conspicuous place and by leaving

89 *Id.*, at 20-21.
90 28 U.S.C. § 1355.
91 28 U.S.C. § 1355(d).
92 28 U.S.C. § 1355(b)(2).
93 *United States v. All Funds on Deposit,* 856 F.Supp. 759 (E.D.N.Y. 1994), *aff'd*, 63 F.3d 148 (2d Cir. 1995).
94 19 U.S.C. § 1605; *United States v. United States Currency in the Amount of $23,481.00*, 740 F.Supp. 950 (E.D.N.Y. 1990).
95 *Republic Nat'l Bank v. United States*, 506 U.S. 80 (1992).

copies with the person in control. Current procedures provide for constructive service on fugitives.[96]

The seizure of real property presents a variety of legal, valuation and property management issues (*e.g.*, whether some form of judicial approval will be required to gain entry to the property; whether seizure is cost-effective, etc.). In order to avoid these potential problems, a cost benefit analysis of real property (whether residential, commercial or industrial) should be conducted prior to seizure. Indeed, current policy mandates such pre-seizure analysis and seizing officers should be familiar with all CBP policies or directives related to the seizure of real property.[97]

15.023 Notice and Opportunity for Hearing Prior to Seizure of Real Property

Although no advance notice or opportunity to an adversary hearing is statutorily or constitutionally required prior to the seizure of personal property for forfeiture, the Supreme Court has held that Fifth Amendment due process requires notice and an opportunity to be heard prior to the deprivation of a real property interest, absent exigent circumstances.[98] Therefore, notice and a hearing are required if the government seeks possession of the property before trial. If the hearing is *ex parte*, because of exigent circumstances, there must be a prompt post-seizure hearing where the claimant can be heard. The due process notice and hearing requirements are not necessary when: (1) the government uses a restraining order, or (2) posts a notice on the property and files a notice of *lis pendens* (*i.e.*, notice that litigation is pending with respect to the property) at the commencement of the civil forfeiture proceeding because these actions are not "seizures."[99]

Where the "posting" and notice of *lis pendens* might not be adequate to protect the government's interests, a restraining order or other process may be sought to protect those interests (*e.g.*, rents due pending forfeiture, etc.). In the unusual case where such ancillary process is inadequate to protect the governmental interest and notice might trigger a loss to the property, exigent circumstances exist for which the court would permit an *ex parte* seizure.[100]

The Second Circuit has stated that exigent circumstances or extraordinary circumstances exist if:

96 18 U.S.C. § 985(c).
97 See Customs Directive 5230-013, "Pre-Seizure Analysis for Real Property," (March 1991).
98 *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 58 (1993).
99 18 U.S.C. § 985(c)*; United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 58 (1993).
100 18 U.S.C. § 985.

- Seizure was necessary to secure an important governmental or public interest,
- Very prompt action was necessary, and
- A government official initiated the seizure by applying the standards of a narrowly drawn statute.[101]

15.024 Summons in Lieu of Seizure of Commercial Fishing Vessels

Title 19 C.F.R. § 171.52(b) provides that where a commercial fishing vessel, as defined in 19 C.F.R. § 171.51(b)(2), is proceeding to or from a fishing area or is engaged in fishing operations and is subject to forfeiture for a violation involving personal use quantities of controlled substances, a summons to appear must be issued in lieu of a physical seizure. "Personal use" quantities, as defined in 19 C.F.R. § 171.51(b)(6), generally means there is no evidence of an intent to distribute.

15.025 Seizure of Foreign Flag Vessels

Seizures of foreign flag vessels on the high seas (beyond the 12 mile limit of the Customs waters) involve questions of international law, treaties, bilateral agreements and special arrangements. The United States only acquires jurisdiction for forfeiture purposes if certain conditions are met.[102] Requests from other agencies for CBP to participate in these types of seizures are coordinated by the Associate Chief Counsel (Enforcement) at CBP Headquarters.

15.026 The Exclusionary Rule and Civil Forfeiture

Evidence obtained in violation of the Constitution may not be used for any evidentiary purpose in a civil forfeiture whether to establish probable cause for the institution of the proceeding or otherwise.[103]

On the other hand, the forfeiture proceeding will not be defeated merely because the government came into possession of the property to be forfeited illegally.[104] This is the same principle that grants a court jurisdiction over a criminal defendant even if the defendant is unreasonably seized. The case may be presented, therefore, where the government seeks forfeiture of property that was seized illegally, but the evidence for forfeiture was lawfully obtained. In such a case, the exclusionary rule would not preclude the forfeiture proceeding, *per se*.[105]

101 *United States v. 141st Street Corp.*, 911 F.2d 870 (2d Cir. 1990); *United States v. 1184 Drycreek Road*, 174 F.3d 720 (6th Cir. 1999).
102 See Chapter 3, *Border Search Authority*, regarding the seizure of vessels.
103 *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693 (1965); *United States v. 500 Delaware Street*, 113 F.3d 310 (2d Cir. 1997).
104 *United States v. Jeffers*, 342 U.S. 48 (1951); *United States v. One 1974 Learjet 24D*, 191 F.3d 668 (6th Cir. 1999).
105 Fed. R. Civ. P. (Supp. R.G(8)(a), 2007).

The forfeitability of an unlawfully seized object notwithstanding, unreasonable seizures of property could nonetheless subject the seizing officers to civil liability. CBP officers and agents should not knowingly seize forfeitable property in violation of the Fourth Amendment.

15.100 CAFRA Procedural Requirements

(NOTE: The procedures discussed in this section, 15.100 *et seq*, do not apply to forfeiture commenced under the "customs carve out" provisions of CAFRA. For those procedures see section 15.200 *et seq*.)

15.110 CAFRA Processing

CAFRA (Civil Asset Forfeiture Reform Act) amended the forfeiture procedures applicable to many statutes enforced by CBP.[106] For example, CAFRA procedures now apply to money laundering offenses under 18 U.S.C. §§ 1956 and 1957, CMIR offenses under Title 31 and smuggling offenses under 18 U.S.C. § 545. For the statutes within its reach, CAFRA revised civil forfeiture practice by enacting new burdens and time limits on the Government, allowing claimants to recover interest and attorneys' fees, resolving ambiguities in forfeiture law that had split the circuits, and by giving the government new procedural tools.[107]

Under CAFRA, two new statutes – 18 U.S.C. §§ 983 and 985 – replace any inconsistent prior civil forfeiture provisions. For example, 19 U.S.C. § 1615 provides that the burden of proof is on the property owner, but 18 U.S.C. § 983(c) provides that the burden of proof in CAFRA forfeitures is on the government. Similarly, 19 U.S.C. § 1608 requires that a claimant of property subject to administrative forfeiture must file a cost bond in order to force the property into judicial forfeiture. In CAFRA forfeitures, however, no bond is required to affect the transfer.[108] Conversely, 19 U.S.C. §§ 1607 and 1609 provide that certain property having a value below $500,000 can be administratively forfeited. Statute 18 U.S.C. § 983(c) is silent on that point, so 19 U.S.C. §§ 1607 and 1609 set the rule. Similarly, the pleading provisions of the *Federal Rules of Civil Procedure, Supplemental Rules for Admiralty or Maritime and Asset Forfeiture Claims* govern all civil judicial forfeiture cases, unless they are inconsistent with 18 U.S.C. §§ 983 and 985. The Supplemental Rules procedures relating to venue, seizure, stays and equitable sharing apply throughout because there is nothing therein inconsistent with CAFRA.

106 "The Civil Asset Forfeiture Reform Act of 2000: Summary and Reference Materials," (U.S. Customs Serv., Office of Chief Counsel, Assoc. Chief Counsel (Enforcement)), June 2000.
107 18 U.S.C. §§ 981, 983, 985.
108 18 U.S.C. § 983(a)(2)(E).

Any dispute in the circuits with regard to Customs forfeitures concerning warrantless seizures of property has been settled for CAFRA forfeitures. A federal warrant supported by probable cause is required to seize property unless one of two conditions exists: (1) the seizure is made pursuant to a lawful arrest or other clearly recognized exception to the warrant requirement, or (2) the property is lawfully seized by a state or local agency and transferred to a federal agency.[109] For CBP, most seizures will be made in a public place which is a recognized exception to the warrant requirement. Thus, most CBP seizures will not require seizure warrants.

Only a warrant issued pursuant to the *Federal Rules of Criminal Procedure* or a warrant of arrest *in rem* issued under the Federal *Rules of Civil Procedure, Supplemental Rules for Admiralty or Maritime and Asset Forfeiture Claims* will suffice when a warrant is required.[110]

Venue for drug and money laundering forfeitures will be in the district where the criminal defendant owning the property is found or the criminal proceeding is brought.[111] A district court vested with proper venue and jurisdiction may exercise *in rem* jurisdiction over property in a foreign country. To exercise this "constructive possession" theory, the foreign government must have seized the property for this purpose.[112] In addition, the government can freeze for 30 days the assets of persons arrested abroad in connection with an offense that would give rise to the forfeiture of property in the United States.[113]

The statute of limitations under CAFRA for any civil forfeiture where the authorizing statute does not incorporate the provisions of the Customs laws is governed by 28 U.S.C. § 2462. Under that section, the five-year time begins to run as soon as the property becomes subject to forfeiture. The statute is tolled only if the property is not within the United States. Otherwise, the applicable period is calculated in the same way as with Customs forfeitures under 19 U.S.C. § 1621.

15.120 Section 983 Procedures

15.121 983(a) Notice and Claims

In general, the government must send a notice of the administrative forfeiture to interested persons within 60 days of the seizure of the property, or 90 days after the date of seizure in cases where a seizure by state or local officers is adopted. Supervisors at the headquarters office of the seizing agency may grant one 30-

109 18 U.S.C. § 981(b).
110 18 U.S.C. § 981(b)(2)(A); Fed. R. Civ. P. (Supp. R.G(3), 2007).
111 18 U.S.C. § 981(h); 21 U.S.C. § 881(j).
112 *United States v. All Funds on Deposit,* 856 F.Supp. 759 (E.D.N.Y. 1994), *aff'd*, 63 F.3d 148 (2d Cir. 1995).
113 18 U.S.C. § 981(b)(4)(A) and (B).

day extension.[114] A judge or magistrate may grant further extensions for good cause.[115] The government must release the property if it fails to give the required notice (without prejudice to commence a forfeiture proceeding at a later time), provided the property is not contraband or other property that is illegal to possess.[116] Notice is legally sufficient if it is reasonably calculated, under all the circumstances, to apprise interested parties of pending forfeiture proceedings.[117]

There are a few exceptions to the CAFRA 60 day notice requirement specifically listed in the statute. These exceptions occur when:

- The government files a civil judicial forfeiture action against the property and provides notice of that action before the 60-day notice period expires.[118]

- The government obtains a criminal indictment containing an allegation that the property is subject to forfeiture before the 60-day notice period expires.[119]

- The seizure was first made by state or local authorities and is adopted by CBP. In such a case the notice of seizure must be issued within 90 days of seizure by the state/local authorities (not within 90 days from referral or adoption).[120]

- The identity or interest of a claimant is not determined until after the seizure but is determined before forfeiture is complete. In that instance CBP will have 60 days from the date that the identity or interest is determined to issue a timely notice.[121]

- The circumstances are such that the Assistant Secretary, Immigration and Customs Enforcement or the Commissioner of Custom and Border Protection (for cases within their respective agencies), or their successors or designees extends the time by issuing a one time administrative extension for 30 days (i.e., from 60 to 90 days from the date of seizure, based on investigative interests). A copy of the 30 day extension will be forwarded to the Fines Penalties & Forfeiture Office (FP&FO) and if applicable, the AUSA. Further extensions require court orders. See generally 19 C.F.R. 162.92(d).[122]

114 18 U.S.C. § 983(a)(1)(B).
115 18 U.S.C. § 983(a)(1)(C).
116 18 U.S.C. § 983(a)(1)(F).
117 *Foehl v. United States*, 238 F.3d 474 (3rd Cir. 2001).
118 18 U.S.C. § 983(a)(1)(A)(ii).
119 18 U.S.C. § 983(a)(1)(A)(iii).
120 18 U.S.C. § 983(a)(1)(A)(iv).
121 18 U.S.C. § 983(a)(1)(A)(v).
122 18 U.S.C. § 983(a)(1)(B).

- A court order is obtained after certification as described above that allows for issuance of the notice of seizure beyond the 60 days (or 90 days with administrative extension factored in). Coordination with the Associate/Assistant Chief Counsel is critical here. Notification will be made to the FP&FO and AUSA of any extensions obtained.[123]

The claimant has 35 days after the date of the mailing of the government's notice to file a claim, or no later than 30 days after the date of final publication of the notice of seizure if the government's notice letter is not received.[124] The claim is made under penalty of perjury and must identify the specific property and state the claimant's interest.[125] The claimant must also have *standing* to contest the forfeiture.[126]

A court can bar or dismiss claims in two situations: (1) claims by fugitives who purposely leave or otherwise evade the jurisdiction of the court, in any related civil forfeiture action or criminal third party proceedings[127] and; (2) claims where the claimant refuses to waive his rights under applicable financial secrecy laws or to produce material records in a foreign bank secrecy jurisdiction, unless the right of the claimant to refuse production is based on a statutory or constitutional privilege.[128]

The government has 90 days after a claim is filed to file a civil forfeiture complaint and/or to obtain a criminal indictment that includes a forfeiture count.[129] The 90 days may be extended by a court for good cause[130], or by

123 18 U.S.C. § 983(a)(1)(C).
124 Fed. R. Civ. P. (Supp. R.G(5), 2007).
125 18 U.S.C. § 983(a)(2).
126 *See e.g., Via Mat Int'l v. United States*, 446 F.3d 1258 (11th Cir. 2006) (claimant, a bailee who was in possession of the seized currency and who suffered injury by its seizure, had standing to challenge). See also, Fed. R. Civ. P. (Supp. R.G(8)(c), 2007), on government's procedure to challenge claimant's standing.
127 28 U.S.C. § 2466.
128 18 U.S.C. § 986.
129 18 U.S.C. § 983(a)(3)(A); See *e.g. Via Mat Int'l v. United States*, 446 F.3d 1258 (11th Cir. 2006) (bailee received notice and made a claim against the currency; government settled with bailor and did not begin forfeiture proceedings within the 90 days, violating the requirements of CAFRA).
130 18 U.S.C. § 983(a)(3)(A); See *e.g., Hammoud v. Woodward*, 2006 U.S. Dist. Lexis 10248, where plaintiff was informed of CBP's intent to forfeit seized currency from a money transmitter. Plaintiff gave timely notice to refer the matter for judicial forfeiture. CBP did not proceed on the claim under the belief that the plaintiff did not have standing. The court found that the government may not decide on its own who does or does not have standing, but the mistake was a "good faith" mistake by CBP and that was "good cause" for an extension of the time for the filing of the judicial complaint.

agreement of the parties.[131] If the government fails to either file the civil complaint (or return the property) within the 90 days, the property must be released pursuant to regulations promulgated by the Attorney General, and the government faces forfeiture "death penalty," *i.e.*, the government "may not take any further action to effect the civil forfeiture of such property in connection with the underlying offense."[132] The government is not precluded from seizing and forfeiting the property based on a new offense, or from initiating criminal forfeiture for the same underlying offense.[133]

For situations where no notice is received, refer to 15.125.

15.122 983(b) Right to Counsel

In all CAFRA forfeitures, a claimant is entitled to court appointed counsel. Criminal defendants may use court appointed counsel in civil forfeiture cases. The court may also appoint the Legal Services Corporation to represent indigent people whose primary residence is subject to forfeiture,[134] and if the claimant "substantially prevails," the government is liable for fees and costs.[135] The government is not liable for fees and costs, however, if the claimant is convicted of a crime involving property subject to criminal forfeiture.[136]

15.123 983(c) Burden of Proof

Here, unlike either Customs or "anti-terrorist" forfeitures,[137] the burden of proof is on the government to establish by admissible preponderant evidence that the property is subject to forfeiture.[138] When the government files its forfeiture complaint, the complaint must include sufficient facts to reasonably establish

131 18 U.S.C. § 983(a)(3)(A). For CBP, this often occurs when a claimant "elects" to pursue administrative remission or mitigation of the seizure in lieu of judicial forfeiture proceedings. See 19 C.F.R. Part 171.
132 18 U.S.C. § 983(a)(3)(B)(ii)(II).
133 18 U.S.C. § 983(a)(3)(B).
134 18 U.S.C. § 983(b)(2)(A).
135 28 U.S.C. § 2465(b).
136 28 U.S.C. § 2465(b)(2)(B).
137 18 U.S.C. § 981(a)(1)(G).
138 18 U.S.C. § 983(c)(1); Many forfeiture cases were decided prior to the passage of CAFRA. In these cases, the government's burden of proof was probable cause. *See United States v. $242,484.00*, 389 F.3d 1149 (11th Cir. 2004). *United States v. Lopez-Buros ($219,860 in U.S. Currency)*, 435 F.3d 1 (1st Cir. 2006), where the lower courts dismissed the forfeiture action after claimant argued (based on previous circuit case law) that the government did not establish the grounds for forfeiture by "probable cause." The First Circuit reversed the lower courts finding that CAFRA applied and that the government no longer needed to establish the basis for forfeiture by "probable cause."

that the government can meet its burden of proof at trial. The government may develop proof for forfeiture during pretrial discovery.[139]

If the government's theory of forfeiture is "facilitation," *i.e.*, that the property was used to commit or facilitate the commission of a criminal offense, the government must also establish that there was a substantial connection between the property and the offense.[140]

15.124 983(d) Innocent Owners

Where property interests are held jointly, consideration of the innocence of one of the owners must be factored into the forfeiture outcome.[141] For example, where a husband and wife jointly own property used for an illegal purpose by one spouse and the other spouse is able to establish innocent ownership, the outcome of the forfeiture depends on how title to the property is held.

Joint Tenants[142], Tenants in Common[143] and Tenants by the Entireties[144]: Federal law provides for three possible outcomes when property subject to civil forfeiture is held by either joint tenancy, tenancy in common, or tenancy by the entirety. In such a situation, a court can[145]:

- Sever the property;
- Transfer the property to the government, with compensation to an innocent owner to the extent of their interest in the property;
- Permit the innocent owner to retain the property subject to a lien in favor of the government to the extent of the forfeitable interest in the property.

All but nine states recognize this kind of indivisible interest. The nine states that do not recognize this type of interest in property are considered to be "community property" states.

139 Fed. R. Civ. P. (Supp. R.G(2), 2007).
140 18 U.S.C. § 983(c)(3).
141 18 U.S.C. § 983(d).
142 "Type of ownership of real or personal property by two or more persons in which each owns an undivided interest in the whole" property. *Black's Law Dictionary, 6th Ed.*, "Tenancy: Joint Tenancy," p. 1465.
143 "A form of ownership whereby each tenant (*i.e.* owner) holds an undivided interest in property." *Id.*, "Tenancy: Tenancy in common."
144 "A tenancy which is created between a husband and wife and by which together they hold title to the whole with right of survivorship so that, upon death of either, other takes whole." *Id.,* "Tenancy: Tenancy by the entirety.
145 18 U.S.C. § 983(d)(5).

Community Property[146]: Community property states are: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin. These community property states create a different result for innocent owner questions. For example, community property in Louisiana may be forfeited because Louisiana law allows for division and forfeiture of community property.[147] If a question of innocent owner arises in one of these states, consultation with Chief Counsel in order to examine state laws will be imperative.

The uniform innocent owner defense in Section 983(d) of CAFRA applies to all CAFRA civil forfeitures. Thus, under CAFRA, there is now an innocent owner defense to forfeitures brought under statutes that never contained an innocent owner defense before, such as 18 U.S.C. § 545 (smuggling); and 31 U.S.C. § 5317(c) (CMIR offenses). Moreover, the definition of innocent owner under Section 983(d) replaces all of the older innocent owner statutes that variously defined innocent ownership in terms of lack of knowledge [18 U.S.C. § 981(a)(2)], lack of knowledge or consent [21 U.S.C. §§ 881(a)(6) and (7)], or lack of knowledge, consent, or willful blindness [21 U.S.C. § 881(a)(4)]. The definition of innocent owner under § 983(d) also replaces the innocent owner provisions of 18 U.S.C. § 2254(a)(2) and (3) (child pornography).[148]

CAFRA defines owner to include "a person with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest."[149] CAFRA specifically excludes general, unsecured creditors[150], bailees (unless the bailor is identified and the bailee shows a legitimate interest in the property), nominees who exercise no dominion or control over the property and person asserting ownership over "contraband or other property that it is illegal to possess.[151]

The innocent owner defense, then, may be advanced by "owners" who:

146 "Property owned in common by husband and wife each having an undivided one-half interest by reason of their marital status." *Black's*, "Community Property," p. 280.

147 *United States v. South 23.19 Acres of Land*, 694 F. Supp. 1252 (E.D. La. 1988).

148 18 U.S.C. § 983(d).

149 18 U.S.C. § 983(d)(6).

150 *See United States v. $61,483.00 in United States Currency*, 2003 U.S. Dist. Lexis 4614 (W.D. Tex. 2003) (general, unsecured creditors are not "owners" as defined by statute).

151 18 U.S.C. § 983(d)(4); See *United States v. 144,774 Pounds of Blue King Crab*, 410 F.3d 1131 (9th Cir. 2005) (crab that was taken in violation of Russian law is "property that it is illegal to possess" and no innocent owner defense is available).

- Had an interest in the property at the time the crime giving rise to the forfeiture occurred ("owners at the time"),[152] or
- Acquired their interest after the crime, giving rise to the forfeiture occurred and the property has become subject to forfeiture ("post-illegal act transferees").[153]

A claimant who held an interest in the forfeitable property at the time of the offense must show:[154]

- No knowledge of the conduct giving rise to the forfeiture[155]; or
- That upon learning of the conduct that would give rise to the forfeiture, he/she took all reasonable steps to stop the illegal use of the property.[156]

The statute makes clear that calling the police is not enough and is only one-half of the requirements. The innocent owner must also do "all that could reasonably be expected" to curtail the activity giving rise to the forfeiture.[157] However, the innocent owner "is not required … to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger."[158]

A person who acquires property after the offense that gave rise to the forfeiture ("post-illegal act transferee") must be a *bona fide* purchaser (BFP) for value, and must be reasonably without cause to believe that the property was subject to forfeiture. In other words, a post-illegal act transferee must show that he was:[159]

- A *bona fide* purchaser for value and
- Did not know and did not have reason to believe the property was subject to forfeiture at the time of the purchase.

152 18 U.S.C. § 983(d)(2)(A).
153 18 U.S.C. § 983(d)(3)(A).
154 18 U.S.C. §§ 983(d)(2)(A)(i) and (ii)
155 *See e.g., United States v. Six Negotiable Checks*, 389 F.Supp.2d 813 (E.D. Mich. 2005) (defendant's claim that he was not aware that wife would fail to report checks being taken out of the country (CMIR violation) was not credible based on facts of the case).
156 "Examples are that the claimant gave timely notice to an appropriate law enforcement agency of information that an offense leading to forfeiture would be committed or had occurred, or attempted to revoke permission from those engaged in the illegal conduct, or took reasonable actions in consultation with the law enforcement agency." From, "The Civil Asset Forfeiture Reform Act of 2000: Summary and Reference Materials," (U.S. Customs Serv., Office of Chief Counsel, Assoc. Chief Counsel (Enforcement)), June 2000, at 4, note 4.
157 18 U.S.C. § 983(d)(2)(B)(i).
158 18 U.S.C. § 983(d)(2)(B)(ii).
159 18 U.S.C. §§ 983(d)(3)(A)(i) and (ii).

For example, children who receive property as gifts, spouses who acquire an interest under marital property law, judgment creditors who file judgment liens on the property, and banks that take a set-off against a bank deposit would fail the BFP requirement because they gave nothing of value for the property. On the other hand, a person who buys property in an arms length transaction, or acquires a lien in exchange for a loan, or who accepts forfeitable cash for valuable goods or services without having any reason to know that the property is subject to forfeiture would qualify as a BFP.

The BFP requirement is waived for those who receive property through marriage, divorce, legal separation, or inheritance if (1) the property is the primary residence of the claimant, (2) the claimant could not otherwise maintain reasonable shelter in the community for the claimant and all dependants residing with the claimant, and (3) the property is not, nor traceable to, the proceeds of any criminal offense or contraband.[160]

15.125 983(e) Set-Asides

A claimant "who did not receive notice of seizure has five years after the date of final publication of notice of seizure to challenge the forfeiture.[161] The court may set aside the forfeiture and order that the property (or value of the property) be returned to the claimant without prejudice to the government to commence another forfeiture proceeding as to that claimant's interest."[162] The claimant must show that he has *standing* to challenge the forfeiture.[163]

160 18 U.S.C. § 983(d)(3)(B).

161 18 U.S.C. § 983(e).

162 "The Civil Asset Forfeiture Reform Act of 2000: Summary and Reference Materials," (U.S. Customs Serv., Office of Chief Counsel, Assoc. Chief Counsel (Enforcement)), June 2000, at 5. See also *e.g. Valderrama v. United States,* 417 F.3d 1189 (11th Cir. 2005), where the plaintiff attempted to set aside a forfeiture of a check seized as related to money laundering. The plaintiff listed four reasons to set-aside the forfeiture. However, the court decided that only procedural (notice) questions can be heard by the court to determine whether the forfeiture should be set-aside. In this case, the notice was adequate and no set-aside of the forfeiture was necessary.

163 *See Munoz-Valencia v. United States*, 169 Fed. Appx. 150; 2006 U.S. App. Lexis 5547 (3d Cir. 2006) (claimant as courier with only "naked possession" did not have standing to set aside forfeiture); relying on authority from *United States v. $321,470.00, United States Currency*, 574 F.2d 298 (5th Cir. 1989). See also similar rulings: *United States v. Currency, United States $42,500.00*, 283 F.3d 977, 983 (9th Cir. 2002); *United States v. $515,060.42*, 152 F.3d 491, 498 (6th Cir. 1989); *Mercado v. United States Customs Serv.,* 873 F.2d 641, 645 (2d Cir. 1989).

15.126 983(f) Release of Property

The claimant may file a petition for immediate release of seized property on the basis of hardship, such as the loss of a business or home.[164] The claimant may petition the court to order the release of the property if the seizing agency does not release the property within 15 days. The government may submit evidence opposing this release to the court, and may do so without providing the evidence to the claimant, in order to avoid disclosing information that may adversely affect an ongoing criminal investigation or a pending criminal trial. The court may enter any order necessary to protect the value and/or condition of released property, and the government may file a lien to prevent transfer of the property.[165]

This hardship provision is not applicable to: (1) contraband, (2) evidence of a violation of law, (3) property particularly suited for use in illegal activities, or (4) is likely to be used to commit additional crimes if returned. Also, hardship does not apply to currency, other monetary instruments, or electronic funds unless it constitutes the assets of a legitimate business that has been seized.[166]

15.127 983(g) Proportionality

Prior to CAFRA, the Supreme Court held that creating innocent owner defenses to certain forfeitures established those forfeitures as "punishment," and therefore subject to Eighth Amendment excessive fines analysis.[167] Since CAFRA provides an innocent owner defense for all forfeitures within its reach, all such forfeitures are now subject to the Eighth Amendment. The Eighth Amendment prohibits "excessive" fines and, therefore, proportionality analysis is required in these "punitive" forfeitures to ensure that a given forfeiture is not excessive in light of the particular offense.[168]

A claimant petitioning a court to determine whether the forfeiture was constitutionally excessive has the burden of proof to establish by a preponderance of the evidence that the forfeiture is "grossly disproportionate" to the offense.[169] If established, the court may reduce or eliminate the forfeiture to avoid a violation of the Eighth Amendment Excessive Fines Clause.[170]

164 18 U.S.C. § 983(f)(1)(C); Fed. R. Civ. P. (Supp. R.G(8)(d), 2007).
165 *See* 18 U.S.C. § 983(f).
166 18 U.S.C. § 983(f)(8).
167 *Austin v. United States*, 509 U.S. 602 (1993).
168 18 U.S.C. § 983(g).
169 18 U.S.C. § 983(g)(3); See, *e.g., United States v. Six Negotiable Checks*, 389 F.Supp.2d 813 (E.D.Mich. 2005) (the defendant's failure to report checks being removed from the country were related to tax evasion; a full forfeiture of checks was not "grossly disproportionate). See Fed. R. Civ. P. (Supp. R.G(8)(e), 2007) for procedures.
170 18 U.S.C. § 983(g)(4).

15.128 983(h) Civil Fines

A court may impose a civil fine for frivolous claims contesting forfeiture action equal to 10% of the value of the forfeited property, but no less than $250 and no more than $5,000[171], and may sanction an attorney who files a frivolous claim.[172] If a prisoner on three or more occasions during his incarceration or detention, has brought a forfeiture related action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous or malicious, that prisoner cannot file another such action absent a showing of extraordinary circumstances.[173]

15.130 CAFRA Civil Forfeiture Statutes

- 8 U.S.C. § 1324(b) Seizure and Forfeiture; Bringing in and harboring certain aliens
- 18 U.S.C. § 545 Smuggling goods into the United States
- 18 U.S.C. § 981 Civil forfeiture
- 21 U.S.C. § 863 Drug Paraphernalia
- 21 U.S.C. § 881 Forfeiture; Controlled substances and paraphernalia
- 31 U.S.C. § 5317 Search and Forfeiture of Monetary Instruments
- 49 U.S.C. § 80303 Seizure and Forfeiture; Transporting Contraband
- 49 U.S.C. § 46306(d) Seizure and Forfeiture; Registration violations involving aircraft not providing air transportation
- 50 U.S.C. App. § 2411 Enforcement; *Export Administration Act*

15.200 CBP Seizure Case Processing For Title 19 Forfeitures

15.210 Introduction

Specific forfeiture statutes were exempted under CAFRA reforms. These exemptions are commonly referred to as the "customs carve-out" because most of the relevant statutes have a primary basis in the importation and exportation of merchandise into and out of the United States as well as other laws enforced under the customs laws of the United States.[174] Even for the "carve-out" forfeitures, many sections of CAFRA apply, including compensation for damaged property, recovering attorney fees and costs, forfeitures of real property, and access to bank records and accounts.[175]

171 18 U.S.C. § 983(h)(1).
172 18 U.S.C. § 983(h)(2).
173 18 U.S.C. § 983(h)(3).
174 18 U.S.C. § 983(i).
175 *See* section 15.300, *et.seq*.

Traditionally, customs officers had broad enforcement authority, due to heightened governmental interest present at the border, including:

- The need for national self-protection,
- The collection and protection of revenue,
- The reduced expectation of privacy at the border, and
- The rights of customs officials to maintain possession of imported merchandise until all legal requirements are met.

The traditional Customs forfeiture statutes place primary importance on the administrative forfeiture process in addition to judicial forfeitures. Administrative forfeitures allow for expeditious resolutions without the need for trade to be delayed or inhibited.

As specified in 18 U.S.C. 983(i), the Customs "carve-out" exemption includes the following statutes:

- Forfeiture statutes located within Title 19 of the U.S. Code, including CBP's primary forfeiture statute, 19 U.S.C. § 1595a.
- Internal Revenue Code of 1986 (Title 26 U.S.C. § 1 *et seq.*)
- Federal Food and Cosmetic Act (21 U.S.C. § 301 *et seq.*)
- Trading with the Enemy Act (50 U.S.C. § App. 1 *et seq.*) or the International Emergency Powers Act (50 U.S.C. § 1701 *et seq.*)
- Neutrality Act (22 U.S.C. § 401)

15.211 Customs Civil Forfeiture Statutes

Congress has passed a wide range of civil forfeiture statutes. The following list contains forfeiture provisions in Title 19 and an example of an export civil forfeiture statute:

- 19 U.S.C. § 467 Imported distilled spirits, etc.
- 19 U.S.C. § 468 Stamps and brands effaced on emptying packages of imported liquor
- 19 U.S.C. § 1305 Immoral articles; importation prohibited
- 19 U.S.C. § 1338 Discrimination by foreign countries
- 19 U.S.C. § 1436 Penalties for violations of the arrival, reporting and clearance requirements
- 19 U.S.C. § 1453 Lading and unlading of merchandise or baggage; penalties
- 19 U.S.C. § 1462 Forfeiture; Report, entry, and unlading of vessels or vehicles
- 19 U.S.C. § 1464 Penalties in connection with sealed vessels and vehicles
- 19 U.S.C. § 1466 Equipment and repairs of vessels
- 19 U.S.C. § 1497 Penalties for failure to declare

- 19 U.S.C. § 1526 Merchandise bearing American trademark[176]
- 19 U.S.C. § 1527 Importation of wild animals and birds in violation of foreign law
- 19 U.S.C. § 1581 Boarding vessels
- 19 U.S.C. § 1584 Falsity or lack of manifest; penalties
- 19 U.S.C. § 1586 Unlawful unlading or transshipment
- 19 U.S.C. § 1590 Aviation smuggling
- 19 U.S.C. § 1594 Seizure of conveyances
- 19 U.S.C. § 1595a Forfeiture and other penalties
- 19 U.S.C. § 1627a Unlawful importation or exportation of certain vehicles; inspections
- 19 U.S.C. § 1629 Inspections and preclearance in foreign countries
- 19 U.S.C. § 1703 Seizure and forfeiture of vessels
- 19 U.S.C. § 1706 Importation in vessels under thirty tons and aircraft
- 19 U.S.C. § 2093 Forfeiture of unlawful imports; Pre-Colum monumental or architectural sculpture or murals
- 19 U.S.C. § 2606 Import restrictions; Cultural property
- 19 U.S.C. § 2609 Seizure and forfeiture; Cultural property
- 22 U.S.C. § 401 Illegal exportation of war materials

15.212 Seizing Property Subject to Forfeiture

When the seizure of property in a public place is contemporaneous with the act giving rise to forfeiture, such as at the border, no warrant is constitutionally or statutorily required.[177]

For seizures that are not contemporaneous with the act giving rise to the forfeiture, the process which must be followed to effect a seizure will vary depending on the statute relied upon and the circuit in which the seizure is to occur.

Warrantless seizures of vehicles in public places based upon probable cause are lawful. No special exigency is required. The Supreme Court has specifically upheld the warrantless, non-exigent seizure of a vehicle from a public place where state law deems the vehicle "contraband."[178]

15.213 Statute of Limitations

Under Customs laws, the statute of limitations for forfeitures expires five years after the alleged *offense* was discovered, or within two years after the time when the *involvement* of the property in the alleged offense was discovered, whichever

176 *See Acadia Tech., Inc., v. United States*, 65 Fed. C. 425 (2005), *aff'd* 458 F.3d 1327 (Fed. Cir. 2006) (government's seizure of cooler fans due to counterfeit certification marks upheld under statute).

177 *Payton v. New York,* 445 U.S. 573, 586 (1980).

178 *Florida v. White*, 526 U.S. 559 (1999).

is later. The limitations period is tolled during any period when the property subject to forfeiture is "concealed" or absent from the United States.[179]

15.214 Summary forfeitures

Summary forfeitures are forfeitures of contraband property, *i.e.*, property which no person has the right to possess, such as illicitly manufactured controlled substances. Such substances cannot be possessed lawfully by any person under any circumstance. On the other hand, the illegal possession of *lawfully* manufactured controlled substances does not, in and of itself, render those substances "contraband." Congress, however, has provided that all controlled substances in Schedules I and II which are illegally possessed shall be deemed contraband and, therefore, subject to summary forfeiture.[180] No right of claim exists for such property and no declaration of forfeiture is required. The forfeiture is "summary," *i.e.*, occurring without any right to notice or opportunity to be heard.[181]

Please note both 19 U.S.C. § 1609 and the Customs regulations use the term "summary forfeiture" in establishing the procedures for the *administrative* forfeiture of seized property; administrative forfeiture should not be confused with summary forfeiture of contraband (described above).

15.215 Settlements of Civil Forfeiture Cases

Settlements in civil judicial forfeiture cases are governed by Attorney General Order No. 1598-92. In 2007, a group of Assistant United States Attorneys, CBP Chief Counsel and attorneys from the Asset, Forfeiture and Money Laundering Section of the Criminal Division met to discuss how to implement the order. The group agreed that the following steps would comply with the Attorney General Order:

1. "The AUSA handling the case must consult with CBP counsel regarding any proposed settlement;
2. If CBP counsel objects to the settlement and the disagreement cannot be resolved, CBP has the option of bringing the matter to the attention of the Assistant Attorney General for the Criminal Division for resolution;
3. The Assistant Attorney General has the final say as to whether any settlement will be approved."[182]

179 *Id.*
180 21 U.S.C. § 881(f).
181 19 C.F.R. § 162.45a.
182 Stefan D. Cassella, "Settlements in Cases Involving CBP and ICE," *Asset Forfeiture News, July-August 2007,* (U.S. Dep't of Justice, AFMLS, 2007).

15.220 Administrative and Judicial Forfeitures

15.221 Administrative Forfeitures

"The vast majority of all federal forfeitures are administrative forfeitures, for the simple reason that the vast majority of all forfeitures are uncontested. . . Basically, an administrative forfeiture begins when a federal law enforcement agency with statutory authority in a given area . . . seizes property discovered in the course of an investigation. The seizure must be based on probable cause to believe that the property is subject to forfeiture and generally must be pursuant to a judicial warrant. . . Once the property is seized, the agency commences the administrative forfeiture proceeding by sending notice of its intent to forfeit the property, to anyone with a potential interest in contesting that action and by publishing a notice in [a newspaper of general circulation] . . . If no one contests the forfeiture by filing a claim within the prescribed period of time, the agency concludes the matter by entering a declaration of forfeiture that has the same force and effect as a judicial order."[183]

Congress has authorized the administrative (nonjudicial) forfeiture of the following classes of property:

1. Any vessel, vehicle, aircraft, merchandise or baggage if the value does not exceed $500,000;
2. Prohibited merchandise regardless of value;
3. Vessels, vehicles, and aircraft used to import, export, transport or store any controlled substances or listed chemical regardless of value; or
4. Any monetary instruments regardless of value.[184]

Seizures of merchandise based solely upon a negligent violation of 19 U.S.C. § 1592, however, may not be administratively forfeited. Absent evidence of an intent to deceive (defraud), merchandise may be seized only in the circumstances set forth in 19 U.S.C. § 1592 and then only to ensure payment of any penalty that might be imposed by the Court Of International Trade.[185]

Because of Fifth Amendment Due Process requirements, post-seizure notice and an opportunity to be heard must be provided to interested parties at a meaningful time and in a meaningful way. Therefore, 19 U.S.C. § 1607 and the Customs regulations require written notice to all interested parties (*e.g.*, owners, lienholders, etc.), informing them of the right to petition for relief. The notice must contain:

183 Stefan D. Cassella, "Overview of Asset Forfeiture Law in the United States," *United States Attorneys' Bulletin, Vol. 55, No. 6,* (U.S. Dep't of Justice, Executive Office for U.S. Attorneys) Nov. 2007, at 12-13.
184 19 U.S.C. § 1607.
185 *United States v. One Red Lamborghini and One Black Lamborghini*, 625 F.Supp. 986 (Ct. Int'l Trade 1986), vacated, 10 Ct. Intl. Trade 654 (1986).

- The provisions of law alleged to have been violated,
- A description of the specific acts or omissions forming the basis of the alleged violations,
- The time and place of the seizure,
- The government's appraisal of value, and
- Available relief procedures.[186]

So long as the institution has a procedure for delivery of such mail, the Supreme Court has held that a notice sent by certified mail to an incarcerated inmate in care of the institution satisfies the Fifth Amendment's Due Process requirements.[187]

Under 19 U.S.C. § 1614, the agency, in its discretion, may allow a bond to be posted to substitute for the *res* (seized property). The regulations governing the implementation of a substitute *res* are set forth at 19 C.F.R. §§ 171.54 and 162.44. This provision is sometimes used with valuable property that presents problems regarding storage. Further, there may be a pre-forfeiture sale, pursuant to 19 U.S.C. § 1612, where assets are perishable or storage costs would be disproportionate to value. Finally, the regulations allow for summary forfeiture of low-value property. [188]

Various Customs regulations set forth the time limits and procedures for filing claims, seeking relief or otherwise causing the forfeitures to be referred to the United States Attorney for institution of a judicial forfeiture.[189]

15.222 Judicial Forfeitures

If there is seized property otherwise subject to administrative forfeiture and the claimant does not wish to submit the property to the administrative process, then the claimant may file a claim and cost bond equivalent to 10% of the value of the seized property, but not less than $250 or more than $5, 000.[190] In such an event, the forfeiture of the property must be referred to the United States Attorney for institution of a judicial forfeiture proceeding.[191]

186 19 U.S.C. § 1607; 19 C.F.R. § 162.31.
187 *Dusenbery v. United States*, 534 U.S. 161 (2002).
188 *See* 19 C.F.R. § 162.48(b) (the "junker" provision). The "junker" provision contained in 19 U.S.C. § 1612(b) provides for the pre-forfeiture disposition by sale or destruction of property where the storage costs are disproportionate to the value of the property. Note, however, that this statute may not be used to prevent a claimant from challenging the forfeiture itself, or his liability for seizure and storage costs, consistent with the Due Process Clause. *Gines-Perez v. Kelly*, 333 F.3d 313 (1st Cir. 2003).
189 *See* 19 C.F.R. Part 171.
190 19 U.S.C. § 1608.
191 19 U.S.C. § 1604.

In addition, all real property and other property not subject to administrative forfeiture, pursuant to 19 U.S.C. § 1607, also must be referred to the United States Attorney for judicial forfeiture.[192] Associate/Assistant Chief Counsels are responsible for referring CBP and ICE civil forfeiture cases to U.S. Attorneys.

The civil forfeiture judicial proceeding begins with the filing of a complaint for forfeiture by the United States Attorney against the particular property. Just as with administrative forfeitures, notice of the proceeding is sent to all known entities having an interest in the property, and a similar notice is published in a newspaper of general circulation in the area where the seizures occurred. Those claiming a cognizable interest in the property may intervene as claimants in the forfeiture proceeding.

15.222a Government's Burden of Proof

The government has the initial burden of showing "probable cause" for the institution of the forfeiture proceeding.[193] The probable cause standard required to institute a forfeiture proceeding is the same as that required to support the search or seizure of persons or things. Although the Second and Sixth Circuits have held that the probable cause determination can be based on facts known at the time of the forfeiture trial,[194] several other circuits have held that evidence acquired after the filing of the forfeiture complaint is inadmissible for purposes of establishing probable cause for instituting the proceeding.[195] This is consistent with the precise language of 19 U.S.C. § 1615.

Hearsay evidence is admissible in the probable cause phase of a forfeiture proceeding to the same extent that it is admissible in any other "probable cause" hearing. The evidence may include:

- Admissions of owners,
- Declarations of person in control of the property,
- Statements of co-conspirators, and
- Tips from confidential informants.

Although probable cause can be established on the testimony of a confidential informant, some U.S. Attorneys are hesitant to rely only on the testimony of a confidential informant to establish probable cause. Thus, CBP officers and agents should seek to develop facts that will establish probable cause independent of the testimony of a confidential informant. Without satisfying the applicable rules of evidence, hearsay evidence cannot be used for any purpose

192 19 U.S.C. § 1610.
193 19 U.S.C. § 1615.
194 *United States v. $67,220 in U.S. Currency*, 957 F.2d 280 (6th Cir. 1992); *United States v. 4492 S. Livonia Rd.,* 889 F.2d 1258 (2d Cir. 1989).
195 *United States v. One Lot of U.S. Currency ($36,634),* 103 F.3d 1048 (1st Cir. 1997); *United States v. $191,910 in United States Currency,* 16 F.3d 1051 (9th Cir. 1994); *United States v. $91,960,* 897 F.2d 1457 (8th Cir. 1990).

other than the initial showing of probable cause. Thus, it cannot be used to rebut an offered defense.[196]

15.222b Claimant's Burden of Proof

Once the government establishes probable cause for the forfeiture, the burden shifts to any claimants to provide evidence of any defenses to forfeiture as they might have. The government may rebut the claimant's evidence. Overall, the burden is on the claimant to prove that the property is not subject to forfeiture by preponderance of the evidence. [197]

15.222c Defenses to Customs Civil Forfeitures

The available defenses to Customs forfeitures are few. Beyond the government's obligations to adhere to the Fifth Amendment's Due Process requirements, precious little exists to defeat a Customs forfeiture.

Constitutional defenses: Neither Double Jeopardy nor Excessive Fines are viable defenses to Customs civil forfeitures.[198] In *United States v. Bajakajian*,[199] the Supreme Court explained that traditional civil Customs forfeitures are not subject to Eighth Amendment considerations.[200]

Further, the Constitution does not prohibit the forfeiture of property belonging to an innocent, ignorant, or non-negligent owner. Historically, the government has been free to forfeit anyone's interest in illegally used property, including landlords, rental companies, secured lenders and owners whose property was loaned to another.

The Supreme Court has held that the Due Process Clause of the Fifth Amendment does not preclude forfeiture by virtue of an owner's innocence.[201] Since there is *no Constitutional innocent owner defense* to forfeiture, any such defense must be provided by statutory law. CAFRA imposes such a defense to its forfeitures, but the CAFRA "customs carve out" exempts such defenses from application to Customs forfeitures.

The Due Process Clause of the Fifth Amendment may become implicated, however, where there is an extended detention of seized property by the

196 *United States v. $129,727 United States Currency*, 129 F.3d 486 (9th Cir. 1997).
197 19 U.S.C. § 1615.
198 *United States v. Ursery,* 518 U.S. 267 (1996).
199 *United States v. Bajakajian*, 524 U.S. 321 (1998).
200 See also *United States v. $173,969.04 United States Currency*, 164 F.3d 462 (9th Cir. 1999) (proportionality does not apply to forfeitures for failure to declare under 19 U.S.C. § 1497).
201 *Bennis v. Michigan*, 516 U.S. 442 (1996).

government pending the initiation of the forfeiture suit.[202] In deciding the issue of due process, the courts will balance the right of an owner to not be deprived of his property without a hearing against the legitimate needs of the government in investigating and bringing the forfeiture action. If the government is slow in its investigative effort or in instituting the forfeiture proceeding, the court will consider this as to whether due process has been violated in a given case. Where, however, the circumstances of the particular case are such that the delays are not due to any fault of the government, *i.e.*, the government proceeds with all due diligence, the courts will not likely hold that the seizure violated the due process clause. The Supreme Court, in considering an 18-month delay by Customs between the date of seizure and the filing of the judicial forfeiture, held that the delay by the government was supported by substantial reasons and therefore justified.[203]

Please note that the unjustified failure of a seizing officer to promptly forward seized property to the Fines, Penalties and Forfeiture office (FP&F), however, would raise Fifth Amendment Due Process issues.

Duress, necessity and impossibility: These defenses are rare. In an old Supreme Court case, a merchant ship was wrecked in the Bay of Delaware and its cargo was landed by sailors at Lewis, which was not a port of entry. The Supreme Court denied the subsequent attempt at forfeiture stating: "*it is unquestionably a correct legal principle, that a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of a forfeiture may be employed. The means . . . cannot be employed where a vessel is deserted by her crew, or cannot be brought into port.*"[204] In other words, where necessity forces the conduct leading to forfeiture, the forfeiture will not accrue.

Duress, on the other hand, implies force from a third party that one cannot escape. In order to establish the defense of duress, a "party must show that he performed the unlawful act because (i) he was under an immediate threat of death or serious bodily injury [from a third party], (ii) he had a well grounded fear that the threat would be carried out, and (iii) he had no reasonable opportunity to escape."[205]

The common carrier defense: Customs laws do not permit forfeitures of common carriers for violations relating to merchandise in the *cargo* of the conveyance unless the owner or person in charge participated in, or had knowledge of, the violation, or was grossly negligent in preventing or discovering the violation.[206] The term "owner," however, is very broad and is defined as including: [207]

202 *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).
203 *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency,* 461 U.S. 555 (1983).
204 *Peicsh v. Ware*, 8 U.S. (4 Cranch) 347 (1808).
205 *Pollgreen v. Morris*, 770 F.2d 1536 (11th Cir. 1985).
206 19 U.S.C. § 1594(b)(1)(C).
207 19 U.S.C. § 1594(d).

- A lessee or person operating the conveyance under a rental agreement,
- Officer and directors of a corporation
- Station managers and supervisory ground personnel employed by airlines,
- Partners of a partnership
- Representatives of the owner or operator who are in charge of passenger or cargo operations at a particular station and
- Other persons with similar responsibilities.

For violations relating to the importation of prohibited merchandise which is concealed in a conveyance but *not in the cargo*, forfeiture is permitted if the owner or operator or any employee responsible for maintaining and insuring the accuracy of the cargo manifest knew, or by the exercise of the highest degree of care and diligence should have known, that such merchandise was on board.[208] In such a case, the innocent owner provision of 19 U.S.C. § 1594(b)(2) is inapplicable.

Congress has left the definition of a *common carrier* to the courts. One court defined a *common carrier* as one engaged in the business of carrying goods for others as public employment, and must hold himself out as ready to engage in the transportation of goods for persons generally.[209] Another court defined a *common carrier* as a carrier that holds itself out to the public as willing to carry all passengers for hire indiscriminately.[210]

A common carrier conveyance can only be forfeited if the owner or person in charge was a consenting party or privy to a violation.[211] If a claimant establishes by a preponderance of the evidence that it is a common carrier, then the burden shifts back to the government to prove that the owner or person in charge had knowledge of the illegal activity. However, if the owner or person in charge was grossly negligent in failing to prevent or discover the violation, the forfeiture may proceed.[212] In such a case, the innocent owner provision of 19 U.S.C. § 1594(b)(2) is inapplicable.

Entrapment not a defense: Entrapment is a factual defense to a criminal prosecution.[213] The federal courts have not allowed the defense in a civil forfeiture action.[214] Sometimes claimants will attempt to use an overreaching or

208 19 U.S.C. § 1594(c)(2).
209 *United States v. Stephen Bros. Line*, 384 F.2d 118 (5th Cir. 1967).
210 *United States v. One Rockwell International Commander*, 754 F.2d 284 (8th Cir. 1985).
211 19 U.S.C. § 1954; 49 U.S.C. § 80303.
212 19 U.S.C. § 1594(b)(1)(C).
213 *See* Chapter One, *Introduction*, for a discussion of this defense.
214 *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984).

government misconduct theory as a defense against forfeiture, but such defenses have not been successful to date.[215]

15.222d Judgment (declaration) of Forfeiture

Following the presentation of all evidence by the government and the claimant(s), the fact finder will determine the issues. If the court (or jury) finds that a preponderance of the evidence establishes one or more of the defenses put forth, a judgment denying the forfeiture is entered. In such a case, it is incumbent upon the case agent to ensure that the Assistant United States Attorney moves for entry of a certificate of probable cause for the institution of the forfeiture proceeding. Such a certificate protects an officer or agent from a lawsuit filed against the CBP officer, agent or government respecting the seizure of the property in question. [216]

If no defense is established, then the judgment of forfeiture is entered, declaring the property forfeit and fixing title to the property in the government. The date upon which title is deemed vested in the government, and the effect of such vesting, is a matter determined by the doctrine of relation, or "relation back."

15.222e Relation Back Doctrine

Historically, the point in time at which title to forfeited property vests in the sovereign (government) depended first upon whether the forfeiture was by way of statute or common law. If by statute, it further depended on the language of the particular forfeiture statute.

At common law, in cases of treason or felony, the lands of a defendant became forfeit at the time of the offense, thus voiding all exchanges or conveyances between the offense and the seizure or condemnation. In such events, the seizure and condemnation served only to ascertain and confirm the fact that the forfeiture had indeed already occurred.[217] In all other forfeitures at common law, however, nothing vested in the sovereign until some legal step was taken to perfect what was only an equitable interest, *i.e.*, the right to acquire legal title. Upon perfection (declaration of forfeiture), title vested in the sovereign and the date thereof "related back" to the commission of the offense. This relation back, however, did not extinguish or void *bona fide* interests acquired between the act and the seizure for forfeiture.[218]

Forfeitures pursuant to a statute are analogous to those at common law. If the statute declares that the property "shall be forfeited" upon the commission of an

215 *United States v. One Boeing 707 Aircraft*, 750 F.2d 1280 (5th Cir. 1985).
216 28 U.S.C. § 2465(a)(2).
217 4 *William Blackstone, Commentaries* 481; See *United States v. 1960 Bags of Coffee*, 12 U.S. 398 (1814).
218 *See*, *e.g.*, *United States v. Grundy and Thornburgh*, 7 U.S. (3 Cranch) 337 (1806).

offense,[219] then title vests in the government immediately upon the act. The subsequent seizure and condemnation serves only to confirm the forfeiture and all interests acquired subsequent to the crime are voided.[220]

If, on the other hand, the statute merely *permits* forfeiture upon the commission of an offense (*e.g.*, "may be forfeited," "subject to forfeiture," "the [property] *or the value thereof* shall be forfeited"),[221] then the general common law rule applies: the government has nothing but the right to acquire title pursuant to a forfeiture action. If it does so and prevails, then its title relates back to the time of the offense, but does not extinguish or void *bona fide* interests acquired between the act and the seizure for forfeiture.[222]

Interestingly, under 19 U.S.C. § 1595a, (importation contrary to law), the question of whether title vests immediately upon commission of the forbidden act, or must await a declaration of forfeiture, depends upon the language of the violated section of the statute involved. Property used in connection with a prohibited importation "may" be seized and forfeited under § 1595a(a) and forfeiture of such property would follow the general common law rule that title vests only upon the declaration of forfeiture. The illegally imported merchandise itself, however, is forfeitable under § 1595a(c), which stipulates that only some of the listed property "shall be forfeited," whereas other listed property "may" be forfeited. Thus, title to "shall be forfeited" property vests at the moment of illegal importation, but the title to "may be forfeited" property vests according to the general common law rule.

15.300 Procedures Applicable to both CAFRA & Customs "Carve-out" Forfeitures

15.310 CAFRA Provisions Applicable to All Forfeitures

The following CAFRA procedures apply to all civil forfeitures, including Customs forfeitures.

15.311 Compensation for Damage to Seized Property

The *Federal Tort Claims Act* (FTCA), 28 U.S.C. § 2680(c), waives sovereign immunity and allows damage claims based on injury or loss of property while seized for the purpose of forfeiture, other than as a sentence imposed upon

219 For example, 8 U.S.C. § 1324(b) (alien smuggling); 18 U.S.C. §§ 544, 545, 548 (Customs violations); 19 U.S.C. §§ 962-967 (Neutrality Act); 19 U.S.C. §§ 1587, 1703 (hovering vessels, vessels engaged in smuggling).
220 *United States v. 1960 Bags of Coffee*, 12 U.S. 398 (1814).
221 For example, 19 U.S.C. § 1959a(a) (may be seized . . .); 21 U.S.C. § 881 (shall be subject to forfeiture); 18 U.S.C. § 550 (merchandise or the value thereof shall . . .).
222 *United States v. 92 Buena Vista Ave., et al,* 507 U.S. 111 (1993); *United States v. Grundy and Thornburgh*, 7 U.S. (3 Cranch) 337 (1806).

conviction of a criminal offense. Further, waiver of immunity is contingent on the property not having been forfeited, remitted or mitigated, and the person must not have been convicted of a crime for which the property could have been criminally forfeited.[223] If CBP remits or mitigates the forfeiture, this provision does not permit a person to recover for damage to the property sustained as a result of or during CBP detention.[224] Also, a certificate entered by the court finding that there was probable cause for the seizure or arrest, immunizes the seizing officer from suit.[225]

15.312 Attorney Fees, Costs and Interest

The government is liable for the claimant's reasonable costs, attorney fees, and interest where the claimant "substantially prevails."[226] Although this statute does not define this term, two courts have examined the plain language of the statute and its legislative history and have held that a claimant does not substantially prevail simply because the government returns the property and declines to pursue a forfeiture case.[227] The Supreme Court had reviewed this standard in the context of other statutes and determined that a "prevailing party" must have succeeded on a significant issue in litigation.[228]

Where there are multiple claims to the same property, the government is not liable for a particular claimant's cost and attorney fees if: (1) it promptly recognizes and does not oppose that claimant's claim (which can be segregated), (2) does not cause that claimant to incur additional costs and fees, and (3) prevails in obtaining forfeiture with respect to one or more of the other claims.[229]

223 "The Civil Asset Forfeiture Reform Act of 2000: Summary and Reference Materials," (U.S. Customs Serv., Office of Chief Counsel, Assoc. Chief Counsel (Enforcement)), June 2000, at 7.
224 28 U.S.C. § 2680(c)(3).
225 28 U.S.C. § 2465(a)(2).
226 28 U.S.C. § 2465(b).
227 *In re Seizure of One 1999 Lexus ES300*, CV 01-10868 SVW (Ex) (C.D. Cal. May 14, 2002); *In re Seizure of $11, 501.00 in U.S. Currency v. Nichols*, CV 01-10871 WMB (PJWx) (C.D. Cal. June 25, 2002). Another court citing several cases, has said: "A court should look to the substance of the litigation to determine whether an applicant has substantially prevailed in its position, and not merely the technical disposition of the case or motion. In effect, substance should prevail over form." *Devine v. Sutermeister*, 733 F.2d 892, 898 (Fed. Cir. 1984). A sample memorandum of law in opposition to a motion for attorney's fees and costs where property has been voluntarily returned may be obtained from the Asset Forfeiture and Money Laundering (AFML) Section of the Department of Justice's Criminal Division, (Form Number CIV3001).
228 *Hensley v. Eckerhart,* 461 U.S. 424, 433 n.7 (1983)(Court indicated same definition would apply regarding all statutes awarding fees).
229 28 U.S.C. § 2465(b)(2)(C); *United States v. Khan et al. ($293,316),* 497 F.3d 204 (2d Cir. 2007) (with over 41 claims to seized currency, where claimants

Also, the government is not liable for costs and attorney fees if the claimant is convicted of a crime for which the property could have been forfeited criminally or if a petition for remission or mitigation is granted.[230]

If seized currency or other negotiable instruments are returned to a claimant, the government is liable for pre-judgment interest paid from the date of seizure or arrest of the currency or other negotiable instruments or the proceeds of an interlocutory sale, plus imputed interest at the 30 day Treasury Bill rate for any period during which no interest was paid. The interest does not accrue while the property is held as evidence nor does it begin accruing until 15 days after seizure (or turnover, in the case of state adoptions).[231]

15.313 Restitution to Crime Victims

The Attorney General is allowed to use forfeited property to compensate any victim of the offense that gives rise to forfeiture, including specified unlawful activities of a money laundering offense, even where the money laundering offense was not pursued.[232]

15.314 Destruction or Removal of Property to Prevent Seizure

It is a crime to remove or destroy property to prevent its seizure for forfeiture,[233] or to destroy or alter records related to property in relation to or in contemplation of a forfeiture proceeding.[234] Offenders may be fined and/or imprisoned for up to five years for the former, or up to twenty years for the latter. It is also illegal for any person to provide advance notice to another person of a search, or service of a warrant of arrest *in rem*, for the purpose of preventing a seizure or the securing of such property by the government.[235] Finally, several courts have held that a property transfer by a defendant that impedes or obstructs a forfeiture action justifies a sentence enhancement for obstruction of justice.[236]

delayed filing claims or filed false claims, the government acted reasonably under "complicated circumstances" taking over 2 years to return funds).

230 19 C.F.R. § 162.96; *United States v. Khan et al. ($293,316),* 497 F.3d 204 (2d Cir. 2007) (convicted claimants received return of some seized currency under 8th Amendment argument; attorneys not entitled to fees under CAFRA or EAJA); *United States v. U.S. Currency in Sum of $660,200 More or Less*, 429 F.Supp. 2d. 577 (E.D.N.Y. 2006) (similar result as above).

231 28 U.S.C. § 2564(b)(1)(C)(ii).

232 18 U.S.C. § 981(e)(6).

233 18 U.S.C. § 2232(a).

234 18 U.S.C. § 1519.

235 18 U.S.C. § 2232(c).

236 *United States v. Jackson-Randolph,* 282 F.3d 369 (6th Cir. 2002); *United States v. Keeling*, 235 F.3d 533 (10th Cir. 2000); *United States v. Baker*, 227 F.3d 955 (7th Cir. 2000).

15.315 Stay of Civil Forfeiture Cases

Upon the government's motion, the court shall stay a civil forfeiture proceeding if the government makes an actual showing: that civil discovery will adversely affect the ability of the government to conduct a related criminal investigation or the prosecution of a related criminal case.[237]

Upon a claimant's motion, the court shall stay the civil forfeiture proceeding if: (1) the court determines that the claimant is the subject of a related criminal investigation or case, (2) the claimant has standing to assert a claim in the civil forfeiture proceeding, and (3) continuation of the proceeding will burden the claimant's right against self-incrimination.[238]

15.316 International Forfeiture Cases

Under 28 U.S.C. § 2467, certain foreign judgments can be enforced in United States courts. A foreign nation seeking to have a forfeiture or confiscation judgment enforced by a U.S. District Court must submit a request to the Attorney General that includes: (1) a summary of the facts of the case and a description of the proceedings that resulted in the forfeiture or confiscation of judgment, (2) a certified copy of the forfeiture or confiscation judgment, and (3) an affidavit or sworn declaration establishing that the defendant received notice of the proceedings in sufficient time to enable the defendant to defend against the charges and the judgment rendered is not subject to appeal.

The statute sets forth:

- The procedures for certification of a foreign government's request,
- Jurisdiction and venue,
- Entry and enforcement of judgment,
- Finality of foreign findings, and
- Currency conversion for any forfeiture or confiscation judgment requiring payment.

A restraining order to preserve the property while the foreign forfeiture action is pending may be obtained. No person may contest the issuance of the restraining order on the ground that it is the subject of parallel litigation in a foreign court.[239]

Federal courts may, however, only enforce a foreign forfeiture order based on a violation of foreign law that would also constitute an offense for which property could be forfeited under federal law if committed in the United States.[240]

237 18 U.S.C. § 981(g)(1); *United State v. GAF Financial Serv. et al,*335 F.Supp.2d 1371 (S.D.Fla. 2004) (civil forfeiture would adversely affect criminal case).
238 18 U.S.C. § 981(g).
239 28 U.S.C. § 2467(d)(3); 18 U.S.C. § 983(j).
240 28 U.S.C. § 2467(a)(2)(A).

15.320 Mitigation and Remission

Title 19 U.S.C. § 1618 authorizes the Commissioner of CBP to remit or mitigate a forfeiture incurred under the Customs laws if the Commissioner finds that such forfeiture was incurred without willful negligence or intent to defraud, or if mitigating circumstances exist to justify the remission or mitigation. Since remission is a form of pardon, there is no legal right to it. The granting of remission by the appropriate CBP officer is purely a discretionary act. Mitigation may be granted when the remission standards set forth in the FP&F guidelines are not met, but extenuating circumstances exist that justify some limited form of relief. For example, forfeiture might be mitigated to the payment of a penalty and/or the imposition of other conditions deemed reasonable and just by the determining officer.

15.321 Procedures

The procedures for submitting a petition for administrative relief with CBP in connection with its mitigation authority are set forth in 19 C.F.R. Part 171. Prior to February 2008, however, forfeitures pursuant to 8 U.S.C. § 1324(b) (alien smuggling) were governed by procedures set forth in 8 C.F.R. Part 274, which differed in some substantive respects from the customs regulations. However, in 2008 a rule change to 8 C.F.R. Part 274 amended that section of the regulations which now states that all forfeitures related to Title 8 will be administered according to 19 C.F.R. parts 162 and 171. This is a procedural rule change that will now allow petitions for mitigation to be submitted and decided by CBP for vehicles subject to forfeiture for a violation of 8 U.S.C. § 1324(b) prior to a completion of the forfeiture process. To the extent that CAFRA applies to Title 8 forfeitures, CBP will follow CAFRA rules just like in other forfeiture provisions not covered by the Customs "carve-out" provisions, *e.g.,* Title 31 cases. Where CAFRA is silent on a procedure, 19 C.F.R. parts 162 and 171 should be followed.

15.321a Filing a petition

Filing a petition for remission or mitigation under the guidelines established in 19 C.F.R. Part 171 suspends the administrative forfeiture process until the petition is decided. Waiver of the continuation of the administrative process and of any judicial action is a condition of CBP considering such a petition. If the waiver is not provided, the administrative process will proceed. If a petition is subsequently withdrawn, the administrative process will resume where it had been suspended. The petitioner may submit a timely claim and cost bond to request judicial forfeiture action and the petition review process will cease. Also, if the petitioner is not satisfied with the agency determination of its petition, a claim and cost bond may be filed requiring institution of judicial forfeiture proceedings.

Petitions for relief are often referred for investigation. Many of the issues raised in a petition can be anticipated in the initial investigation if agents/officers are alert to the potential forfeiture issues. Thus, during an investigation that may

lead to a seizure, and certainly as part of a post-seizure petition investigation, the agents/officers should gather evidence on the following and related issues:

- The property owners' intent to defraud the revenue of the U.S. or to use property illegally;
- Whether the property was used illegally while stolen;
- Whether any owner had knowledge of the illegal use;
- What steps any owner or other interested party took to prevent the illegal use;
- The existence and status of the lienholders as "arms length" transactors;
- In the case of leases, did the owner ask the person taking possession if he had a criminal record? Did he ask for references and did he contact those references? Did the agreement contain a provision that the property only be used in accordance with law? Did the owner contact law enforcement authorities as to the criminal record or reputation of the person taking possession?
- In the case of common carriers, did the owner, operator, master, pilot, conductor or driver participate in or have knowledge of the violation or was he grossly negligent in preventing or discovering the violation?
- Any other circumstances bearing on the legitimacy of any person who might file a claim or appear as an "innocent owner."

The time period for filing a petition for remission or mitigation is 30 days from the date of mailing of the notice of seizure.[241] The agency also has the authority to extend the time for filing a petition under 19 C.F.R. § 171.2(c). The contents of the petition must include an identification of the property in question, an explanation of the claimant's interest in the property and a list of all reasons claimed to justify remission or mitigation.[242]

Petitions for remission or mitigation may be filed by anyone with an interest in the seized property. Although there is no "innocent owner" defense to a Title 19 forfeiture, the agency has discretion under 19 U.S.C. § 1618 to remit or mitigate based on similar factors that include the lack of "willful negligence" and the lack of an intent to defraud the revenue or to violate the law. In addition, 19 C.F.R. § 171.11(b) allows the agency to consider remission on grounds that the acts or omissions forming the basis for the seizure did not occur.

15.321b Disposition of Petitions

If the prohibited act or omission did not occur, the forfeiture action should be terminated.[243]

Title 19 U.S.C. § 1618 establishes statutory guidelines for remission or mitigation. If the forfeiture "was incurred without willful negligence or without

241 19 C.F.R. § 171.2(b).
242 19 C.F.R. § 171.1(c)(1).
243 19 C.F.R. § 171.11(b).

any intention on the part of the petitioner to defraud the revenue or to violate the law, or . . . mitigating circumstances . . . justify the remission or mitigation, [then the deciding official may] . . . remit or mitigate the same upon such terms and conditions as he deems reasonable and just . . ."

Offers to compromise a forfeiture are governed by 19 U.S.C. § 1617. Associate/Assistant Chief Counsels review all offers of compromise submitted in connection with forfeiture cases and make appropriate recommendations.

15.322 Expedited Procedures for "Personal Use" Seizures

Where property is seized pursuant to 19 U.S.C. § 1595a based on "personal use" quantities of drugs, expedited procedures[244]are provided for petitioners who:[245]

1. Have a valid, good faith interest in the seized property as owner or otherwise;
2. Reasonably attempted to ascertain the use of the property in a normal and customary manner; and
3. Did not know or consent to the illegal use of the property, or, in the event of knowledge, did what reasonably could be expected to prevent the violations.

Those petitions must be received by CBP within 20 days from the date the notice of seizure was mailed or, in the case of a commercial fishing vessel for which a summons to appear is issued, 20 days from the original date when the vessel is required to report.[246]

If no petition for relief is filed or if a petition is filed and denied, the property is declared forfeit by the appropriate agency official. The property can then be disposed of in the same manner as any judicially forfeited property: by sale, asset sharing, destruction, or retention for official use. If the property is sold, the proceeds are deposited in the Treasury Forfeiture Fund.

15.400 Comparing CAFRA & Customs "Carve-Out" Procedures

15.410 Summary of Procedural Differences

There are a number of procedural differences between forfeitures governed by CAFRA and those covered by the Customs "carve-out":

15.411 Notice

Notice is required for all seizures, but CAFRA has a specific requirement that notice be sent within sixty days of the seizure[247], while Customs requires only that notice comply with due process principles.[248]

244 19 C.F.R. §§ 171.51-171.55.
245 19 C.F.R. § 171.52(c)(1).
246 19 C.F.R. § 171.52(d).
247 18 U.S.C. § 983(a)(1)(A)(i).

15.412 Claims

Claimants under Customs procedures must receive a minimum of twenty days notice of CBP's intent to forfeit the property.[249] CAFRA requires at least thirty-five days notice.[250] Also, Customs claimants requesting judicial forfeiture proceedings must file a bond equal to 10% of the value of the property, with a $250 minimum bond and a $5,000 maximum.[251] Under CAFRA, no bond is required to request judicial forfeiture.[252]

15.413 Filing of complaints

Once a claim is filed, Customs forfeitures have no specific time requirements regarding the filing of a judicial complaint, though there must be compliance with due process. CAFRA requires an action be commenced by filing a complaint within ninety days of receipt of a claim unless an extension is granted or the property returned. Failure to comply, unless a criminal indictment containing a forfeiture allegation was obtained, results in a "death penalty" wherein no civil forfeiture may be sought.[253]

15.414 Mitigation and Remission

Customs forfeitures allow claimants to file petitions for mitigation and remission.[254] CAFRA has no similar provision. Although CAFRA contains no express provision for mitigation proceedings, the parties can agree to suspend CAFRA deadlines pending administrative petition processing.

15.415 Innocent Owner Defense

CAFRA establishes an "innocent owner" defense to forfeiture, which does not exist for Customs actions.[255]

[248] 19 U.S.C. § 1607; 19 C.F.R. § 162.31; See *Jones v. Flowers et al.,* 547 U.S. 220 (2006) (to comply with due process, if service of notice fails for any reason, and the government has other reasonable options to effect notice, the government must do so).
[249] 19 U.S.C. § 1608.
[250] 18 U.S.C. § 983(a)(2)(B).
[251] 19 U.S.C. § 1608.
[252] 18 U.S.C. § 983(a)(2)(E).
[253] 18 U.S.C. § 983(a)(3).
[254] *See* 19 C.F.R. Part 171.
[255] 18 U.S.C. § 983(d).

15.416 Set Asides

CAFRA also provides a mechanism for a motion to set aside a civil forfeiture, which does not exist in customs forfeitures, and provides a formal process for seeking judicial release of seized property.[256]

15.417 Disproportional Challenges

All CAFRA forfeitures may be challenged as disproportional to the offense, but traditional Customs forfeitures are not subject to this test.[257]

256 18 U.S.C. § 983(e).
257 18 U.S.C. § 983(g).

15.420 CUSTOMS FORFEIT URE/CAFRA COMPARISON CHART[258]

Issue	Customs Forfeiture	CAFRA
Application of Civil Forfeiture Changes		18 U.S.C. § 983(i)(1): Applies to all civil forfeitures except Titles 19, 26, FDA Act, Trading with the Enemy Act, 22 U.S.C. 401.
Burden of Proof	Burden on claimant by a preponderance of the evidence.	18 U.S.C. § 983: Burden on the government "by a preponderance of the evidence."
Sending Notice	Statute says notice must be sent promptly; 19 U.S.C § 1604, 1608; policy requires notice within 60 days absent good cause.	18 U.S.C. § 983(a): Notice must be sent within 60 days of seizure (90 days for seizures by state or local agencies) or the government must return property.
Time to File Claim	Claimant has 20 days from first publication of notice to file claim; 19 U.S.C. § 1608.	18 U.S.C. § 983(a)(2): Claimant has 30 days from last publication of notice and seizure, or 35 days from date notice letter is mailed.
Time for Filing Forfeiture Complaint	No provision.	18 U.S.C. § 983(a)(3): Gov't must file civil complaint, or commence criminal forfeiture, or return the property within 90 days of the date the claim is filed.
Cost Bond	Cost bond is required; 19 U.S.C. § 1608.	18 U.S.C. § 983(a)(2): Cost bond abolished.
Innocent Owner Defense	Innocent owner provisions exist for some but not for all forfeitures.	18 U.S.C. § 983(d): Protects innocent owners and BFPs and heirs and those persons who alert law enforcement.
Excessive Fines	Most courts have held that 8th Amendment should be resolved by court, not jury, after the return of a forfeiture verdict.	18 U.S.C. § 983(g): After forfeiture verdict, court determines if forfeiture is "grossly disproportional to the offense."

1.500 Specific Forfeiture Authority

15.510 Importing Goods Contrary to Law

[258] Adapted from, "The Civil Asset Forfeiture Reform Act of 2000: Summary and Reference Materials," (U.S. Customs Serv., Office of Chief Counsel, Associate Chief Counsel (Enforcement)), June 2000, Appendix II.

15.511 19 U.S.C. § 1595a(a

This statute authorizes the seizure and forfeiture of any "vessel, vehicle, aircraft, or other *thing,* used in, to *aid in*, or to *facilitate*, by obtaining information or *in any other way,* the importation, bringing in, unlading, landing, removal, concealing, harboring, or *subsequent* transportation of any article which is being or has been introduced, or attempted to be introduced, into the United States contrary to law, whether upon such vessel, vehicle, animal, aircraft or other thing or *otherwise*," including tackle, apparel, furniture, harness, or equipment (emphasis added).

15.511a Definitions

Article is not defined in the Customs laws. CBP has interpreted the term to be synonymous with the term "merchandise" which includes prohibited merchandise.[259] Thus, this section may be applied to seizures of controlled substances.

Facilitate is used in many statutes without being defined. Courts have traditionally interpreted the word according to its ordinary or dictionary meaning. *Webster's Third New International Dictionary* defines "facilitate" as: "To make easier or less difficult; free from difficulty or impediment . . . to lessen the labor of; assist, aid." The courts have placed some practical limitations on the meaning of the word "facilitate" by requiring a significant connection between the property to be seized and a violation of law before the property can be found guilty of facilitation. Like most facilitation cases, the test for facilitation is whether the property is being used as an active aid in carrying out essential elements of the offense.[260]

Equipment. There is apparently only one reported case interpreting the term "equipment" as used in § 1595a(a). However, it is a very useful decision because many different articles of property were in dispute. The government sought forfeiture of the vessel *Crosswinds* together with its tackle, apparel and equipment, for attempting to smuggle 887 pounds of hashish.[261] The claimant sought return of the following property, alleging that it did not constitute "tackle, apparel, or equipment":

> Various and all power tools, one large red toolbox, one small gray toolbox, one 12-volt battery charger, one 32-volt battery charger, two large hunting knives (Buck and Hunter), two pairs of binoculars (German Steiner, American Swift), two diving regulators, two diving masks, one set of diving fins, one wet suit, three sets of foul weather

259 19 U.S.C. § 1401(c).
260 *United States v. 1966 Beechcraft Aircraft Model King Air A90,* 777 F.2d 947 (4th Cir. 1985).
261 *United States v. One Custom Sport Fisherman Vessel Named the "Crosswinds," etc.*, 543 F.Supp. 749 (E.D. Va. 1982).

> gear, one portable FM stereo, two Igloo ice chests, one pair of Rayban sunglasses, one blue leather bomber jacket, one leather money belt, one Homelite generator, one small attaché case, personal fishing tackle (5 reels and 5 rods), sixteen life preservers, miscellaneous kitchen utensils, one tan Ultrasuede jacket, one green sleeping bag, one spear gun, one ten-power scope target (Lyman), one box of jewelry with contents (two gold tie tacks, high school ring, bracelet, gold wedding band, chains), one duffel bag.

The government conceded that the sunglasses, the blue leather jacket, the money belt, the tan Ultrasuede jacket and the box of jewelry were not "tackle, apparel, furniture, harness or equipment" under § 1595a(a), but moved for summary judgment as to the remaining items on the list. The court ruled that every disputed item on the list was part of the "equipment" of the vessel except the duffel bag and the small leather attaché case. It accepted the similar definitions of equipment set forth in a 1914 Treasury Department decision which defined equipment as:

> portable articles necessary or appropriate for the navigation, operation or maintenance of a vessel, but not permanently incorporated in or permanently attached to its hull or propelling machinery and not constituting consumable supplies. The term includes, therefore, anchors, chains, tackle, boats, repair parts, life-saving apparatus, nautical instruments, signal lights, lamps, furniture, carpets, table linen, table ware, bedding, arms and munitions.[262]

15.511b Seizure of Currency or Real Property Used to Facilitate Unlawful Importation

To use the facilitation provision of 19 U.S.C. § 1595a(a) with regard to currency or real property, the item must have some substantial connection to, or be instrumental in an importation contrary to law. For example, money paid for the unlawful importation of drugs would be "any . . . thing" used to facilitate in any way the importation of the drugs.

Also, if real property is being used to facilitate unlawful importations or the unlawful concealment of such, then § 1595a(a) arguably authorizes the seizure and forfeiture of the real property. For example, an airstrip used to land unlawfully imported drugs or a warehouse used to store unlawfully imported drugs certainly "facilitates" the importation in the former case, or the concealment of the drugs in the latter. Whether realty can be understood within the definition of "thing" is the question. No case has ruled on the point, although § 1595a(a) has been cited in conjunction with 21 U.S.C. § 881 in innumerable cases to authorize forfeiture of real estate. The word "thing" does not have a technical definition in the law as do "realty" and "personalty," but the words "things real" and "things personal" have been used to describe both realty and

262 26 Treas. Dec. 34150, at 184.

personalty. There seems to be no legal principle why realty should not be understood as encompassed by the term "thing."

CBP, then, may use § 1595a(a) as a basis for seizure of currency or real property in appropriate cases based on the plain language of the statute. However, given the complexity of this issue, seizure of currency or real property under § 1595a(a) should be coordinated in advance with the appropriate Associate/Assistant Chief Counsel. Further, as in all real property seizures, judicial process must be used to accomplish seizures of real property.

15.512 19 U.S.C. § 1595a(c)

The statute's seizure and forfeiture provisions contain both permissive and mandatory aspects. For instance, the following *shall be* seized and forfeited: [263]

- Merchandise that is stolen, smuggled, or clandestinely imported or introduced,
- Controlled substances,
- Contraband articles, and
- Plastic explosives[264] that do not contain a detection agent.[265]

However, merchandise in the following circumstances *may* be seized and forfeited:[266]

- Noncomplying merchandise restricted or prohibited by any law relating to health, safety, or conservation;
- The merchandise is unlicensed where such is required for importation;
- Copyright, trademark or trade name violations;
- Trade dress merchandise in violation of a court order;
- The merchandise exhibits marking violations under 19 U.S.C. § 1304 which are either intentional or the importer has been notified that previous shipments were improperly marked;
- Counterfeit visa violations;[267]
- Smuggled Agricultural Merchandise.[268]

This provision does not generally authorize the seizure of merchandise imported or introduced contrary to a provision of law which governs only the classification

263 19 U.S.C. § 1595a(c)(1); *United States v. One Lucite Ball Containing Lunar Material*, 252 F.Supp. 2d 1367 (S.D. Fla. 2003) (a moon rock stolen under Honduran law was subject to seizure and forfeiture as merchandise imported contrary to law in violation of 19 U.S.C. § 1595a(c)).
264 As defined in 18 U.S.C. § 841(q).
265 As defined in 18 U.S.C. § 841(p).
266 19 U.S.C. § 1595a(c)(2).
267 19 U.S.C. § 1595a(c)(3).
268 Assistant Commissioner, Office of Field Operations Memorandum, "Seizure of Agriculture Importations," dated May 11, 2006.

or value of merchandise and where there are no issues as to the admissibility of the merchandise.[269]

15.513 19 U.S.C. § 1595a(d)

This section of the statute was enacted as part of the PATRIOT Act Improvement and Authorization Act of 2005. This section adds broad forfeiture for goods exported contrary to law. In addition, any merchandise subject to an attempted exportation contrary to law may be forfeited. Further, in lieu of the actual merchandise, the proceeds of the offense or the equivalent value thereof may be forfeited. This section can be used in conjunction with 22 U.S.C. § 401, CBP's traditional export forfeiture provision.

15.514 Common carriers

Common carriers are excepted from the provisions of § 1595a[270] but are covered by 19 U.S.C. § 1594(b) and (c) and may be assessed monetary penalties under 19 U.S.C. § 1595a(b) if they are "in any way concerned in any unlawful activity" covered by 19 U.S.C. § 1595a(a). For example, common carriers could be assessed monetary penalties when they fail to document or dispose of cargo properly.[271]

15.520 Aviation smuggling

The purpose of the aviation smuggling statute, 19 U.S.C. § 1590, is to deal with air to sea transfers of prohibited and restricted merchandise and other acts of aviation smuggling. The statute prohibits the knowing possession or transportation of prohibited or restricted merchandise for the purpose of unlawful introduction into the United States on any aircraft. The statute also prohibits a sea transfer of prohibited or restricted merchandise between an aircraft and a vessel for purposes of unlawful introduction into the United States. In any case in which criminal and/or civil penalties may be imposed, any involved vessel or aircraft also may be seized and forfeited.

15.521 Aircraft or Vessels Outfitted for Smuggling

Forfeiture under 19 U.S.C. § 1590 is useful for forfeiting aircraft or vessels that are "outfitted for smuggling." The statute lists the prima facie elements of what constitutes smuggling if committed within 250 miles of the territorial seas:[272]

- Operation of vessels without lights when required;
- Presence of an auxiliary fuel tank not installed according to law;

269 19 U.S.C. 1595a(c)(4).
270 *See* 19 U.S.C. § 1595a(a): "Except as specified in subsection (b) or (c) of section 1594 of this title . . ."
271 Chief Counsel Memorandum, EN 91-1018; CC:LB, dated June 1, 1991.
272 19 U.S.C. § 1590(g).

- Failure to identify correctly vessel by name or country of registration or correctly identify aircraft by registration number and country of registration;
- External display of false registration numbers, false country or registration or false vessel name;
- Presence onboard of merchandise the importation of which is prohibited or restricted;
- Presence onboard of unmanifested controlled substances;
- Presence of any compartment or equipment built or outfitted for smuggling;
- Failure of the vessel to stop when hailed by a customs officer or other government authority.

Any aircraft or vessel engaged in any of the above acts, on that fact alone, may be seized and forfeited.

The remedies under § 1590 are in addition to remedies under other statutes reaching conduct similar to that listed here (*e.g.,* 21 U.S.C. § 881, 19 U.S.C. §§ 1581, 1587, 1703, etc.) and should be considered when and were appropriate.

15.522 Importations Contrary to Law

Forfeiture of aircraft may also be done pursuant to 19 U.S.C. § 1595a. A violation of this statute, *i.e.* importation contrary to law, may provide a basis for forfeiture in addition to 19 U.S.C. § 1436. For example, under these two statutes, an aircraft may be subject to forfeiture if: (1) the aircraft fails to meet the reporting requirements and merchandise comes into the United States which is not authorized; (2) the aircraft fails to meet requirements other than arrival requirements, *e.g.* landing merchandise prior to entry; or, (3) the aircraft does not arrive in the U.S. but has assisted another vessel or person which has arrived and not complied with the reporting requirement.

15.523 Federal Aviation Act – Forfeitures

The following are criminal violations of 49 U.S.C. §§ 46306 and 46315:

1. Knowingly sells, uses, attempts to use, or possesses with intent to use a forged, altered, or falsely made FAA authorization certificate, *e.g.,* Airman, Registration, etc – 49 U.S.C. § 46306(b)(2);
2. Knowing and willful display on an aircraft of a mark that is false or misleading as to the nationality or registration of the aircraft – 49 U.S.C. § 46306(b)(3);
3. Own an aircraft eligible for registration and knowingly and willfully operate it, or allow another to operate it, when the aircraft has not been registered or when the owner knows or has reason to know that the other person does not have proper authorization to operate the aircraft without first registering it – 49 U.S.C. § 46306(b)(5);

4. Knowing and willful operation of an aircraft that has not been registered or while any registration has been suspended or revoked – 49 U.S.C. § 46306(b)(6);
5. Knowing and willful service as an airman without a valid airman's certificate authorizing service in such capacity[273] – 49 U.S.C. § 46306(b)(7);
6. Knowing and willful employment for service as an airman one who is not authorized to serve in that capacity – 49 U.S.C. 46306(b)(8);
7. Operating an aircraft with an unauthorized fuel tank or system – 49 U.S.C. 46306(b)(9); and
8. Knowing and willful operation of an aircraft without displaying navigation or anti-collision lights as required by FAA regulations in connection with a felony drug offense – 49 U.S.C. § 46315.

An aircraft may be seized and forfeited if its use was related to any of the above criminal violations. This may be done regardless of whether a person is charged with the violation.[274] Further, an aircraft is presumed to have been used in violation of the statute, and thus is subject to seizure and forfeiture, in the following circumstances:[275]

- The aircraft registration has been forged, counterfeited, altered or falsely made;
- External display of false or misleading registration numbers or country of registration marks;
- The aircraft is registered to a fictitious person;
- Presence of an unauthorized auxiliary fuel tank, or, if authorized for which no certification (FAA 337) is carried aboard the aircraft.

Although 19 U.S.C. § 1590 (Aviation Smuggling) also authorizes seizure and forfeiture for some of the same circumstances noted above, it only does so if they exist within 250 miles seaward or landward of the territorial sea. The enumerated circumstances above, however, can support a seizure and forfeiture wherever CBP officers come upon them within the territorial jurisdiction of the United States.

15.530 Border Patrol Use of Title 19 Forfeitures[276]

Any merchandise that was not declared to a CBP officer or agent, or otherwise imported in violation of law, may be seized and forfeited by a Customs officer or

273 *United States v. Evinger*, 919 F.2d 381 (5th Cir. 1990) (operating a twin-engine aircraft while holding a single-engine license and an expired medical certificate does not constitute as serving as an airman without a valid airman's certificate within the meaning of the criminal statute).
274 49 U.S.C. § 46306(d)(1).
275 49 U.S.C. § 46306(d)(2).
276 Commissioner Memorandum, "Use of Customs Authority for Border Patrol Vehicle Seizures," dated August 2004.

agent pursuant to 19 U.S.C. § 1595a(a). Customs-authorized Border Patrol Agents (CBPA's) have been specifically designated to use Customs authority[277] for seizures and forfeitures of vehicles and any items therein that are subject to seizure and forfeiture.

Smuggled merchandise is subject to forfeiture pursuant to a variety of statutes,[278] and the vehicle used to facilitate the offense may be seized and forfeited pursuant to 19 U.S.C. § 1595a(a). The emphasis in seizing the vehicle pursuant to a Customs forfeiture statute rather than an immigration statute was, at one time, mainly due to the regulatory benefits under Title 19. However, the rule change to 8 C.F.R. Part 274 allows for seizures pursuant to 8 U.S.C. § 1324 to be administered pursuant to 19 C.F.R. parts 162 and 171. The result of this rule change is that the same administrative process applies to both customs and immigration seizures and forfeitures.

However, there are still benefits to a Border Patrol Agent seizing and forfeiting articles and merchandise under Customs authority, (Title 19), rather than under Title 8. Title 19 seizures and forfeitures are not subject to many of the requirements of CAFRA, providing the Agency with cost savings associated with the CAFRA publications of notices and other CAFRA requirements.

Border Patrol Agents encounter many vehicles in the course of their duties. An agent may encounter vehicles: during roving patrol stops, at interior immigration checkpoints, attempting to circumvent checkpoints, at load houses used to facilitate cross-border violation, and fleeing a Port of Entry. The encounters with these vehicles may lead to a seizure and forfeiture of the vehicle itself. For example:[279]

1. "A vehicle that has crossed the border at a place other than a designated border crossing may be seized and forfeited pursuant to 19 U.S.C. § 1436(b) for a violation of 19 U.S.C. § 1433(b)(1). A vehicle containing any article or type of merchandise that is brought into the United States contrary to law (including smuggled items) may be seized and forfeited pursuant to 19 U.S.C. § 1595a(a) for its involvement in the importation contrary to law.
2. In some instances, a vehicle is used only within the United States to facilitate smuggling, including facilitation of the subsequent domestic movement of aliens and their clothing, baggage, and personal effects that have illegally crossed the border (often on foot). If there is probable cause that a vehicle facilitated the subsequent transportation of any article, which was brought into the country contrary to law, the vehicle would be subject to seizure and forfeiture pursuant to 19 U.S.C. § 1595a(a).

277 19 U.S.C. §§ 1602-1619.
278 18 U.S.C. § 545 and 19 U.S.C. § 1595(a)(c).
279 Commissioner Memorandum, "Use of Customs Authority for Border Patrol Vehicle Seizures," dated August 2004.

3. If a vehicle is known to have crossed at a POE, then the agency must establish that the merchandise within the vehicle was imported contrary to law. If, at the POE crossing, the vehicle contained persons hiding from a CBP officer, then any merchandise accompanying the persons would be undeclared and subject to forfeiture pursuant to 19 U.S.C. 1595a(a). If the driver of the vehicle presents false documentation to a CBP officer at the time of arrival at the POE (in violation of 19 U.S.C. § 1433(d)) such vehicle may be seized and forfeited pursuant to 19 U.S.C. § 1436."

If, while performing traditional BPA duties, probable cause develops that a vehicle was involved in a cross-border movement of merchandise contrary to law, or the post-importation domestic movement thereof, the BPA should determine whether or not the seizure should be effected pursuant to Title 19 or other applicable laws.

15.540 Title 8 Forfeitures

15.541 8 U.S.C. § 1324 Prohibited Acts

Title 8 U.S.C. § 1324 has several different provisions of prohibited conduct with regard to alien smuggling.

Section (a)(1)(A)(i) makes it a crime for anyone to bring or attempt to bring an alien into the U.S. at an unauthorized location knowing that the person is an alien.

Section (a)(1)(A)(ii) makes it a crime for anyone to knowingly or recklessly transport, move, or attempt to transport or move an alien who has come in, entered or remains in the U.S. in violation of law, and the transportation is done in furtherance of the violation of law.

Section (a)(1)(A)(iii) makes it a crime for anyone to knowingly or with reckless disregard of an alien's unlawful status conceal, harbor or shield from detection (or attempt to do so) in any place an alien who has come in, entered or remains in the U.S. in violation of law.

Section (a)(1)(A)(iv) makes it a crime for anyone to knowingly or with reckless disregard encourage or induce an alien to come in, enter, or reside in the U.S. in violation of the law.

15.542 Civil Forfeitures

The statute, 8 U.S.C. § 1324, contains a provision mandating civil forfeiture with regard to the above activities. Section 1324(b)(1) requires any conveyance (vessel, vehicle, or aircraft) used in violation of the statute, any proceeds of the violation of the statute, and any property traceable to the conveyance or proceeds be seized and forfeited.

Seizures and forfeitures under this statute are conducted pursuant to the civil forfeiture provisions of CAFRA (18 U.S.C. §§ 981 et seq.).

15.543 Criminal Forfeiture – 18 U.S.C. § 982

Title 18 U.S.C. § 982(a)(6)(a) mandates criminal forfeiture of certain property once a person has been convicted of violation 8 U.S.C. § 1324. The forfeiture is included as part of the convicted person's sentence. The mandatory forfeiture includes the following property:

- Any conveyance, including any vessel, vehicle or aircraft, used in the offense; and
- Any property, real[280] or personal, that is the proceeds of the offense or was used to facilitate the offense.

15.550 Controlled Substances

Civil seizure and forfeiture is also provided for by 21 U.S.C. § 881. This statute permits the civil seizure and forfeiture of a wide variety of property connected to violations of the drug laws. Specifically, the following property may be seized and forfeited:

- All controlled substances;
- All raw materials, products, equipment of any kind used or intended for use in manufacturing, compounding, importing, exporting any controlled substance;
- All property used or intended for use as a container for controlled substances, raw materials, or listed chemicals;
- Conveyances, including vehicles, vessels, aircraft used or intended for use to transport or in any manner facilitate transportation, sale, receipt, possession or concealment of controlled substances;
- All books, records and research, formulas, microfilm, etc., used or intended for use to violate Title 21;
- All money, negotiable instruments, securities or other things of value furnished or intended for use in violating and any proceeds traceable to such an exchange.[281] If only a part of the purchase price of property comes from drug proceeds under this section, and since only such proceeds are forfeitable, the entire property cannot be forfeited.[282]

280 *See United States v. Neto,* ____ Fed.Appx. ____, Nos. 07-1268, 07-1478 (1st Cir. Dec. 5, 2007) (defendant convicted of harboring illegal aliens by renting out rooms in his house; house is subject to forfeiture based on his conviction; no 8th Amendment violation).

281 *See United States v. $242,484.00*, 389 F.3d 1149 (11th Cir. 2004) (under Pre-CAFRA standards, the government proved by a totality of the circumstances that probable cause existed that the currency was proceeds of, or otherwise connected to, illegal drugs and subject to forfeiture).

282 *United States v. One 1980 Rolls Royce, et al.,* 905 F.2d 89 (5th Cir. 1990).

- Real property used or intended for use to commit or facilitate the commission of a violation.
- All listed chemicals or drugs, manufacturing equipment, tableting machines, gelatin capsules which have been imported, exported, manufactured, possessed, distributed or intended to be distributed, imported or exported, in violation of any felony provision of this title or Title III (21 U.S.C. §§ 951 et seq.).[283]

The Office of Legal Counsel in the Justice Department has opined that U.S. Customs (CBP) lacks authority to administratively forfeit property pursuant to 21 U.S.C. § 881. In any case where CBP officers seize property for forfeiture where 21 U.S.C. § 881 provides the only basis for doing so (*i.e.*, no other forfeiture statute applies), then the property must be turned over to the Drug Enforcement Administration (DEA) forthwith. Under the asset sharing provisions, however, CBP can recover a proportionate share of the forfeiture proceeds.

As a practical matter, only two circumstances would precipitate a mandatory referral to the DEA. One is where the property was never actually used to facilitate a drug importation violation, but was only *intended* to be used in some way to do so. An example would be a tow vehicle and boat trailer being backed down a boat ramp to pick up a boat loaded with smuggled drugs at which point the driver is arrested and the conveyances seized. The vehicle and trailer did not actually "transport" the drugs but certainly were *intended* to do so. The only forfeiture statute available is 21 U.S.C. § 881. Therefore, the property must be turned over to the DEA.

On the other hand, if the boat is successfully pulled from the water on the trailer, the vehicle and trailer are now subject to seizure and forfeiture under 19 U.S.C. § 1595a(c) for having been "used . . . to facilitate in any . . . way . . . the landing . . . or subsequent transportation of any article . . . introduced . . . contrary to law." CBP may proceed with the administrative forfeiture pursuant to § 1595a(c) assuming the drugs were in fact imported at some point in time.

The second situation would involve a seizure of cash where probable cause exists to believe that it is proceeds of a drug transaction (other than a direct purchase upon importation),[284] and there are no facts to support probable cause to believe that a money laundering violation has occurred. As with the first boat example, 21 U.S.C. § 881 provides the only authority to seize and forfeit the cash. CBP may seize the cash, but DEA must institute any forfeiture proceedings.

283 21 U.S.C. § 881.

284 Cash paid for the importation itself, either for the goods or services, would be considered property used to "facilitate" the prohibited importation and would be subject to forfeiture pursuant to 19 U.S.C. § 1595a.

15.560 CMIR and Related Statutes

15.561 Bank Secrecy Act[285]

The Bank Secrecy Act employs specific reporting requirements which are implemented by regulations. For example, there are reporting requirement related to domestic coin and currency transactions at financial institutions.[286] There are also reporting requirements for transactions at foreign financial agencies[287] as well as transactions by a U.S. person with foreign currency.[288]

15.562 CMIR

The Bank Secrecy Act also requires a report from a person who is transporting monetary instruments at one time in excess of $10,000 into or out of the United States.[289] This rule is often referred to as the CMIR (Currency and Monetary Instrument Reporting) rule. There are two exceptions to this specific reporting requirement: (1) overland shipments by armored car between dealers in securities or banks, and (2) shipments from non-U.S. persons overseas to a dealer in securities or banks.[290] Failure to report such transportations of monetary instruments may subject them to forfeiture.

15.563 Elements of CMIR

For a detailed discussion of the CMIR requirements, see Chapter 7, Bank Secrecy Act.

15.563a Transportation

"Transportation" includes a person physically transporting the monetary instruments or a person causing the monetary instruments to be physically transported.[291]

15.563b Monetary Instruments

"Monetary instruments" encompasses different types of monetary documents:

- Coin (not gold coins) and currency customarily used as money in the country of issuance,
- Travelers checks in any form,
- Instruments made payable to fictitious persons, and

285 31 U.S.C. § 5311 et seq.
286 31 U.S.C. § 5313.
287 31 U.S.C. § 5314.
288 31 U.S.C. § 5315.
289 31 U.S.C. § 5316.
290 31 C.F.R. § 103.23.
291 19 U.S.C. § 1956(a).

- Other negotiable instruments in bearer form. For example: (1) instruments payable to "cash," "bearer," or blank and not restrictively endorsed; and (2) instruments payable to a named entity and endorsed without restriction.[292]

15.563c At one time – More than $10, 000 Transported

"At one time" has three possible definitions: (1) at one time, (2) during one calendar day, or (3) over any period with the intent to evade the reporting requirement.[293]

15.563d Filing the Report

An individual who meets the above requirements of the CMIR rule is required to file the report as he or she transports or ships the money into or out of the United States. *Inbound* reporting must take place at pre-clearance facilities outside of the U.S. or at the time of entry. *Outbound* reporting must take place at the time of departure from the U.S.

15.564 Seizure and Forfeiture of Monetary Instruments – 31 U.S.C. § 5317(c) and 5332(c

The Bank Secrecy Act allows for forfeitures of monetary instruments physically transported into or out of the U.S. without being reported pursuant to the CMIR rule, using FinCEN form 105 (formerly Customs Form 4790). If a report is false (contains a material omission or misstatement of fact) or is not filed, the statute provides that the instruments underlying the false report may be seized and forfeited.[294] The amount to be forfeited with respect to any particular seizure on this basis, however, may be subject to an Eighth Amendment proportionality analysis.[295]

In *United States v. Bajakajian,*[296] the Supreme Court held that forfeiture of 100 percent of the unreported currency in a CMIR case (under 31 U.S.C. § 5317) would be "grossly disproportional to the gravity of the offense," unless the currency was connected to some other criminal activity.[297] In so holding, the court ruled that a currency reporting offense, such as the CMIR offense set forth in 31 U.S.C. § 5316, is not a serious offense, and that the unreported currency is not the *corpus delicti* (the body) of the crime. This contrasts, the Court said, with the various anti-smuggling statutes which authorize the forfeiture of 100 percent of the items concealed from CBP or imported in violation of the Customs laws. (Presumably the same principle would apply to forfeiture of conveyances

292 31 C.F.R. § 103.11(u)(2).
293 31 C.F.R. § 103.11(b).
294 31 U.S.C. § 5317(c).
295 *United States. v. Bajakajian*, 524 U.S. 321 (1998).
296 *Id.*
297 *See also, United States v. $100,348.00*, 354 F.3d 1110 (9th Cir. 2004).

and other assets involved in the violation and subject to the forfeiture under 31 U.S.C. § 5317(c)).

The "excessive fines" defense will virtually always be available for forfeitures based solely on § 5316 CMIR violations (§ 5317 forfeitures) since, absent an involvement of the currency in other criminal activity, forfeiture of the entire amount for a CMIR violation will likely be regarded as excessive in violation of the Eighth Amendment and the court will likely authorize only forfeiture of a portion of the seized funds.

Distinct from the mere failure to report the transportation of monetary instruments (31 U.S.C § 5316), 31 U.S.C. § 5332(a) (bulk cash smuggling) makes it an offense for any person, with the intent to evade a currency reporting requirement under § 5316, to conceal in any fashion more than $10,000 in monetary instruments, and then to transport, or attempt to transport, such monetary instruments into or our of the United States.

However, when it enacted 31 U.S.C. § 5332, Congress included a set of "findings" emphasizing the seriousness of currency smuggling and the importance of forfeiting smuggled money. In particular, the "findings" state that the intentional transportation of currency into or out of the United States "in a manner designed to circumvent the mandatory reporting [requirements] is the equivalent of, and creates the same harm as, smuggling goods." Moreover, the "findings" state that only the confiscation of smuggled bulk cash can effectively break the cycle of criminal activity or which the laundering of bulk cash can effectively break the cycle of criminal activity of which the laundering of bulk cash is a critical part."[298]

For § 5332 bulk cash smuggling forfeitures, therefore, if the government can demonstrate, based on admissions or other evidence, that currency involved in a CMIR reporting violation was also concealed with the intent to evade the reporting requirement, the entire amount seized should be forfeitable because bulk cash smuggling violations generally are not believed to be subject to an "excessive fines" defense.[299] However, many courts are continuing to engage in an analysis of the bulk cash smuggling forfeiture under the Eighth Amendment excessive fines clause.[300]

298 Act Oct. 26, 2001, P.L. 107-56, Title III, Subtitle C, § 371(a), (b), 115 Stat. 336.

299 *See* Stefan D. Cassella, "Bulk Cash Smuggling and the Globalization of Crime: Overcoming Constitutional Challenges," *Berkeley Journal of International Law* 22.1 (2004): 98-122.

300 *See, e.g., United States v. Ely*, 468 F.3d 399 (6th Cir. 2006), where, after the excessive fines analysis, the court decided that forfeiture of all monetary instruments was not grossly disproportionate due to the potential fines under the Sentencing Guideline and statute were more than the forfeiture; *United States v. Jose,* 499 F.3d 105 (1st cir. 2007) (similar ruling as above); *United States v. $293,316 in United States Currency*, 349 F.Supp. 2d 638 (S.D.N.Y.

The civil penalties for a violation of § 5332(a) include seizure and forfeiture of any property involved in or traceable to a violation or a conspiracy to violate the statute.[301]

Criminal penalties for a willful violation of this statute include imprisonment not to exceed five years and/or mandatory forfeiture of all property involved in or traceable to the offense.[302] If neither directly forfeitable property nor substitute asses are available, the court shall issue a personal money judgment for the amount subject to forfeiture. "Property involved in the offense" may include: (1) monetary instruments concealed or intended to be concealed; (2) any article, container, or conveyance used or intended to be used to conceal or transport the monetary instruments; and (3) any other property used or intended to be used to facilitate the offense.[303] "One wrinkle that applies to CMIR cases concerns a person who transports a given sum of money into or out of the United States and . . . reports some, but not all of the money to [CBP]. In such cases, the person who fails to file the report receives no credit for the fraction that was reported. All of the money is forfeitable as property involved in the reporting violation."[304]

15.564a Knowledge as a Requirement for Civil Forfeiture

In the Second, Fifth, Seventh, Eighth, and Ninth Circuits, actual knowledge of the reporting requirement is not required as an element of the proof for civil forfeiture pursuant to 31 U.S.C. § 5317. These courts hold that the word "knowingly" only applies to knowledge that the person has the instruments, not knowledge of the reporting requirements.[305] This should not be confused, however, with the constitutional Due Process issue that would be raised by way

2004) (after a conviction for bulk cash smuggling, but no connection between the currency and another crime 100% forfeiture would violate the 8th Amendment); *United States v. $120,856*, 349 F.Supp. 2d 687 (D.V.I. 2005) (defendant acquitted of bulk cash smuggling, 100% forfeiture would be excessive fine).

301 31 U.S.C. § 5332(c).

302 31 U.S.C. § 5322; *United States v. Tatoyan*, 474 F.3d 1174 (9th Cir. 2007) (jury needs to find a "willful" violation of § 5332 in order for penalties under §5322 to be authorized).

303 31 U.S.C. § 5332(c)(3).

304 Stefan D. Cassella, "Forfeiture of Property Involved in Money Laundering," *United States Attorneys' Bulletin*, *Vol. 55, No. 6,* (U.S. Dep't of Justice, Executive Office of U.S. Attorneys) Nov., 2007, at 37.

305 *United States v. § 359,500,* 828 F.2d 930 (2d Cir. 1987); *United States v. $20,757.83 Canadian Currency,* 769 F.2d 479 (8th Cir. 1985); *United States v. $47,980 in Canadian Currency*, 804 F.2d 1085 (9th Cir. 1986); *United States v. $173,081.04 in U.S. Currency*, 835 F.2d 1141 (5th Cir. 1988); *United States v. $94,000 in U.S. Currency*, 2 F.3d 778 (7th Cir. 1993).

of defense if there was no actual or constructive knowledge in fact.[306] Further, criminal prosecution does require proof of knowledge as discussed in Chapter 7.

The Eleventh Circuit requires proof of actual knowledge of the reporting requirement as an element of civil forfeiture of the instruments.[307] Knowledge of the requirement can be shown by a previously filed CMIR by the person, a completed written declaration (6059B) which has the CMIR warning when the person acknowledges hearing and understanding an announcement, or is personally advised by the CBP officer or agent.

15.570 Money laundering and money transmitters

The money laundering statutes are discussed in more detail in Chapter 9, while this discussion will center on the forfeiture aspects of the principle money laundering statues.[308]

15.571 Money Laundering Control Act and Forfeiture

There are four major components to the money laundering control act (which will be listed individually below in sections 15.571b-e), as well as conspiracy to commit these components. The focus of these major components is on the intent of the actor, not the act itself. Money laundering forfeitures fall under 18 U.S.C. § 981 (civil forfeitures) or 18 U.S.C. § 982 (criminal forfeitures).

The courts have been quite generous when it comes to forfeitures for money laundering, specifically forfeiting property involved in the offense. That term "has been construed to apply to the money being laundered, the money or other property that is commingled with it or obtained in exchange for it when the money laundering transaction takes place, and any other property that facilitates the money laundering offense."[309]

15.571a Definitions

For the statutes described below, the following definitions apply:

Financial Transactions.[310] These include any transactions which affect interstate or foreign commerce (1) by moving funds by wire or any other means or (2) involving monetary instruments or (3) involving the transfer of title of real

306 *United States v. §395,000,* 828 F.2d 930 (2d Cir. 1987).
307 *United States v. One (1) lot of $24,900 in United States Currency,* 770 F.2d 1530 (11th Cir. 1985).
308 18 U.S.C. §§ 1956, 1957, 1960.
309 Stefan D. Cassella, "Forfeiture of Property Involved in Money Laundering," *United States Attorneys' Bulletin*, *Vol. 55, No. 6,* (U.S. Dep't of Justice, Executive Office of U.S. Attorneys) Nov., 2007, at 36.
310 18 U.S.C. § 1956(c)(4).

property, vessel, vehicle, or aircraft; or any transaction using a financial institution which affects interstate or foreign commerce in any way.

Specified Unlawful Activity (SUA).[311] The following is a representative list of a few of the SUAs in the statute:

- Financial transaction occurring in whole or part in the U.S. involving:
 - Manufacture, import, sale or distribution of a controlled substance
 - Murder, kidnapping, robbery or other crimes of violence
 - Fraud by or against a foreign bank
 - Bribery of a public official
 - Smuggling or export control violations
 - Human trafficking
- Acts constituting a continuing criminal enterprise
- Environmental crimes
- Many other offenses related to terrorism, fraudulent activities, pornography and intellectual property rights.

15.571b Domestic Transactions of Any Nature – 18 U.S.C. § 1956(a)(1

The elements of this offense are as follows:

1) Knowing financial transaction or attempted transaction of
2) Proceeds of a specified unlawful activity (SUA)
3) With the intent/purpose to:
 a) Promote some violation (SUA, in fact);
 b) Conceal some aspect of (SUA, in fact);
 c) Avoid a reporting requirement
 d) Engage in conduct prohibited by 26 U.S.C. §§ 7201, 7206.

15.571c Movement of funds into or out of the United States – 18 U.S.C. § 1956(a)(2)

The elements of this statute are as follows:

1) Transmissions or transfers (or attempts to do so) of monetary instruments or funds
2) Into or out of the United States
3) With the intent to carry on a SUA; or
4) With the intent or purpose to conceal some aspect of (SUA, in fact)[312]; or
5) With the intent or purpose to avoid the reporting requirement.

311 18 U.S.C. § 1956(c)(7).

312 See *Cueller v. United States*, 553 U.S. 550 (2008) (mere concealment of funds during transportation out of the country is insufficient to show intent or purpose to conceal or disguise the nature, location, source, ownership or control of the funds).

15.571d Government Sting operations – 18 U.S.C. § 1956(a)(3)

The elements of the statute are as follows:

1) Financial transactions or attempted transactions
2) Involving property represented to be proceeds of SUA;
3) With the intent to:
 a) Promote some SUA; or
 b) Conceal some aspect or represented proceeds; or
 c) Avoid a reporting requirement.

15.571e Transactions at financial institutions – 18 U.S.C. § 1957

The elements of the statute are as follows:

1) Knowing monetary transaction (or attempt) in property from
2) Proceeds of SUA
3) More than $10, 000 in value
4) Conducted in the U.S. or
5) Conducted outside the U.S. by a "U.S. person" (includes U.S. National, Permanent Resident Alien, U.S. Corporation, or company composed principally of U.S. Nationals or resident aliens).

15.572 Unlicensed money transmitting businesses – 18 U.S.C. § 1960

The legislative history accompanying the 2001 amendments to this statute provides valuable guidance to law enforcement officers investigating alleged unlawful money transmitting businesses:

"[A]n offense under 1960 is a "general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or knew that the Federal registration requirements promulgated pursuant 31 U.S.C. § 5330 applied to the business."[313]

"[T]he definition of an unlicensed money transmitting business [includes] a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing

313 House Report 107-250 (Part I), Financial Anti-Terrorism Act of 2001, October 17, 2001. See, *e.g., United States v. Keleta*, 441 F.Supp. 2d 1 (D.D.C. 2006) (statute is a general intent crime and there is no need to prove that the defendant knew or willfully violated state license or federal registration requirements).

such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would be unnecessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another."[314]

"Section 1960 is something of a hybrid between a currency reporting offense and a money laundering offense . . . Sections 981(a)(1)(A) and 982 (a)(1) authorize civil and criminal forfeiture of all property "involved" in a violation of § 1960. The forfeiture of all property involved in the illegal operation of the money transmitting business could include, of course, the business itself and all its assets. . . What is likely to be of greater importance, however, is that the forfeiture may include the funds being transmitted by a money transmitter who is acting in violation of the statute."[315]

"[T]here are now three situations in which § 1960 can be used to prosecute a money transmitter:

- when he operates without a State license, § 1960(b)(1)(A);
- when he operates in violation of Treasury regulations requiring all money service businesses to register with FinCEN; § 1960(b)(1)(B); and
- when he transfers money knowing that funds being transmitted are derived from a criminal offense, or are intended to be used for an unlawful purpose; §1960(b)(1)(C)."[316]

15.572a Elements of offense[317]

1. Anyone who knowingly conducts, controls, manages, supervises, directs, or owns

2. All or part of a money transmitting business

3. Affecting interstate or foreign commerce

4. Without a State license where unlicensed operation is a crime under State law; or

314 House Report 107-250 (Part I).
315 Stefan D. Cassella, "Forfeiture of Property Involved in Money Laundering," *United States Attorneys' Bulletin*, *Vol. 55, No. 6,* (U.S. Dep't of Justice, Executive Office of U.S. Attorneys) Nov., 2007, at 40-41.
316 Stefan D. Cassella, "Application of 18 U.S.C. § 1960 to Informal Money Service Businesses," (U.S. Dep't of Justice, AFML Section).
317 18 U.S.C. § 1960; See *United States v. Uddin*, 365 F.Supp.3d 825 (E.D. Mich. 2005) (operating an "unlicensed money transmitting business," 18 U.S.C. § 1960(b)(1)(B), is a general intent crime); *United States v. Elfgeeh,* 515 F.3d 100 (2d Cir. 2008) (government does not need to prove that the defendant knew that a license was required).

5. Without complying with the Federal registration requirements for money transmitting business found in 31 U.S.C. § 5330 or the regulations promulgated thereunder; or

6. Involving the transportation or transmission of funds that are known to have been derived from a criminal offense or intended to be used to promote or support unlawful activity.

15.572b Sample violations of 18 U.S.C. § 1960

1. Bill and Pete receive monies from various clients and deposit the funds into an account. They thereafter wire transfer the monies to other accounts (as directed by the clients), without a license, in a state where such unlicensed conduct is a crime.

2. Bill and Pete are licensed in Florida as money transmitters and are actually engaged in that business, however, their business is not registered in accordance with 31 U.S.C. § 5330.

3. Bill and Pete are licensed in Florida as money transmitters and are registered as required in 31 U.S.C. § 5330, but Bill accepts money from Sam knowing that it was criminally derived and transmits the money to another person in accordance with Sam's instructions.

15.572c Forfeiture

Title 18 U.S.C. § 982(a)(1) provides for seizure and forfeiture of any property, real or personal, that is involved in the § 1960 offense or any other property that is traceable to such involved property.[318] A criminal conviction is required before criminal forfeiture under this statute may take place.

The possibility of civil forfeitures also exists for violations of § 1960. These forfeitures are authorized under 18 U.S.C. § 981(a)(1)(A).[319]

15.580 Vessel forfeitures

15.581 Definitions

The word "vessel" includes every description of water craft or other contrivance used, or capable of being used, as a means of transportation in water, but does

318 *See United States v. Elfgeeh*, 515 F.3d 100 (2d Cir. 2008) (forfeiture of $22 million not excessive when this was the amount of money transmitted in violation of the law; defendants were persons to whom the statute was aimed).
319 Stefan D. Cassella, "Application of 18 U.S.C. § 1960 to Informal Money Service Businesses," (U.S. Dep't of Justice, AFML Section).

not include aircraft.[320] Another section of Title 19, section 1644, does provide that aircraft are subject to some customs laws, such as anti-smuggling laws.

"Vessels" are distinguishable from "vehicles" whose definition includes every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land, but does not include aircraft.[321]

15.582 Reporting requirements: 19 U.S.C. § 1433(a); 19 C.F.R. § 4.2

The statute imposes reporting requirements on any vessel, including: (1) those arriving from a foreign port or place (including from the high seas if it met another vessel or received merchandise or passengers outside of the territorial seas), (2) any foreign vessel from any U.S. port, or (3) any U.S. vessel with merchandise in bond or which must be entered. These vessels must report their arrival to the nearest customs facility upon arrival at any port or place within the United States.[322]

The regulations provide a definition of "arrival" which means the time when the vessel first comes to rest, whether at anchor or dock, in any harbor within the customs territory of the United States.[323] "Arrival" is different from "entry." "Entry" is the documentation and process by which conveyances, property, merchandise, and people (not just aliens) are allowed into the United States. For example, vessels must "enter" within 48 hours of arrival. This entry is separate from the entry of merchandise being imported into holds. Typically, "entry" is required after "arrival."

The vessel is required to immediately report to the nearest CBP facility[324] by any means of communication, including telephoning in. Ports may also publish local rules or procedures and vessels must meet these as well.[325]

There are also statutory and regulatory limitations on the vessels and persons on board until the arrival is reported. Pursuant to 19 U.S.C. § 1459 and 19 C.F.R. § 4.51, no person may board or leave a vessel without the permission of the port director or until CBP takes charge of the vessel. Only one person may leave to report the arrival of the vessel if necessary.

If anyone leaves or boards in violation of the statute, there are potential penalties. Violations of the statute may result in civil penalties to the master of the vessel and seizure of any conveyance used in connection with the violation.[326]

320 19 U.S.C. § 1401(a).
321 19 U.S.C. § 1401(b).
322 19 U.S.C. § 1433(a).
323 19 C.F.R. § 4.0(f).
324 19 C.F.R. § 4.2(a).
325 19 U.S.C. § 1434(c).
326 19 C.F.R. § 4.3a; 19 U.S.C. § 1595a.

CBP also restricts and controls the departure of vessels.[327] Under the regulation, no vessel that has arrived at and has not reported its arrival may depart. Violations of this provision may result in penalties under 19 U.S.C. § 1436 including seizure and forfeiture of the vessel.

15.583 Private vessels, yachts, and recreational vessels

The reporting requirements mentioned above apply to ALL vessels, whether documented or undocumented, foreign or domestic. U.S. vessels must report after: (1) having been to a foreign port or place, or (2) having contact with hovering vessels, or (3) having delivered or received merchandise or passengers (regardless of whether or not the passengers paid) outside of the United States.[328]

Pursuant to 19 U.S.C. § 1441, some U.S. vessels are exempt from making entry after arrival. These vessels are exempt from entry if they comply with all reporting arrival requirements, comply with customs and navigation laws, have not visited any hovering vessel and if they have reported any merchandise upon arrival that needed to be reported. This entry exemption does not include vessels with paid passengers (passengers for hire).

Failure for private vessels, yachts and recreational vessels to comply with the reporting requirements may result in an imposition of penalties under 19 U.S.C. § 1436.

15.584 CBP controls after arrival

After a vessel arrives, CBP still controls its movement, including departures and coastwise travel. Violations of the requirements on vessels while in the United States may result in statutory penalties, such as 19 U.S.C. § 1595a, including forfeiture of conveyances involved in the violation. CBP may even control U.S. vessels for some purposes.[329] It is important to note that CBP control of a vessel does not automatically mean that CBP may border search that vessel.

15.585 Cruising licenses issued by port directors to private yachts

The cruising licenses, issued under 19 C.F.R. § 4.94, exempt the private yachts from entry and clearance requirements but not arrival reporting requirements at all subsequent ports for a limited period of time. A yacht that fails to comply with the cruising license requirements may be seized and forfeited.[330]

327 19 C.F.R. § 4.6.
328 19 U.S.C. 1434(a).
329 *See* 19 U.S.C. § 1433(e).
330 19 U.S.C. §§ 1436, 1595a.

15.586 Passenger obligations

On a reported conveyance, including vessels, passengers must remain on board until authorized by a CBP officer or agent to depart.[331] Violations of these provisions may subject passengers to penalties and may subject the conveyance involved in the violation to seizure and forfeiture.[332] If a passenger is on an unreported conveyance, the passenger must report his or her arrival to the nearest CBP facility.[333] The passenger's failure to report as required may subject the conveyance involved to seizure and forfeiture.[334]

15.587 Vessels outfitted for smuggling

Any vessel that has been outfitted for smuggling may be seized and forfeited.[335] Title 19 U.S.C. § 1703 provides that whenever any vessel has been built, purchased, or fitted out in whole or in part for the purpose of being used to defraud the revenue or smuggling merchandise into the United States, the same may be seized and forfeited. For example, secret compartments may indicate the vessel has been outfitted for smuggling purposes. It is important to note that there is no requirement for the government to have actual evidence that the vessel was involved in smuggling. It is sufficient for forfeiture purposes that the vessel was outfitted for smuggling.[336]

The statute, 19 U.S.C. § 1703(c), establishes *prima facie* acts of smuggling. If any of the following acts occurs, it is *prima facie* evidence of smuggling and the vessel is subject to seizure and forfeiture:

1. If the vessel is subject to pursuit under 19 U.S.C. § 1581. For example, if the vessel fails to stop on command of a "customs officer," (which includes chief, warrant and petty officers of the U.S. Coast Guard), the vessel is "subject to pursuit; or
2. If the vessel fails to display lights as required by law; or
3. If the vessel meets the definition of a "hovering vessel."[337]

331 19 U.S.C. § 1459(b).
332 19 U.S.C. § 1595a.
333 19 U.S.C. § 1459(c).
334 19 U.S.C. § 1595a.
335 19 U.S.C. § 1703.
336 *Id.*; see *United States v. One 1983 Homemade Vessel Named Barracuda,* 858 F.2d. 643 (11th Cir. 1988).
337 "Hovering vessels" are defined several places. In 19 U.S.C. § 1401(k)(1): "any vessel which is found or kept off the coast of the United States within or without the customs waters, if, from the history, conduct, character or location of the vessel, it is reasonable to believe that such vessel is being used or may be used to introduce or promote or facilitate the introduction or attempted introduction of merchandise into the United States in violation of the laws of the United States; and (2) any vessel which has visited a vessel described in paragraph (1)." See also 19 U.S.C. §§ 1581(g), 1587.

The statute applies to "U.S. vessels" which is defined more broadly than "U.S. documented vessel." A "U.S. vessel" under this statute includes any vessel owned or substantially controlled by a U.S. citizen or corporation.[338]

Prior to any seizure under this section, you should consult with your Associate/Assistant Chief Counsel.

15.588 Maritime Drug Law Enforcement Act (MDLEA)[339]

Title 46 U.S.C. § 70507 was codified in 2006 and contains a list of practices commonly associated with maritime-based smuggling activity. This statute addresses contemporary maritime smuggling practices and techniques, while it has been decades since 19 U.S.C. § 1703 (see above) has been amended to address new smuggling practices and techniques.

This statute states that property described in 21 U.S.C. § 881(a) that is used to commit, or facilitate an offense of manufacturing or distributing controlled substance on board of a vessel of the United States, within the jurisdiction of the United States, or with an individual of the United States,[340] may be seized and forfeited pursuant to 21 U.S.C. § 881.

The statute also recognizes that certain practices common to smuggling provide *prima facie* evidence of the intent to use the vessel to commit, or to facilitate the commission of an offense under 46 U.S.C. § 70503. These practices also may support the seizure and forfeiture of the vessel, even when no controlled substances are found on board. The statute lists facts which may be considered in the totality of the circumstances to be *prima facie* evidence of an offense making the vessel subject to seizure and forfeiture:

- Configuration of the vessel to ride low or provide a low hull to avoid visual or radar detection;
- Compartments or equipment that is built or fitted out for smuggling;
- Presence of an auxiliary tank;
- Engines that are excessively overpowered in relation to the design and size of the vessel;
- Presence of materials to alter or reduce heat or radar signature of the vessel;
- Camouflaging paint scheme;
- Display of false registration;
- Equipment, personnel or cargo inconsistent with stated purpose of vessel;
- Excessive fuel, oil, food, water, spare parts;
- Operation without lights when required;
- Failure to stop or heave when hailed;

338 19 U.S.C. § 1703(b).
339 46 U.S.C. §§ 70501-70507.
340 46 U.S.C. § 70507(a).

- Declaring false information about the vessel, cargo or crew;
- Presence of controlled substances residue;
- Use of petroleum products or other substances to foil detection of controlled substances residue;
- Controlled substances in the water near the vessel.

15.590 Intellectual Property Forfeiture

See, generally, Chapter 8 for more detailed information on this topic.

15.591 Copyright, Trademark, Trade Secrets

15.591a Definitions

The law of copyright, in general, protects "original works of authorship" including the following broad categories: literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings, and architectural works.[341] Once in place, a copyright protects against unlicensed reproduction, distribution, display, performance, or modification of the copyrighted work, generally for a term equivalent to the author's life plus seventy years (if the work was created before 1978, it is protected for ninety-five years from the date of creation).[342]

If copyright is the law of authorship, trademark is the law of consumer marketing and advertising. Trademarks are given federal protection by the *Lanham Act*.[343] The *Lanham Act*, in general, prohibits the imitation and unauthorized use of a trademark which is defined as "any word, name, symbol, or device, or any combination thereof [used by a person] to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown."[344]

In general, a trade secret is any formula, pattern, device or compilation of information, whether tangible or intangible, used in a business to obtain an advantage over competitors who do not know or use it.[345]

Patent is the law of invention. Generally, a patent can be obtained for "any new and useful process, machine, manufacture, or composition of matter, or any new or useful improvement thereof . . ."[346] A patent gives the patentee the right to exclude others from making, using, or selling or offering to sell any patented

341 17 U.S.C. § 102(a).
342 *See* 17 U.S.C. §§ 106, 302.
343 15 U.S.C. §§ 1051-1127.
344 15 U.S.C. § 1127.
345 *See* 18 U.S.C. 1839(3) (sets forth complete definition).
346 35 U.S.C. § 101.

invention throughout the United States or importing the invention into the United States.[347]

15.591b Copyright Protections--Relevant Statutes

The principal criminal statute protecting copyrighted works is 17 U.S.C. § 506. This statute prohibits two types of criminal copyright infringement: for-profit and nonprofit. In order to obtain a conviction under the for-profit provision, the government must prove:

- A valid copyright exists;
- It was infringed by the defendant;
- Willfully; and
- For purposes of commercial advantage or private financial gain.

The criminal copyright infringement statutes are arranged so that the substantive offenses are described in 17 U.S.C. § 506(a), but the penalty provisions are located in 18 U.S.C. § 2319.

15.591c Forfeitures

Once a conviction is obtained under 17 U.S.C. § 506(a), § 506(b) requires that "the court in its judgment of conviction shall . . . order the forfeiture" of the infringing copies or phonorecords and "all implements, devices, or equipment used in the manufacture of such infringing copies or phonorecords." Subsection 506(b) also provides the court with the discretion to order the destruction or other disposition of the infringing copies or phonorecords or production equipment.

15.592 Trademark Protections

15.592a Intellectual Property Entitled to Trademark Protections

The laws recognize and protect four functions performed by trademarks. These are:

- Identify a particular seller's goods and distinguishing them from goods sold by others;
- Signifying that all goods bearing the trademark come from or are controlled by a single source;
- Signifying that all goods bearing the trademark are of an equal level of quality; and
- As a prime instrument in advertising and selling goods.[348]

347 *See* 35 U.S.C. § 271(a).

348 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 3.01[2] (1995); See, *Lanham Act,* 15 U.S.C. §§ 1051-1127.

A trademark is also an important "objective symbol of the good will that a business has built up. Without the identification function performed by trademarks, buyers would have no way of returning to buy products that they have used and liked."[349] Thus, trademarks are used not only to identify sources of goods, but also to obtain marketing advantage.

15.592b Counterfeit Goods and Services – 18 U.S.C. § 2320

In order to establish a criminal offense under 18 U.S.C. § 2320, the government must prove that:

- The defendant trafficked or attempted to traffic in goods or services;
- Such trafficking, or attempt to traffic, was intentional;
- The defendant used a "counterfeit mark" on or in connection with such goods or services, or knew that a counterfeit mark had been applied; and
- The defendant knew that the mark used was counterfeit.

15.592c Criminal Forfeiture

The forfeiture provision, contained at 18 U.S.C. § 2320(b), resembles a civil, rather than a criminal provision. It provides that "[u]pon a determination by a preponderance of the evidence that any articles in the possession of a defendant in a prosecution under this section bear counterfeit marks, the United States may obtain an order for the destruction of such articles." In choosing a civil-type forfeiture provision, the joint committee explained that "[e]ven if the defendant is ultimately acquitted for the criminal charge, there is no valid public policy reason to allow the defendant to retain materials that are in fact counterfeit."[350]

15.592d Civil Forfeiture

Any merchandise bearing a counterfeit mark imported into the United States is required to be seized and, in the absence of the written consent of the trademark owner, forfeited. Merchandise forfeited is required to be destroyed unless it is determined that the merchandise is safe or not a hazard to health and CBP has the written consent of the U.S. trademark owner. Then CBP may dispose of the merchandise, after obliteration of the trademark where feasible, by: [351]

- Delivery to any federal, state, or local government agency that, in the opinion of CBP, has established a need for the merchandise; or
- Gift to any charitable institution that, in the opinion of CBP, has established a need for the merchandise; or
- Sale at public auction.

349 *Id.*
350 Joint Statement on Trademark Counterfeiting Legislation, 130 Cong. Rec. at H12077, 98th Cong., 2d Sess. (1984).
351 19 C.F.R. § 133.52.

15.600 Forfeiture of Cultural Property

15.610 Applicable Statutes and Regulations

- 19 U.S.C. 2091-2095 (Pre-Columbian Monumental or Architectural Sculptures or Murals)
- 19 U.S.C. 2601-2613 (Convention on Cultural Property)
- 19 U.S.C. 1595a(c)(1)(A) (Importation Contrary to Law - Stolen, Smuggled or Clandestinely Introduced Merchandise)
- 19 U.S.C. 1497 (Failure to Declare)
- 19 C.F.R. 12.104-12.109 (Cultural Property Regulations)

15.620 Pre-Columbian Monumental or Architectural Sculpture or Mural

The items covered under these statutes are defined in 19 U.S.C. § 2095 and 19 C.F.R. § 12.105. The item must be "stone carving or wall art" which is a product of pre-Columbian Indian culture and is an immobile monument or structure or affixed to an immobile monument or structure, and must come from Belize, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Peru, and Venezuela.[352] For the restrictions of these statutes to apply, the merchandise must have been exported after July 1, 1973.[353]

The importation of this particular merchandise is permitted if a certificate of export from the foreign country is provided pursuant to 19 U.S.C. 2092 and 19 C.F.R. § 12.107(a).

Pursuant to 19 U.S.C. 2093 and 19 C.F.R. 12.109 any pre-Columbian monumental or architectural sculpture or mural imported in violation of the Customs statutes shall be seized and is subject to forfeiture. Any forfeited property will first be offered to the country of origin as a disposition.

15.630 Merchandise subject to UNESCO Convention

Certain statutes regulate importation of merchandise documented as belonging to a museum or religious or secular institution of a country that is a party of the 1970 United Nations Educational, Scientific, and Cultural Organization (UNESCO) Convention.[354]

If the item was stolen from a museum or institution after the later date of either April 12, 1983 or the date the country became a party to the convention[355] then

352 19 U.S.C. § 2095.
353 19 C.F.R. § 12.106.
354 *See* 19 U.S.C. §§ 2601-2613.
355 19 C.F.R. § 12.104a(a); See 19 C.F.R. § 12.104b for a list of parties (countries) to the Convention.

seizure and/or forfeiture of the merchandise is authorized pursuant to 19 U.S.C. 2609 and 19 C.F.R. § 12.104e.

15.640 Merchandise Covered by a Special Agreement

As of December 2009, thirteen countries have special agreements with the United States that provide CBP with seizure authority for certain types of cultural property: Bolivia, Cambodia, Canada, Colombia, Cyprus, El Salvador, Guatemala, Honduras, Italy, Mali, Nicaragua, the People's Republic of China and Peru.[356]

These countries can provide a certificate of export pursuant to 19 C.F.R. 12.104a(b). However, if the merchandise is:

- From one of these countries, and
- Is the type of merchandise described in 19 C.F.R. 12.104g, and
- There is no certificate of export, then

there is seizure and/or forfeiture authority pursuant to 19 U.S.C. 2609 and 19 C.F.R. § 12.104e.

15.650 Catch-all Authority

If the merchandise does not explicitly fall within any of the authorities listed above, but it was removed from the foreign country illegally (e.g., the merchandise was stolen in the foreign country in violation of the foreign country's law, or the merchandise was exported from the foreign country in violation of the foreign country's law), there may be seizure authority pursuant to 19 U.S.C. 1595a(c)(1)(A) (importation of stolen merchandise).[357]

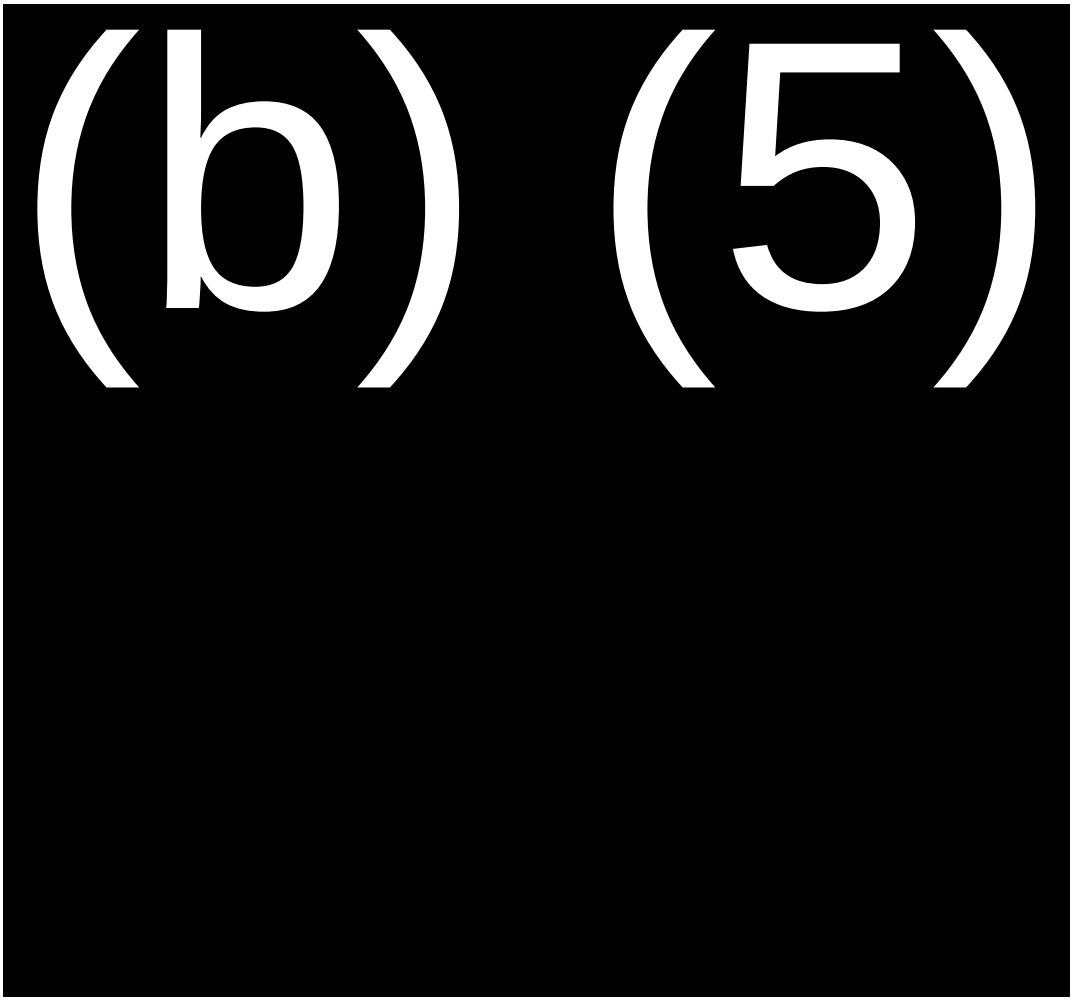
If the merchandise was not declared or was misdescribed, there may be seizure authority pursuant to 19 U.S.C. 1595a(c)(1)(A) (importation of merchandise that is smuggled or clandestinely introduced).

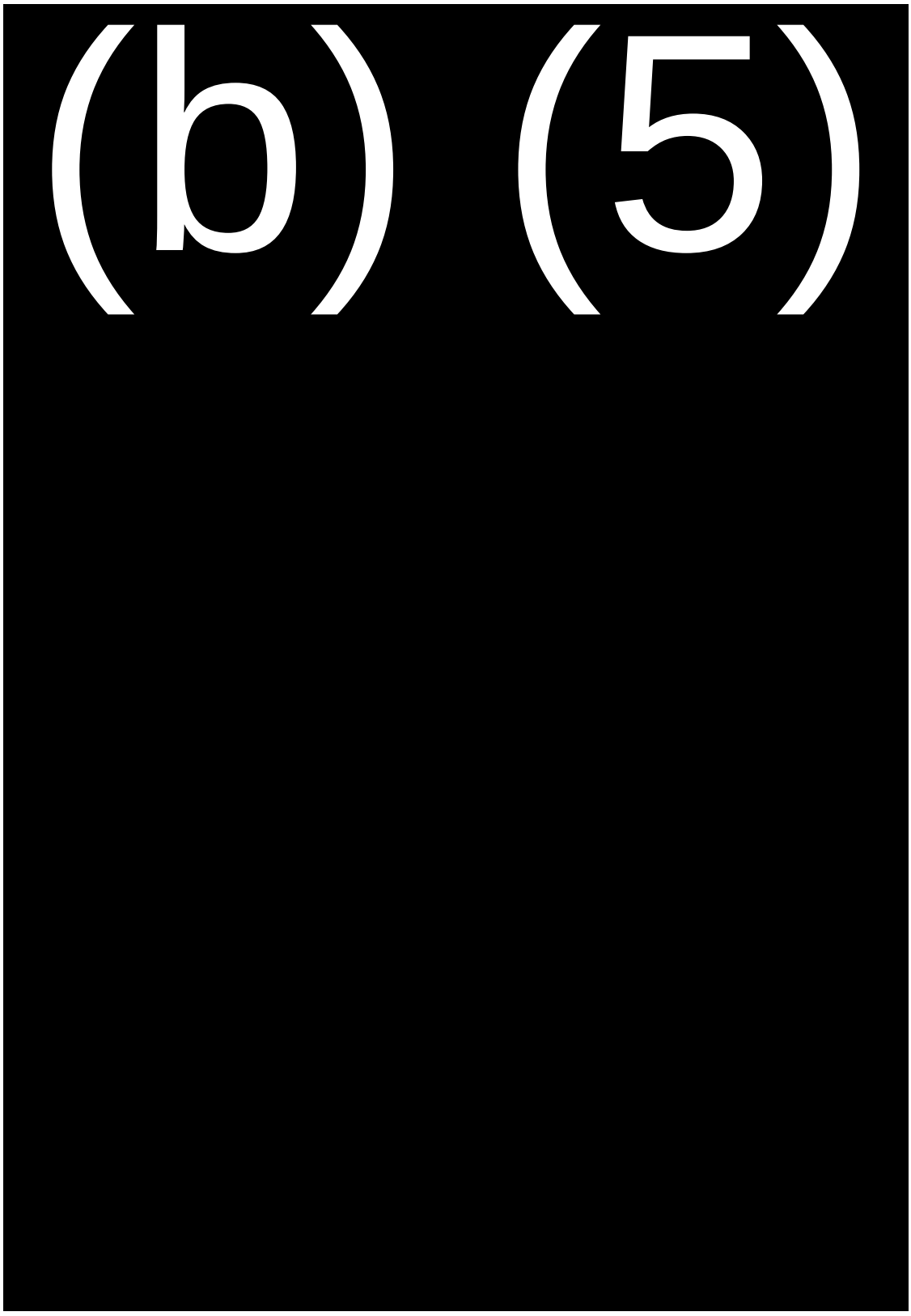
If the merchandise was not declared prior to examination of baggage, there is seizure authority pursuant to 19 U.S.C. 1497.

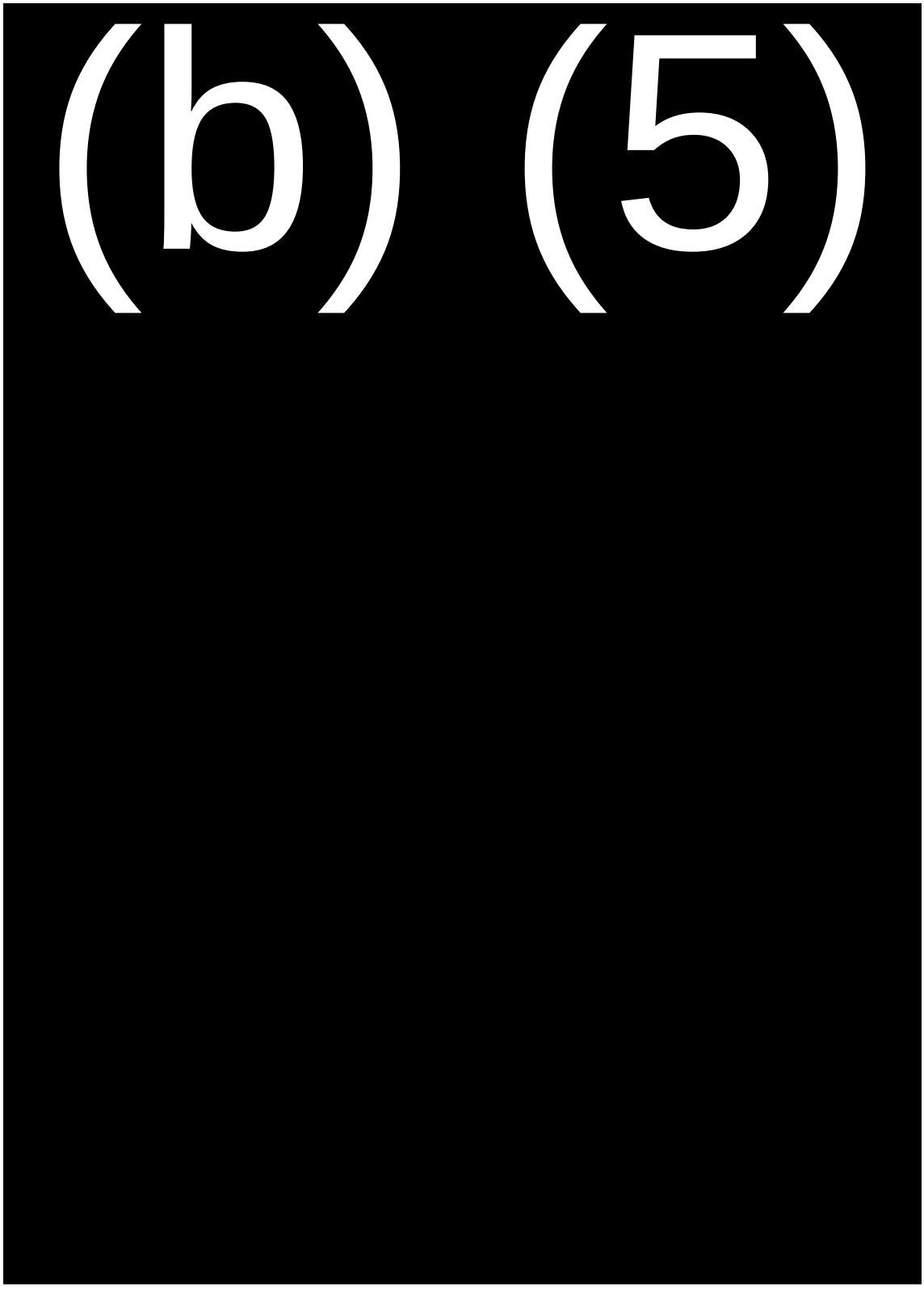
356 19 C.F.R. § 12.104g.
357 *See U.S. v. One Moon Rock*, 252 F.Supp.2d 1367 (S.D. Fla. 2003).

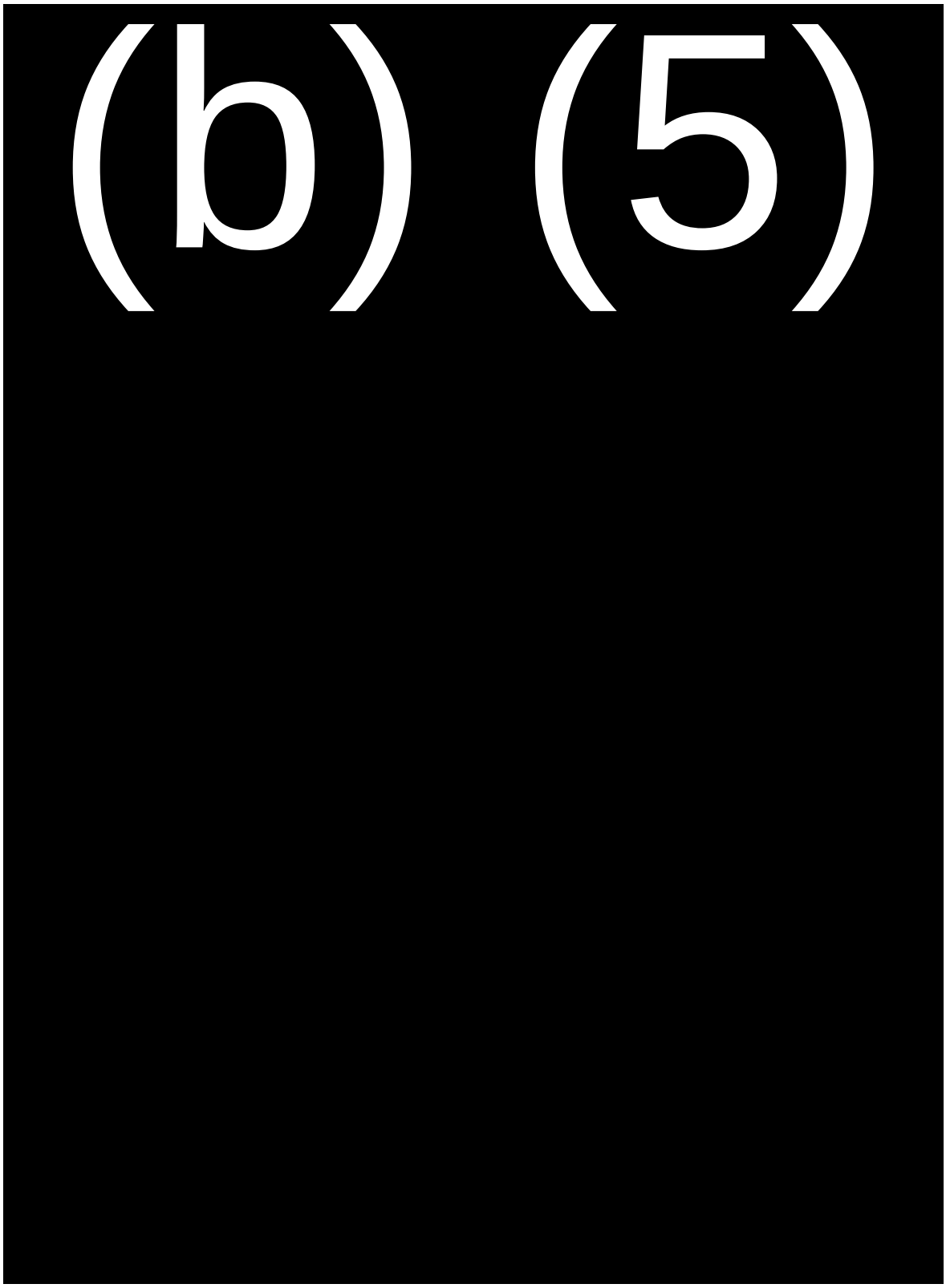
Chapter Sixteen

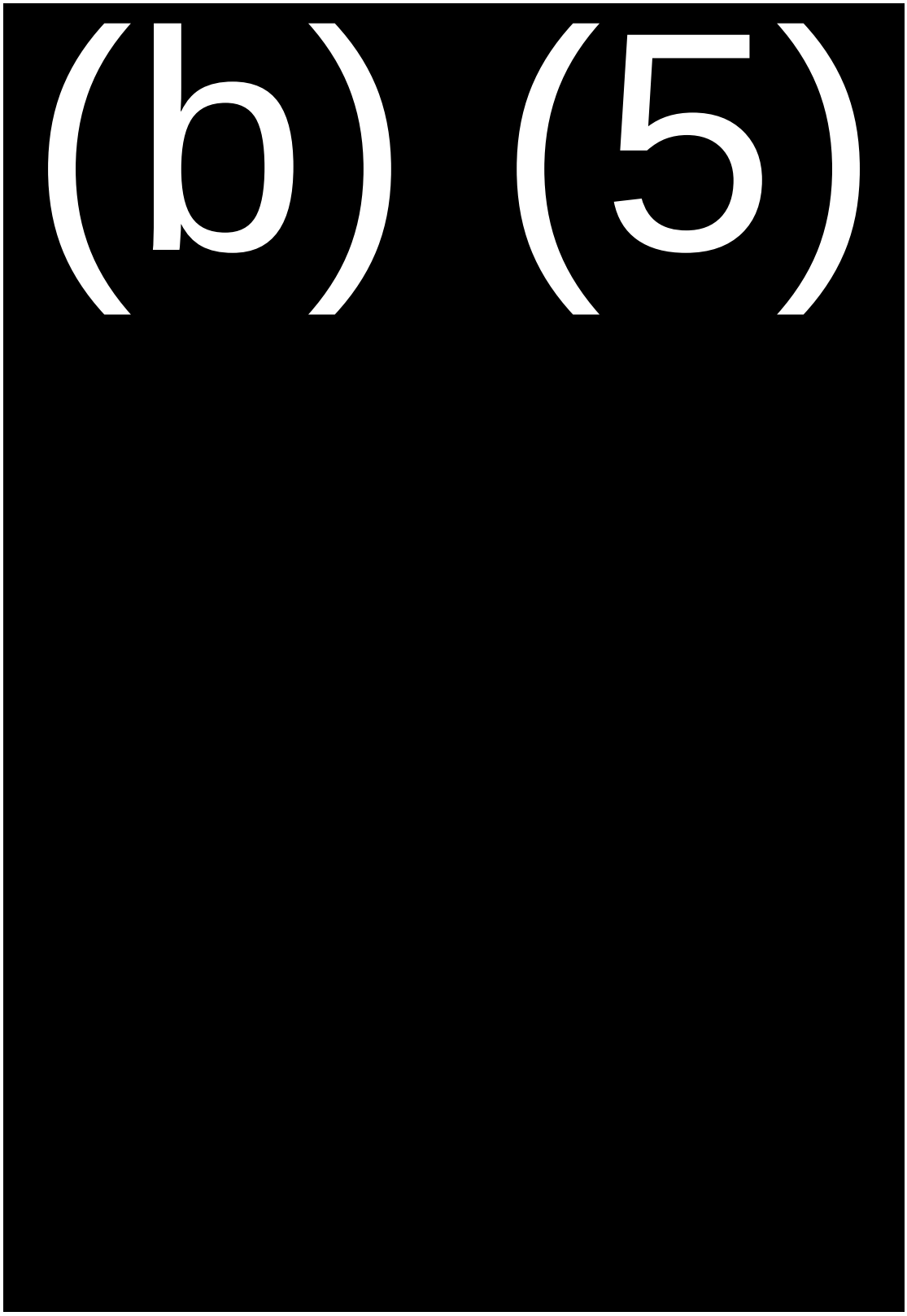
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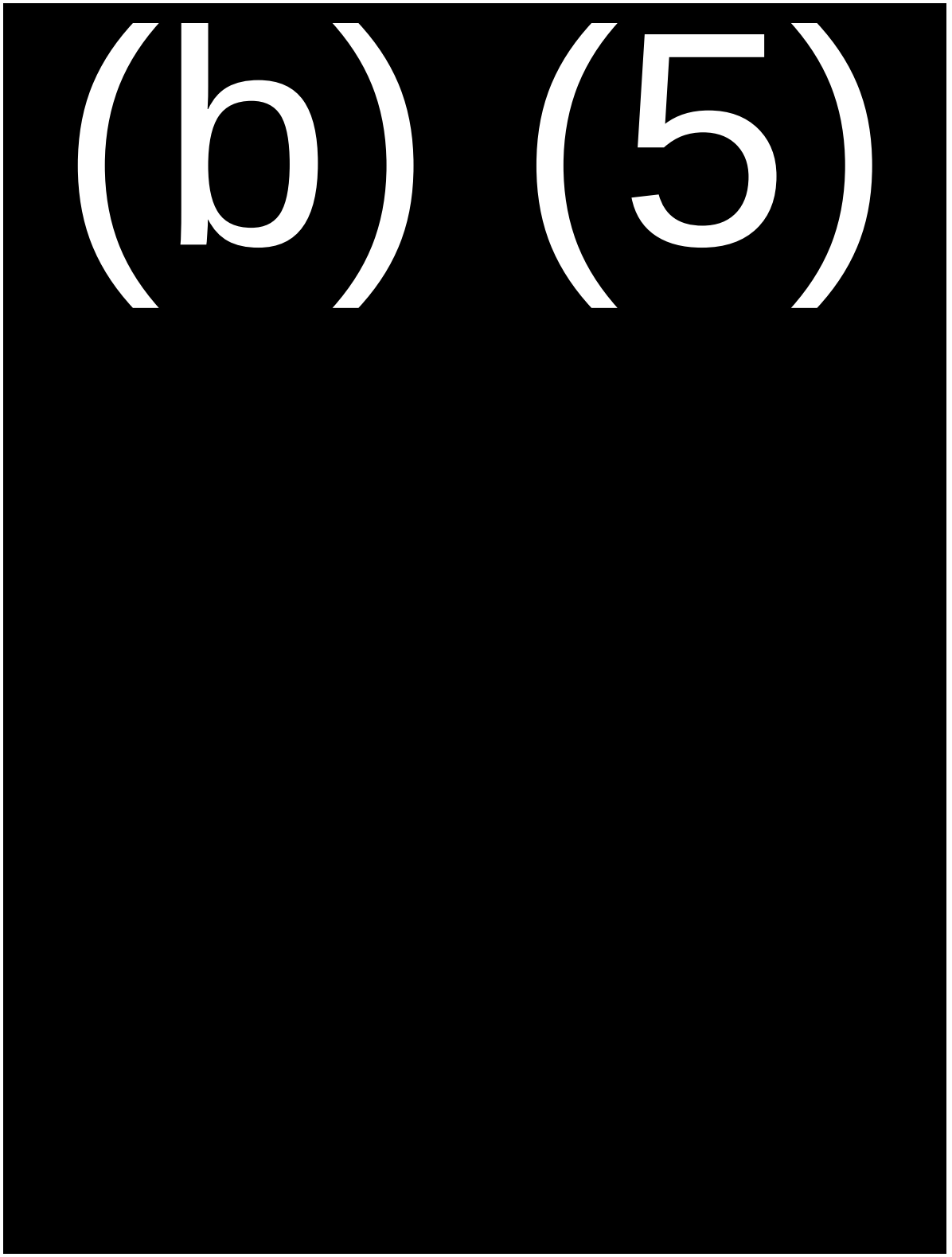


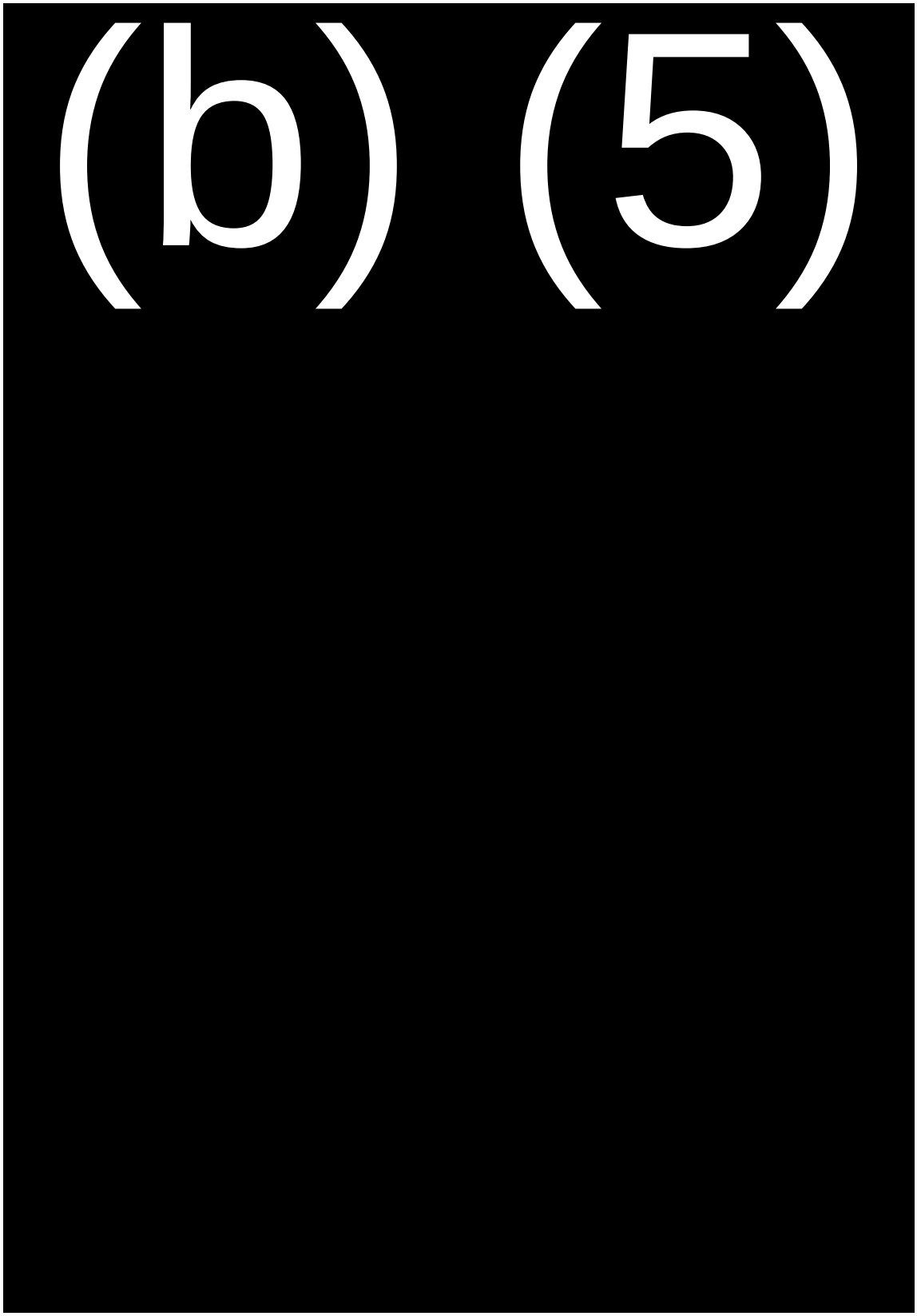

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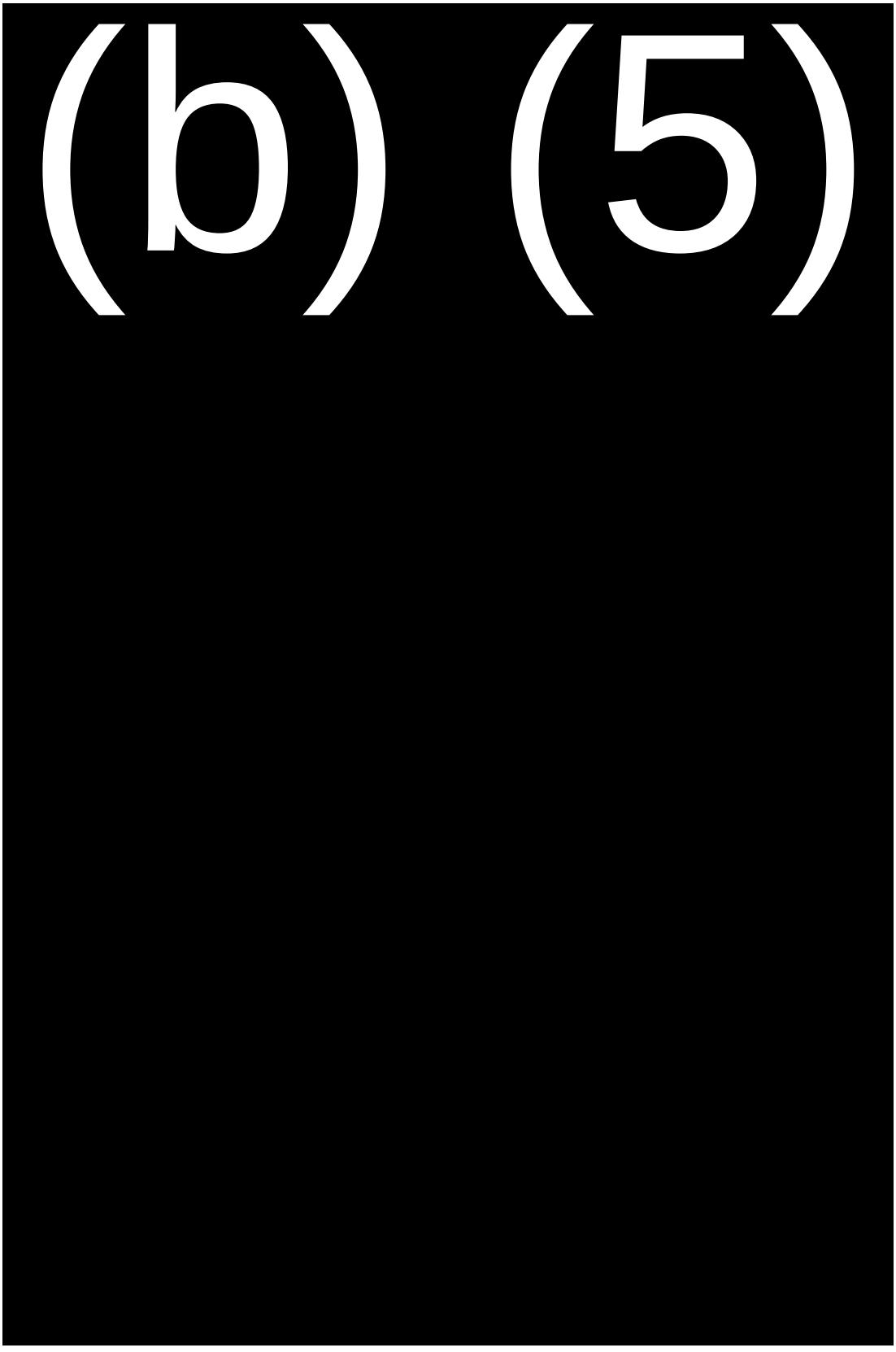

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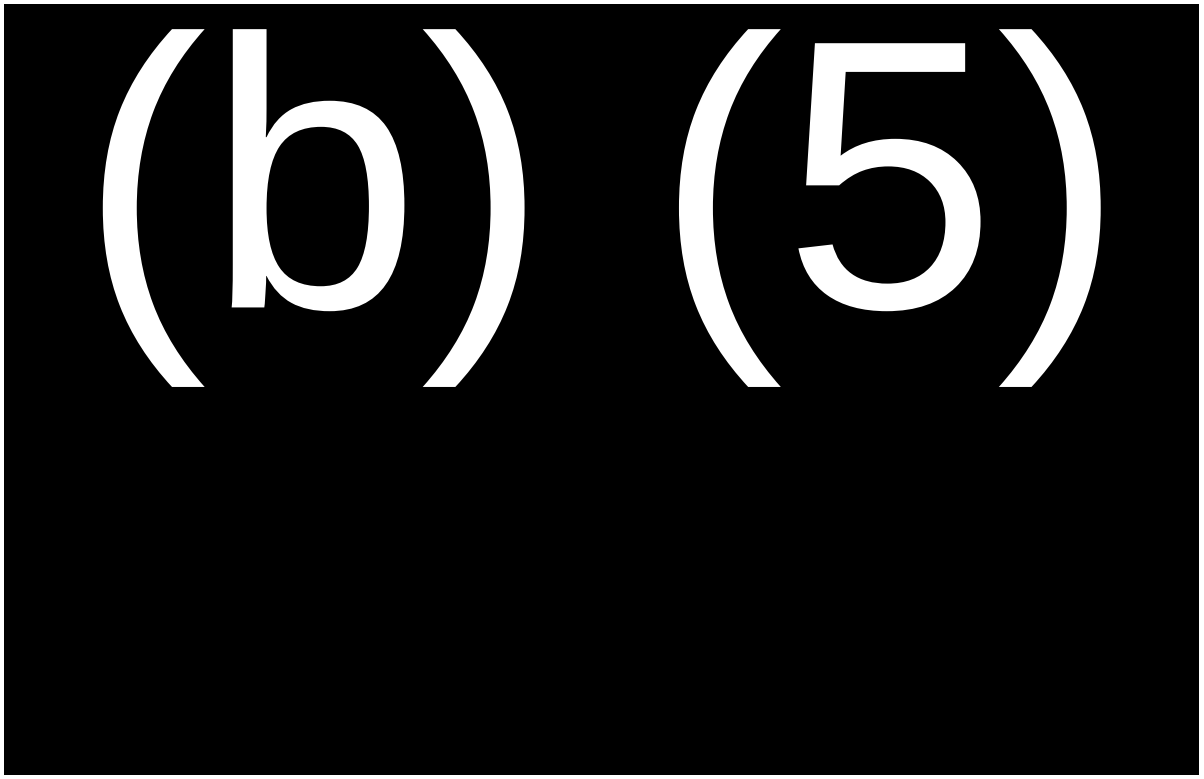

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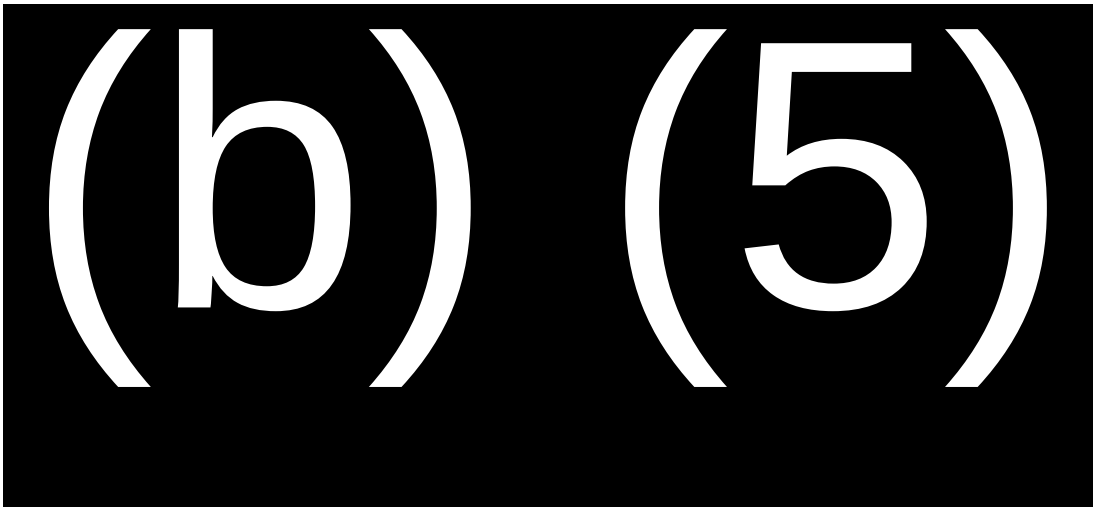

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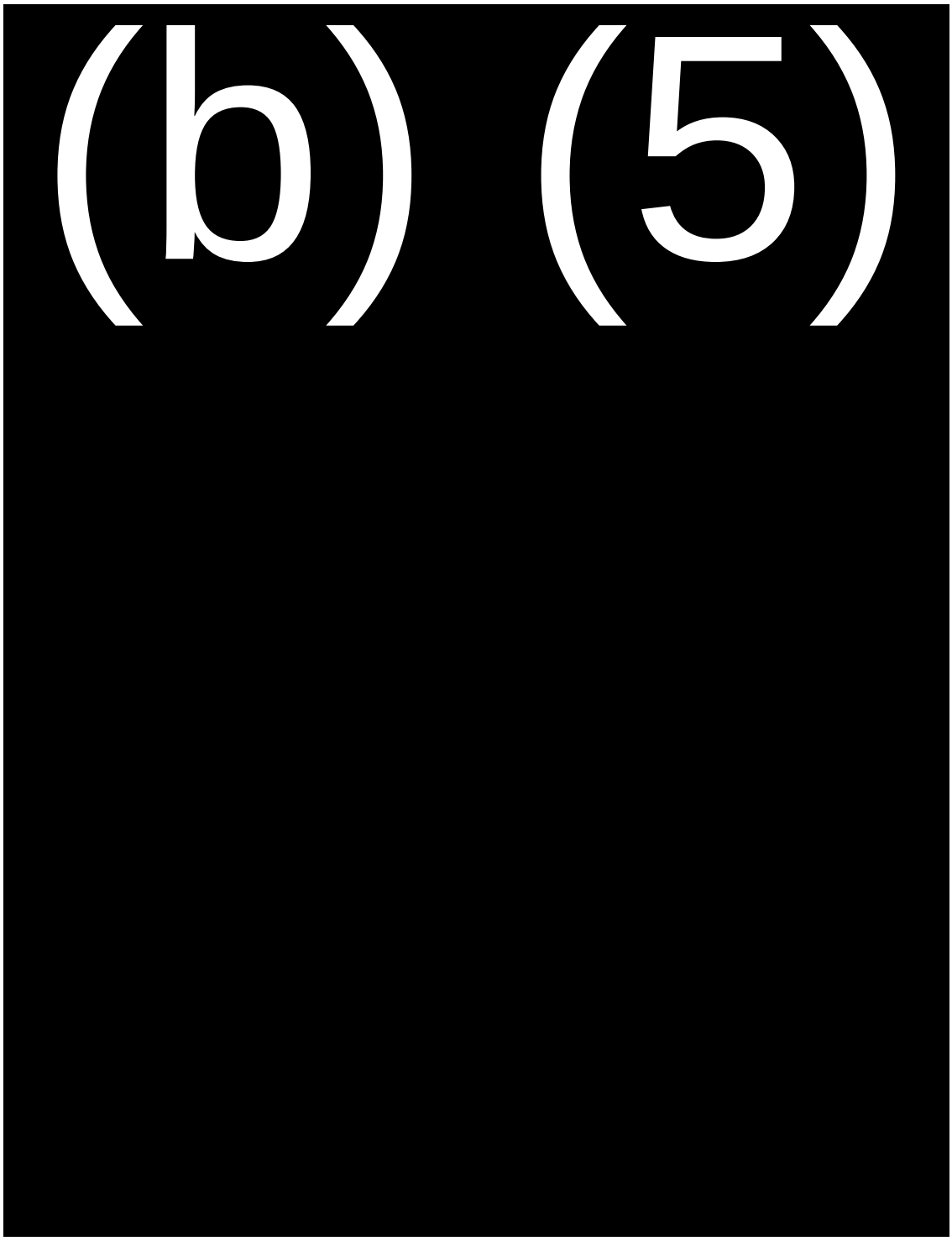

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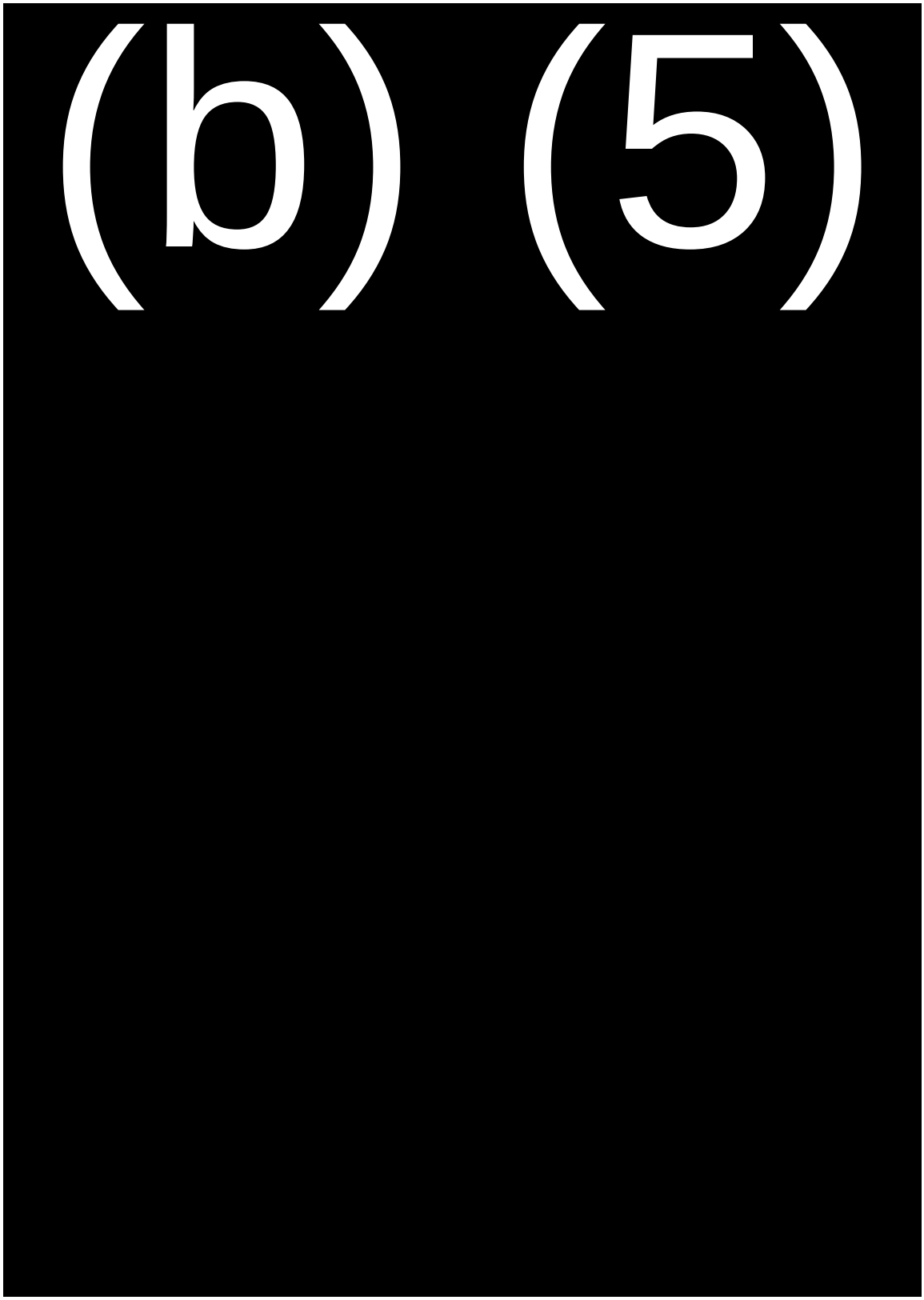
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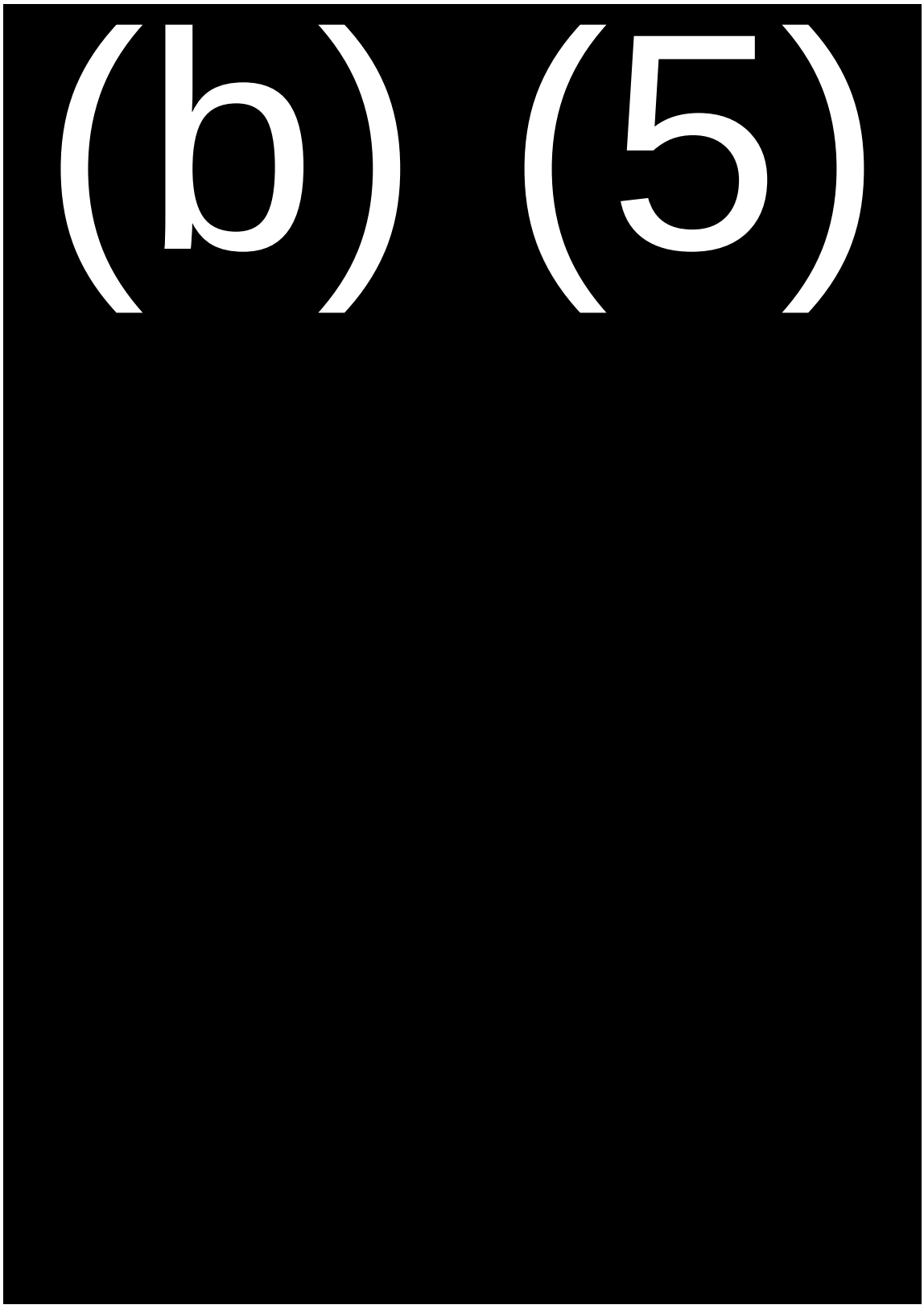
Chapter Seventeen

Personal Lawsuits

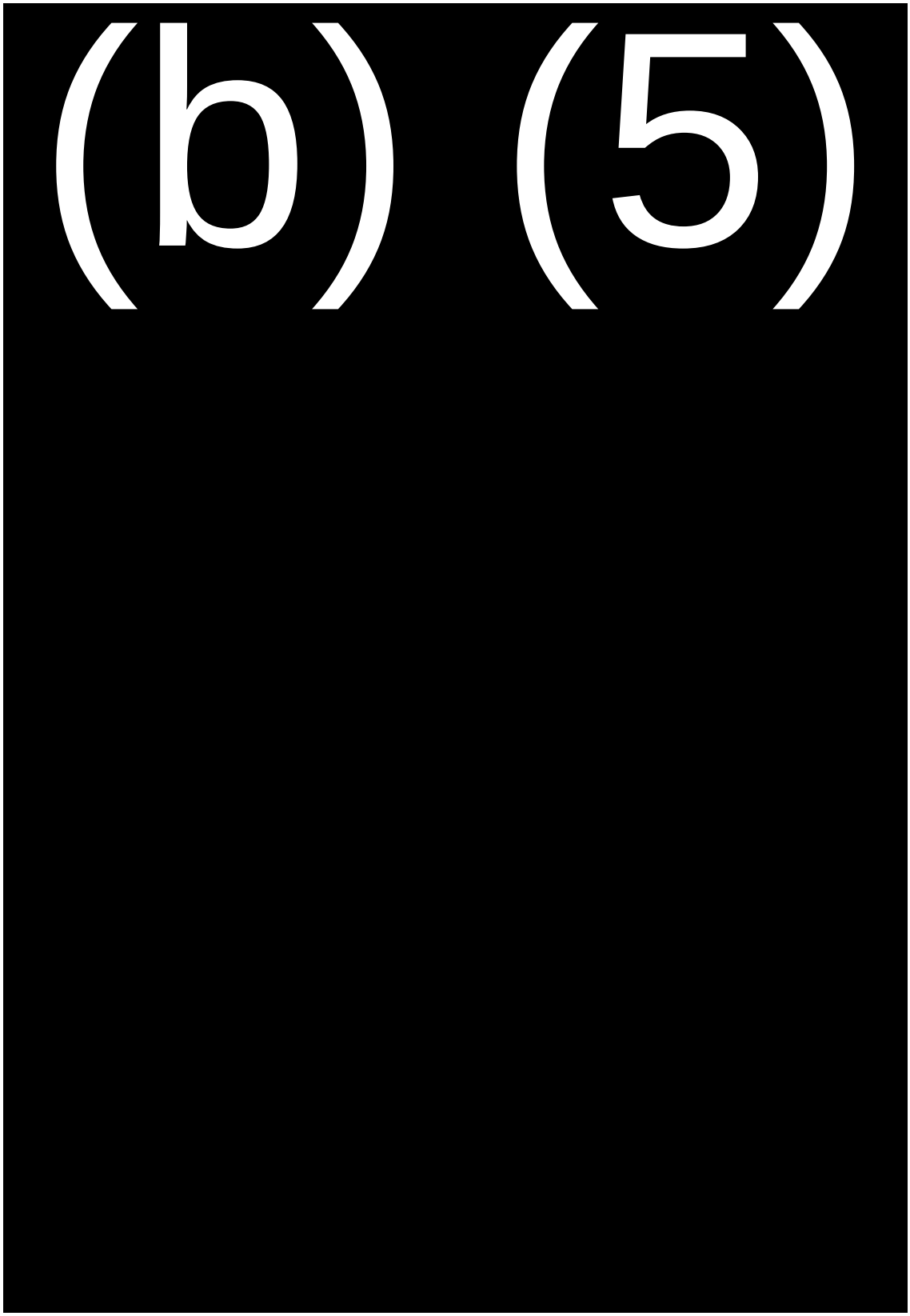


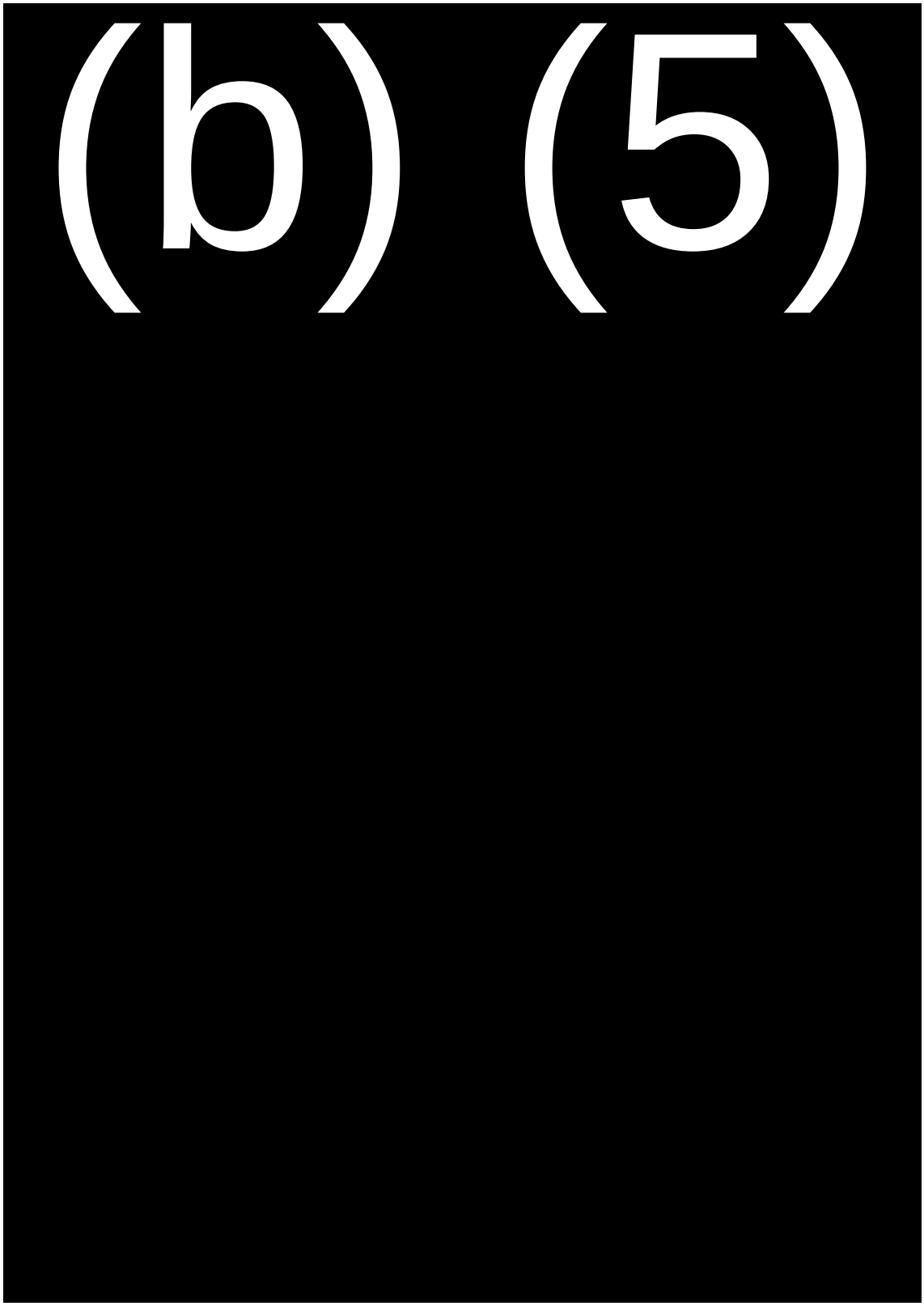

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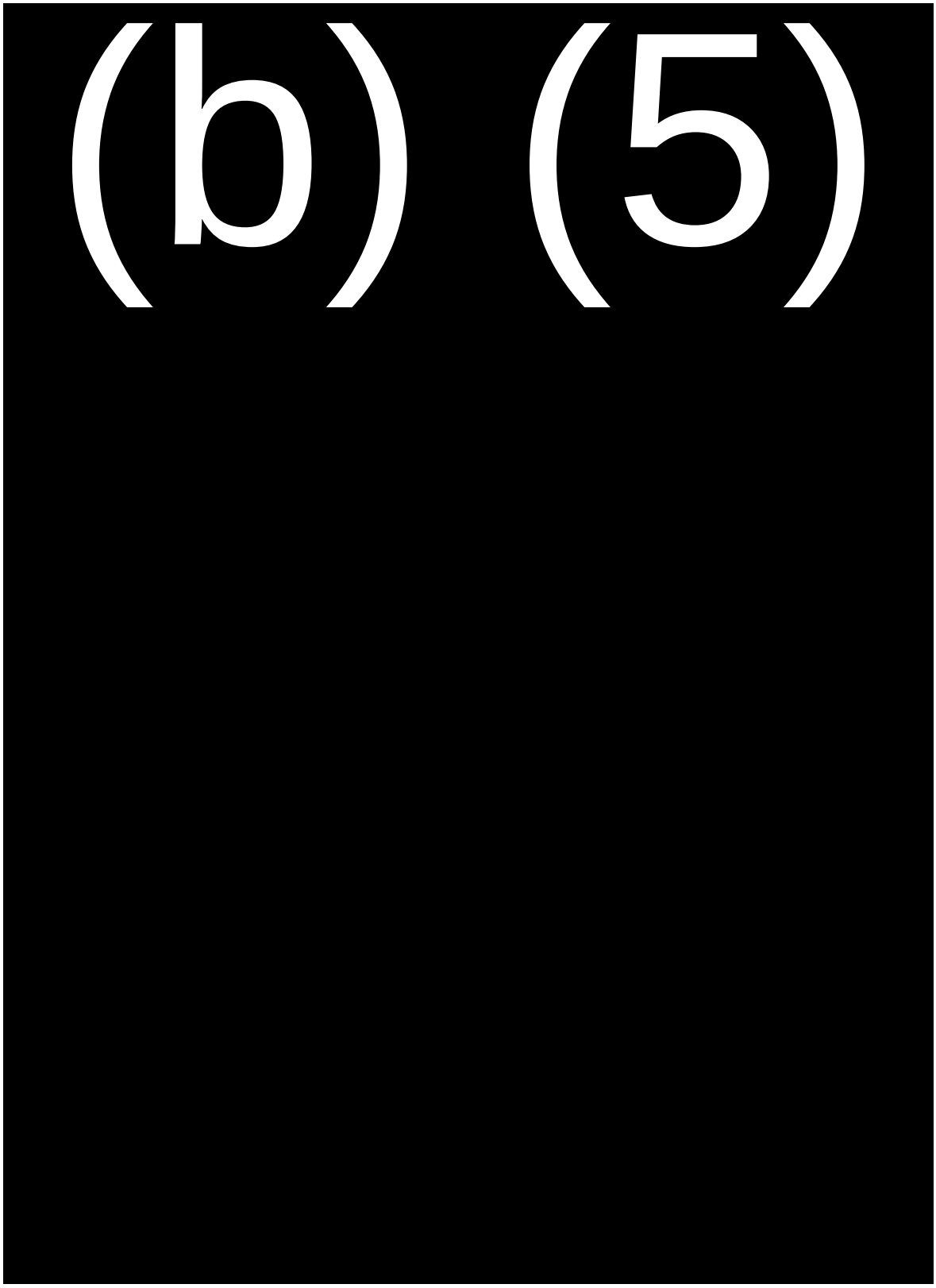

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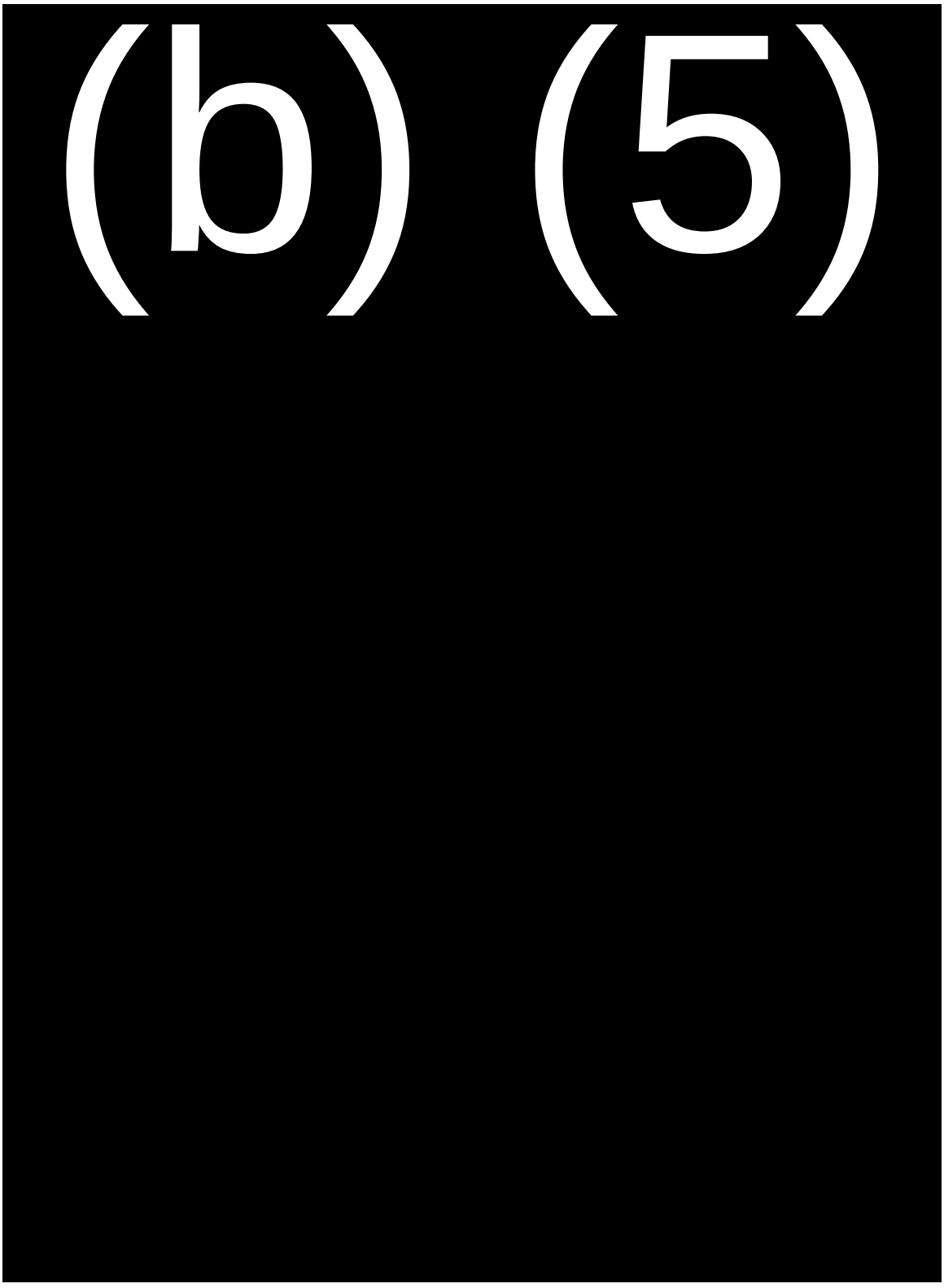

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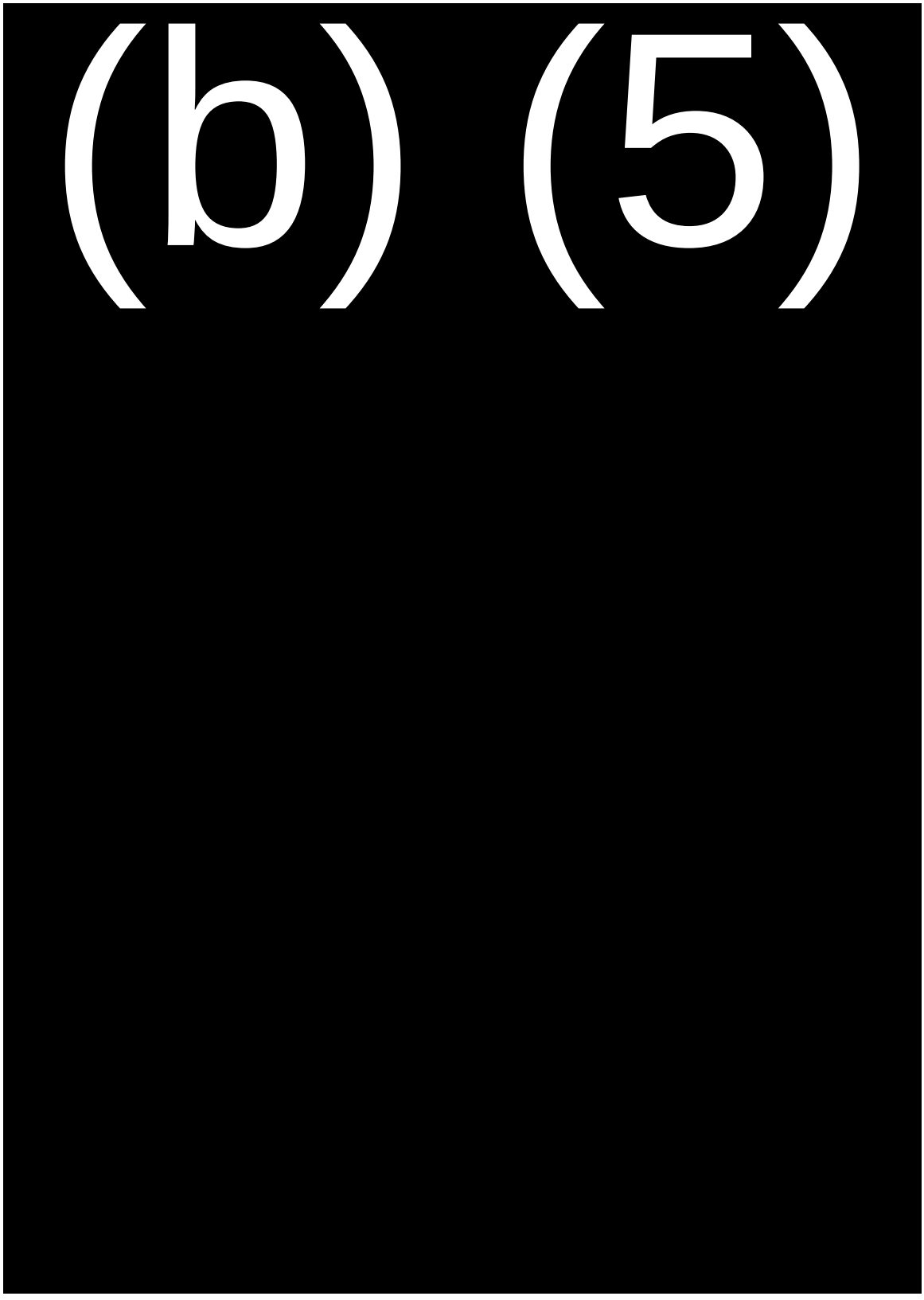
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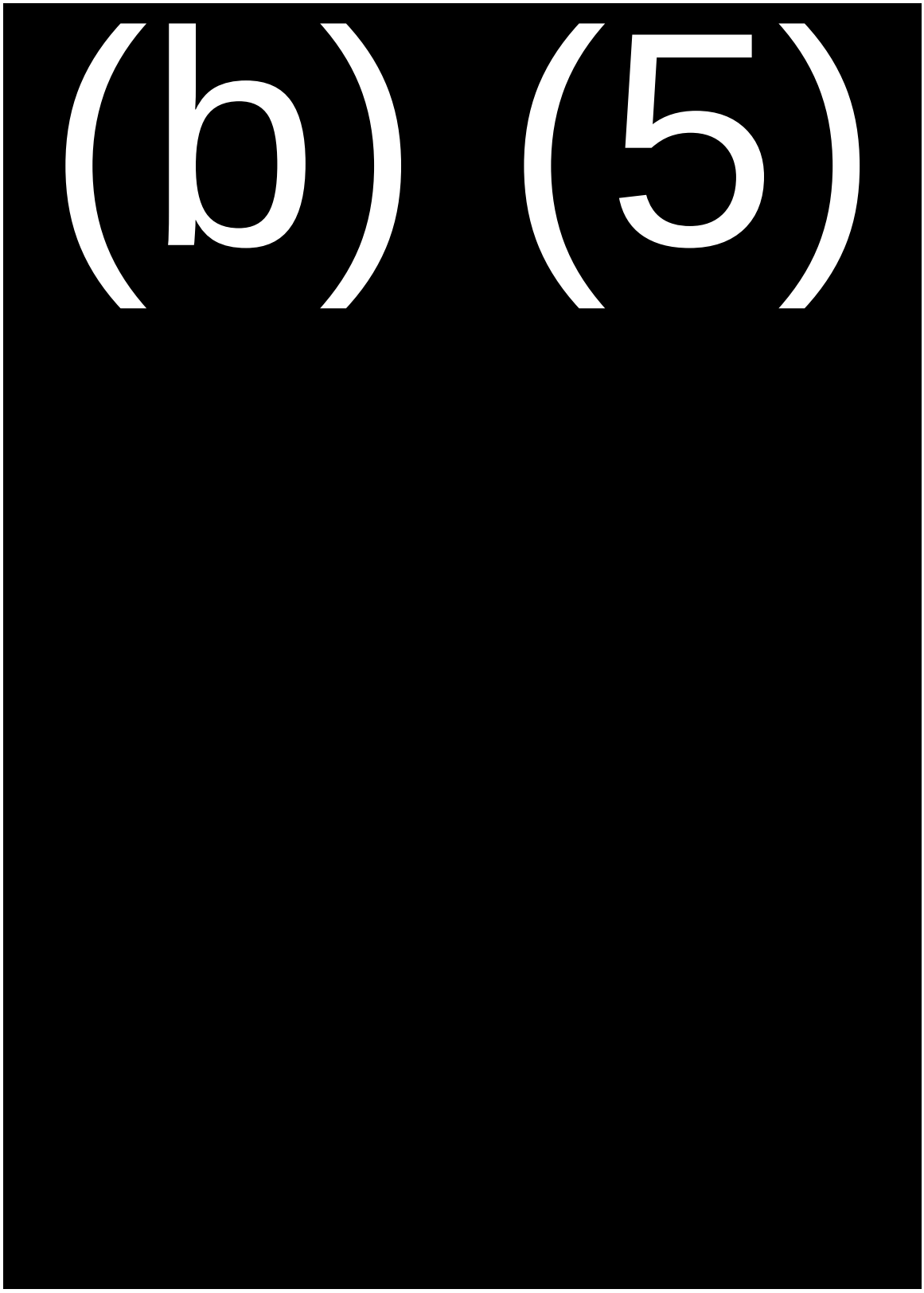

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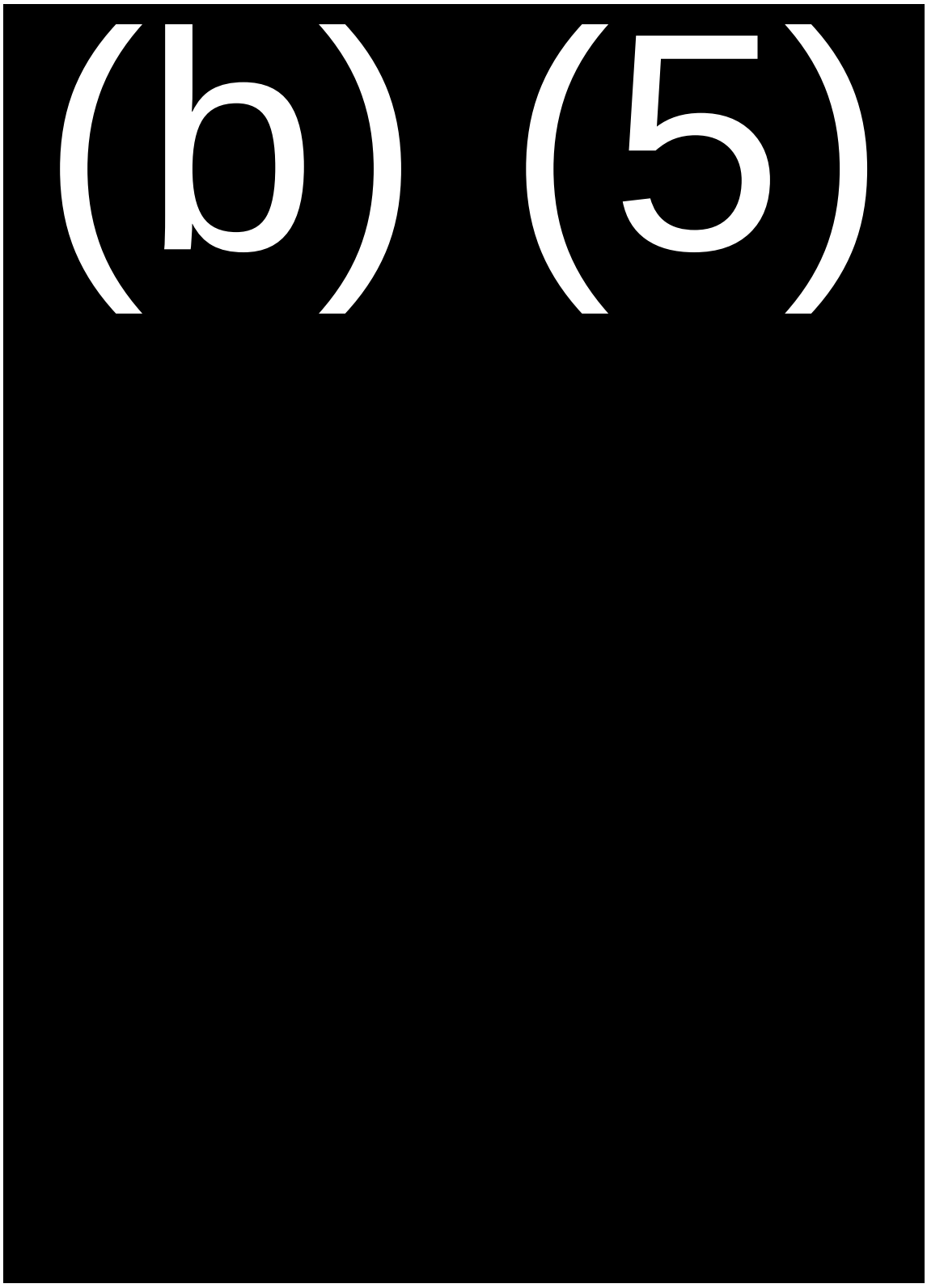

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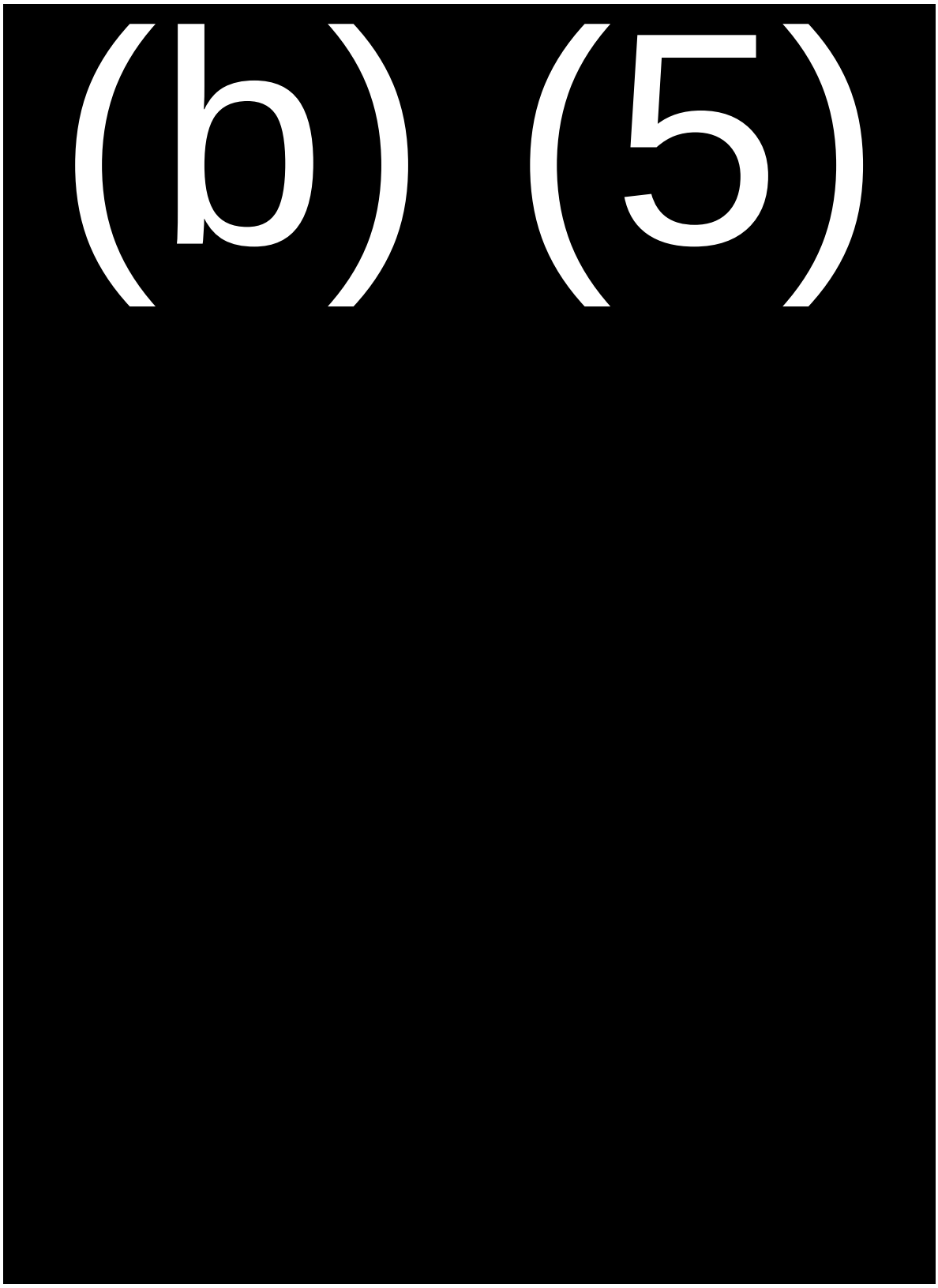

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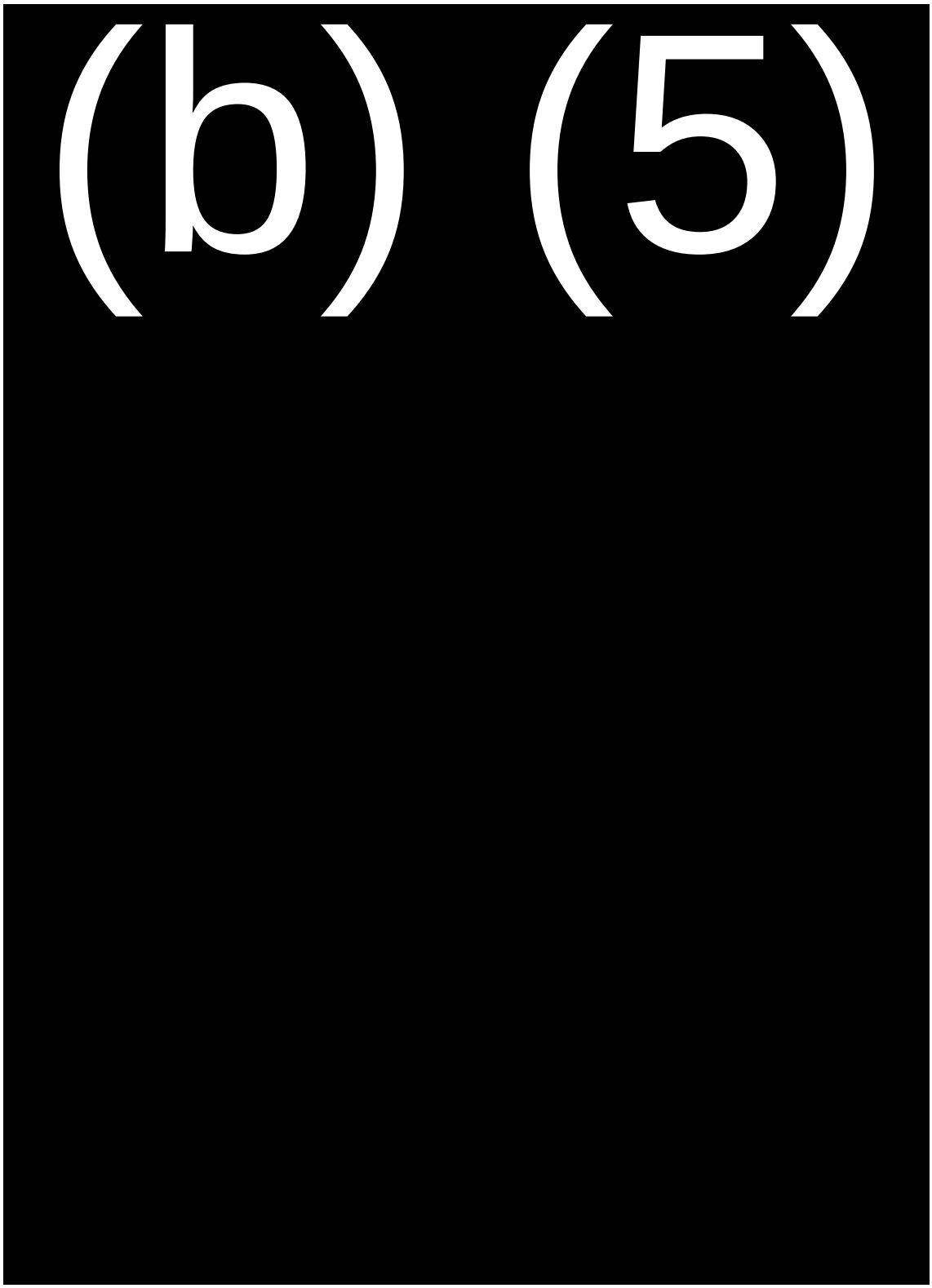

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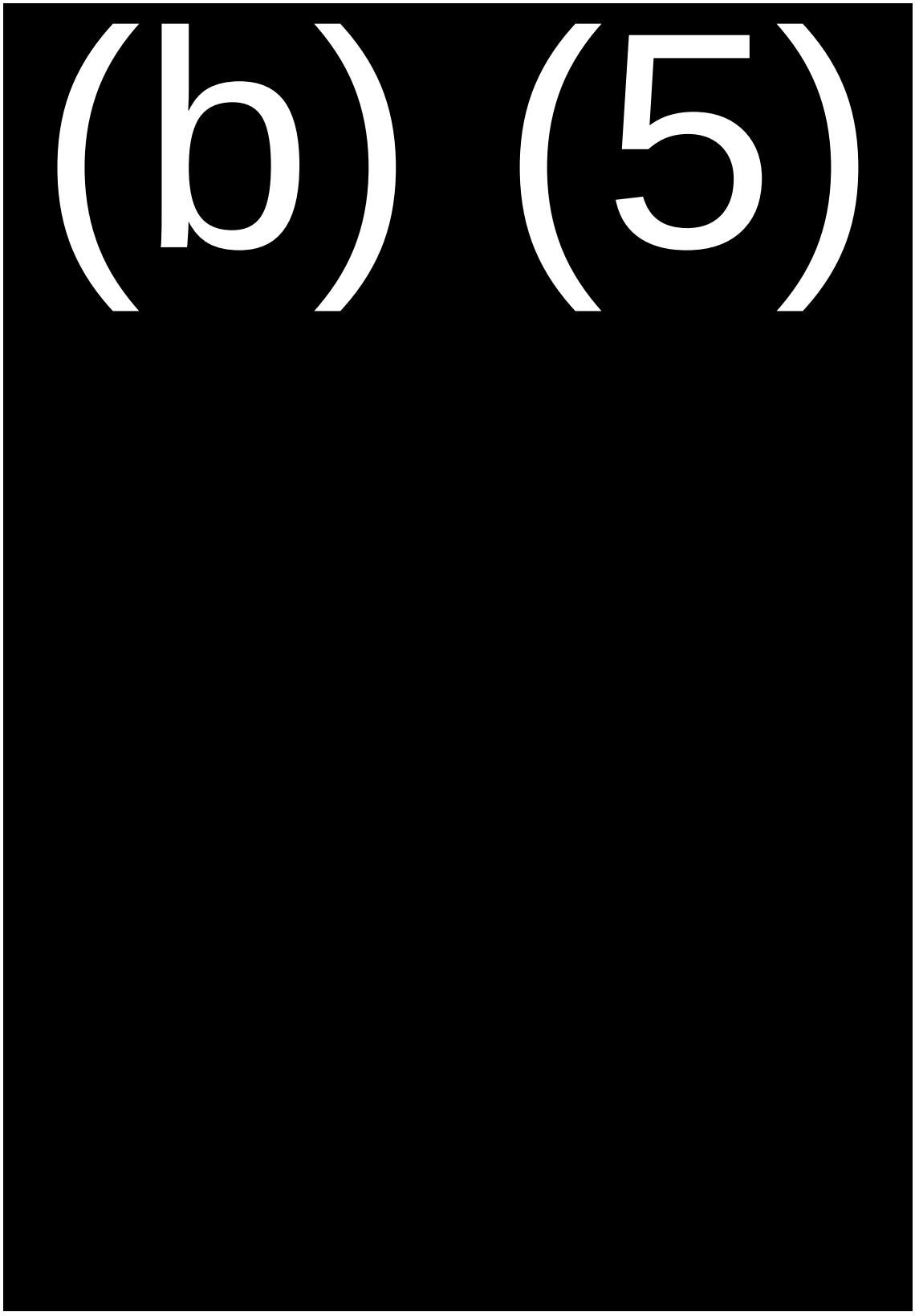

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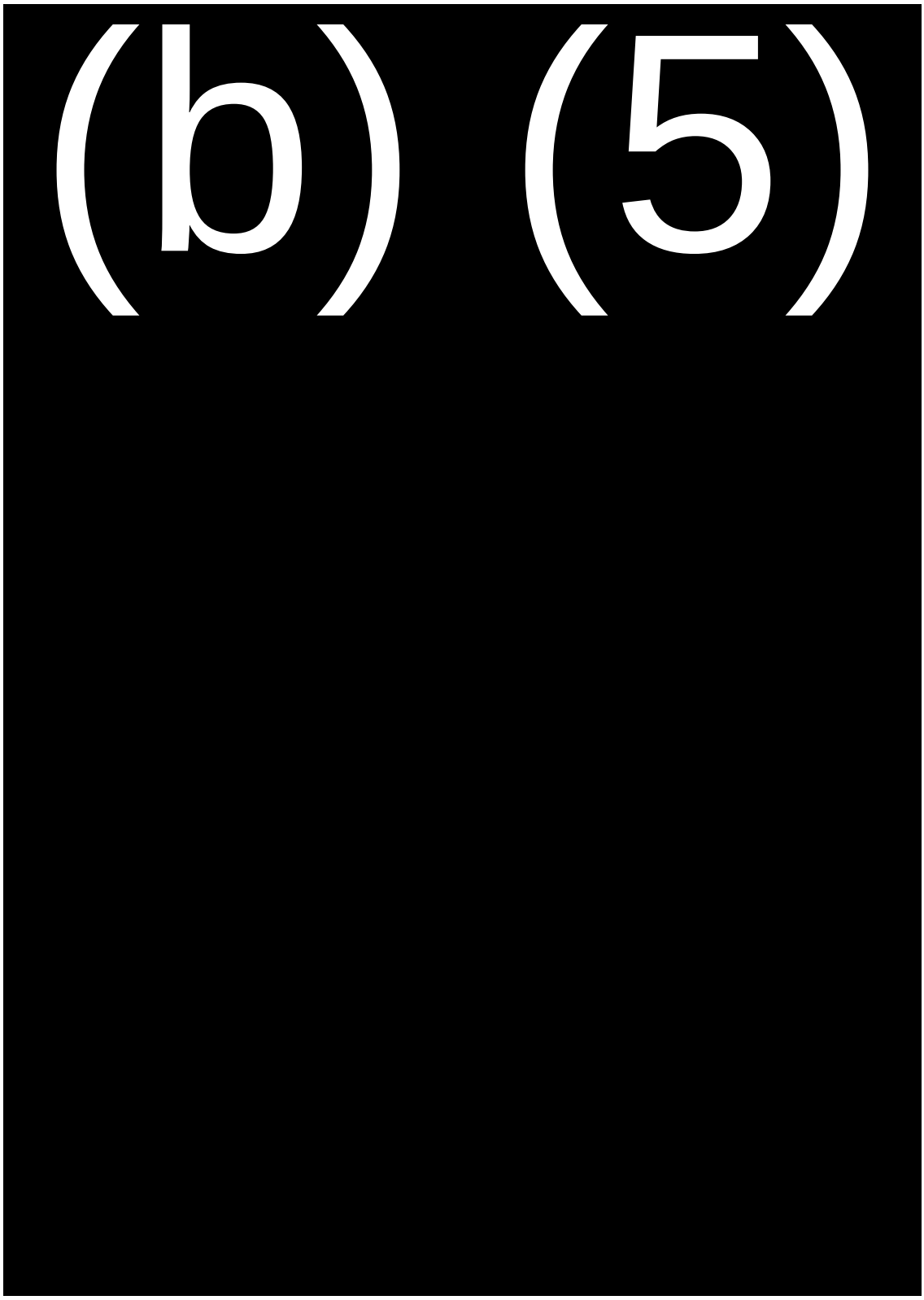

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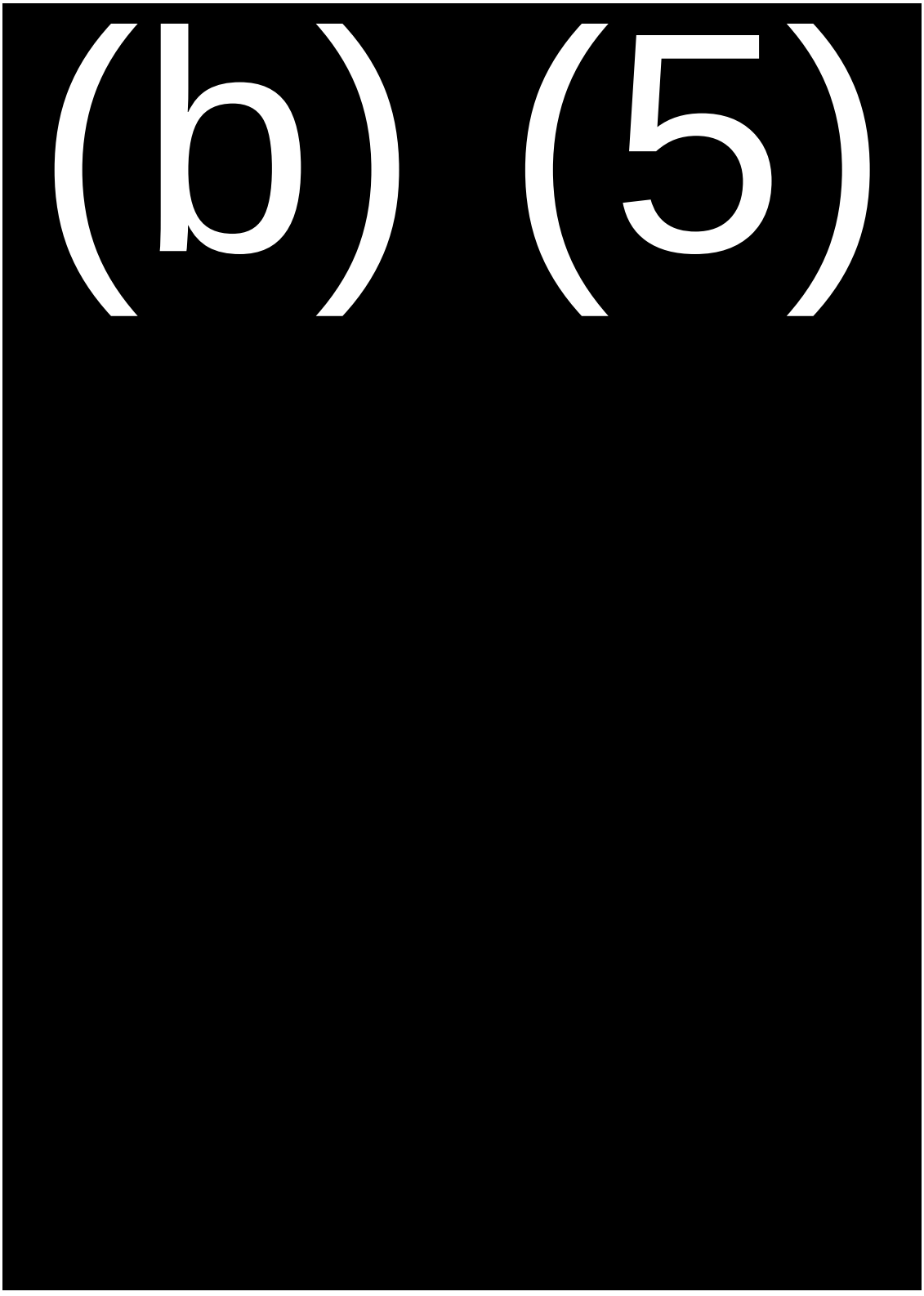

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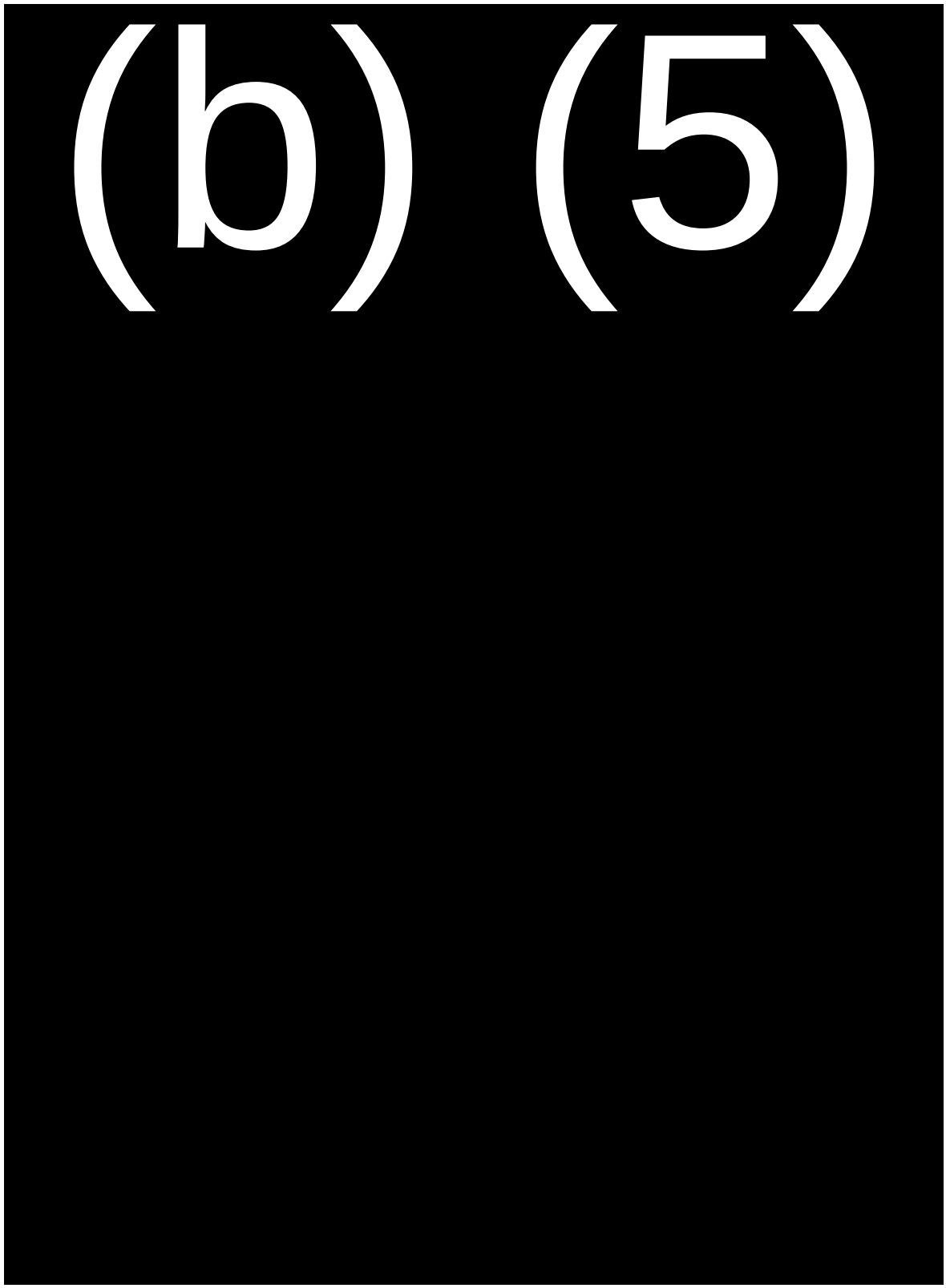

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Chapter Eighteen

Extraterritorial Law Enforcement

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18.000 Introduction

Extraterritorial law enforcement connotes the process of identifying conduct outside the United States that has been deemed an offense against the United States and is punishable by her courts. The ability of Congress to proscribe conduct occurring beyond our borders (extraterritorial) and the ability of courts to try those engaging in such conduct become the critical issues. There are two types of jurisdiction that apply to all cases: personal jurisdiction and subject matter jurisdiction. Personal jurisdiction means the lawful right to try the individual defendants. Subject matter jurisdiction means the ability to litigate the particular offense in the indictment or issue in a civil complaint. Factors bearing on jurisdictional questions involve principles of international law and the constitutional authority of Congress to denominate certain conduct beyond our shores as a criminal offense as well as the application of constitutional restrictions to extraterritorial enforcement actions. Finally, there must be statutory authority for particular federal officers to even engage in such activities and, at that, under what circumstances.

18.100 CBP's Authority to Act on Waters within the National Boundary

18.110 Document Check – Vessel Boarding
18.120 Documents Subject to Document Check
18.130 Fourth Amendment Implications during Document Checks

"Officers of the Customs" as defined in Title 19 U.S.C. § 1401(i) currently encompasses all enforcement components of CBP. Any statutory authority to act originally bestowed upon the customs officer now applies to all CBP law enforcement.[1] As such, the CBP officer has broad authority to interact with people, vessels, vehicles, and animals throughout the territorial United States.[2] Of course, these statutes merely grant the officer authority to act; they do not authorize the officer to act in any manner chosen by the officer. Rather, the Constitution, in particular, the Fourth Amendment, limits the scope of the officer's statutory authority to act.

Despite Fourth Amendment limitations, CBP law enforcement officers and agents enjoy unique authority to act and interact with vessels within United States territorial waters.[3] The statement of authority in 19 U.S.C. § 1581(a) provides:

> Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the Customs waters or, as he may be authorized, within a customs-enforcement area established under the *Anti-Smuggling Act* (19 U.S.C. § 1701 *et seq.*), or at any other authorized place, without as well as within his district, and

[1] 6 U.S.C. §§ 111 and 112.
[2] 19 U.S.C. §§ 482; 1581 (a) and (b); 1595 (b); 8 U.S.C. §§ 1225 and 1357; and, 18 U.S.C. § 7.
[3] 19 U.S.C. § 1581 (a).

> examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

This statute, however, is one of the best illustrations of the dangers associated with assuming that a statute means what it literally says. No statute can lawfully authorize more than the Constitution permits. The courts ultimately determine what a law means, consistent with the Constitution. The court decisions under § 1581 have determined that it means something other than what it literally says.

As to vessels, vehicles and aircraft arriving from foreign at the border, FEB or extended border § 1581(a) means what it says. If the requirement of border nexus is read into § 1581(a), then a CBP officer may do what § 1581(a) authorizes. No suspicion is required except as is required by CBP policy and the Constitution for a particular search of persons. Without border nexus, however, § 1581(a) authority is constitutionally limited.

18.110 Document Check - Vessel Boarding
18.111 18 U.S.C. § 2237 – Failure to Heave To
18.112 19 U.S.C. § 1581(d) – Failure to Stop on Command

The Supreme Court has held that CBP officials may properly board any vessel that is located in Customs waters,[4] or inland waters providing a ready access to the open sea,[5] for the sole purpose of conducting a document or safety

[4] Customs waters of the United States are defined in 19 U.S.C. § 1401(j) as follows: In the case of a foreign vessel subject to a treaty or other arrangement between a foreign government and the United States enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon such vessel upon the high seas the laws of the United States, the waters within such distance of the United States as the said authorities are or may be so enabled or permitted by such treaty or arrangement and, in the case of every other vessel, the waters within four leagues of the coast of the United States. See also, *Act to Regulate the Collection of Duties on Imports and Tonnage*, 1 Stat. 627, Section 54, March 2, 1799 and Maul v. United States, 274 U.S. 501 (1927). A league is defined as three nautical/marine/geographical miles. One nautical/marine/geographical mile equals 1.15 English/statute/land miles. *United States v. California*, 332 U.S. 19, 24, note 1 (1947).

[5] Inland Waters – Waters on the landward side of the baseline of the territorial sea. Convention on the Territorial Sea and the Contiguous Zone, Annex 1, Article 5 (1958); 15 U.S.T. 1606 (1961); *United States v. California*, 381 U.S. 139, 164-167 (1965). Also included as "inland waters" is the United States' portion of the Great Lakes.

inspection.[6] Vessels in such waters may be boarded, without suspicion, for purposes of conducting a document check. Such document checks comply with the Fourth Amendment and can include a vessel docked in a private marina in a body of water with ready access to the open sea. The determinative factor in the lawfulness of the boarding is the access to the open sea, not the fact that the vessel was moored rather than underway.[7]

In addition, the Court said that CBP officers may rely on § 1581(a) even though they have reason to suspect the vessel of smuggling contraband.[8] This means that CBP officers may board a vessel in inland waters which provide a *ready* access to the open sea, or in Customs waters to check its documents, even if the boarding officer's intent is to look for signs of contraband.[9] Motivation for a particular boarding is not relevant.[10]

Section 1581(b) provides additional authority to board vessels within the 12-nautical mile line in order to enforce navigational laws.[11] By policy, the authority to engage in navigational law enforcement and/or safety inspections has been given to the Coast Guard. As such, unless working with members of the Coast Guard, CBP officers will typically conduct only document checks.

18.111 18 U.S.C. § 2237 – Failure to Heave to

According to Section 2237, it is unlawful for a United States registered vessel or any vessel subject to United States jurisdiction[12] to knowingly fail to obey a CBP order to heave to that vessel. It is also unlawful under the statute for persons on board such a vessel to forcibly resist, oppose, prevent, impede, intimidate, or interfere with a boarding or other CBP action, including resisting a lawful arrest. The statute also makes it unlawful to provide materially false information during the boarding regarding the vessel's destination, origin, ownership, registration, nationality, cargo, or crew. Violators of this statute are subject to fines and up to five years imprisonment. This statute applies to United States registered vessels and all vessels within United States territorial waters. Therefore, this statute works well in conjunction with CBP's document check authority under 19 U.S.C. § 1581(a).

18.112 19 U.S.C. § 1581(d) – Failure to Stop on Command

Section 1581(d) applies to vessels, vehicles and aircraft which are subject to being stopped by CBP at any authorized place because of a nexus with the

6 *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983). See also, *Federal Boat Safety Act of 1971*, 16 U.S.C. § 1606a; 46 U.S.C. §§ 1474, 1475, 1479.
7 *United States v. One 1972 44' Striker, Bonaza*, 753 F.2d 867 (11th Cir. 1985).
8 Note 3, *United States v. Villamonte-Marquez*, 462 U.S. at 584 (1983).
9 *See United States v. Albano*, 722 F.2d 690 (11th Cir. 1984).
10 *United States v. Pringh*, 751 F.2d 419 (1st Cir. 1984).
11 19 U.S.C. § 1581 (b).
12 46 U.S.C. § 70502(c) - vessels subject to United States jurisdiction.

border or, in the case of a vessel which has refused to comply with a lawful CBP command to stop, may be pursued and the master of the vessel is subject to fines between $1,000 and $5,000.

18.120 Documents Subject to Document Check

18.121 United States Vessels
18.122 United States Documented Vessels
18.123 United States Undocumented Vessels
18.124 Foreign Registered Vessels
18.125 19 U.S.C. § 1581(c) – Presenting Forged, Altered, or False Documents
18.126 19 U.S.C. § 1581(f) – Authority to Seize
18.127 19 U.S.C. § 1581(h) – Relationship to Treaties of the United States

Once on board, what documents are eligible for examination? The answer to that question depends upon the type of vessel (U.S. or foreign vessel).

18.121 United States Vessels

United States law regulating vessel documentation is found at 46 U.S.C. §§ 12101 et. seq. and these statutes rely upon the following definitional provisions found at 46 U.S.C. 101 et. seq.:[13]

Vessel – The word vessel includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.[14]

Documented Vessel – A vessel for which a certificate of documentation has been issued under 46 U.S.C. §§ 12101, et. seq.[15]

Undocumented Vessel – Not having and not required to have a certificate of documentation under 46 U.S.C. §§ 12101, et. seq.[16]

Foreign Vessel – A vessel of foreign registry or operated under the authority of a foreign country.[17]

Vessel of the United States – Any vessel documented, [or exempt from documentation per § 12102(c)], numbered, or titled under 46 U.S.C. § 12101, et. seq.[18]

[13] *Vessel Documentation Act of 1980*, 46 U.S.C. §§ 102-107, 110-116, 2101, and 12101-12309 (amended in 2006).
[14] 1 U.S.C. § 3. See also, 46 U.S.C. § 115 [formerly 46 U.S.C. § 2101(45)].
[15] 46 U.S.C. § 106 [formerly 46 U.S.C. § 2101 (10)].
[16] 46 U.S.C. § 113 [formerly 46 U.S.C. § 2101 (41)].
[17] 46 U.S.C. § 110 [formerly 46 U.S.C. § 2101 (12)].
[18] 46 U.S.C. § 116 [formerly 46 U.S.C. § 2101 (46)].

The above mentioned statutes mandate the documents all U.S. vessels ("documented" or "undocumented") must possess in order to sail as a U.S. vessel.

18.122 United States Documented Vessels

Generally speaking, U.S. documented vessels must have a Certificate of Documentation, which consists of at least two items: (1) Registry (Certificate of Registry, Register, or Registry); and, (2) Endorsement (license or enrollment and license).[19] The registry and endorsement have a relationship that is similar to a passport and a visa. That is, the registry of a vessel serves as the vessel's proof of nationality, while the endorsement is a license that allows the vessel to engage in a particular activity referred to as a trade (for instance, an endorsement to engage in coastwise trade). Once the vessel obtains a Certificate of Documentation, then the vessel may, with the proper endorsement, engage in a trade.[20] In order to obtain a Certificate of Documentation, the vessel must be:

- Wholly owned by one or more eligible owners. An eligible owner is a United States Citizen, an association, trust, joint venture, partnership, or corporation that is U.S. owned and controlled, the U.S. government, or a state government.
- At least 5 net tons, and
- Not documented under the laws of a foreign nation.[21]

Once issued, the Certificate of Documentation must show each endorsement assigned to the vessel along with the identity and description of the vessel and the owner of the vessel.[22]

As mentioned above, a vessel endorsement allows the vessel to engage in a particular trade, and trade, as used in this context, means one of four primary activities: (1) To engage in foreign trade (this endorsement is known as a registry endorsement);[23] (2) To engage in coastwise trade (this endorsement is known as a coastwise endorsement and allows the vessel to engage in domestic trade between two or more U.S. ports);[24] (3) To engage in fishing (professional/chartered fishing);[25] and, (4) To engage in recreational activities.[26] Recreational Endorsements allow the vessel to travel from the United States to a foreign location or port without clearing customs, but must make entry under

19 46 U.S.C. § 12101.
20 46 U.S.C. § 12102. Note: A vessel less than 5 tons may engage in a trade without being documented if it otherwise satisfies the requirements to engage in that trade. 46 U.S.C. § 12102(b).
21 46 U.S.C. § 12103.
22 46 U.S.C. § 12105.
23 46 U.S.C. § 12111.
24 46 U.S.C. § 12112.
25 46 U.S.C. § 12113.
26 46 U.S.C. § 12114.

19 U.S.C. § 1433 upon its return to the United States.[27] Note: Office of Field Operations has made it clear that pleasure vessels and recreational vessels are only required to report their arrival when they have touched foreign soil, had contact with a foreign hovering vessel, or received merchandise outside the United States territorial waters.[28]

According to United States law, all U.S. documented vessels (except those with a recreational endorsement and/or unmanned barges working outside U.S. territorial waters) must be placed under the command of a United States citizen.[29] In addition, each U.S. documented vessel must sail with the certificate of documentation (registry and appropriate endorsement) and make the certificate available for examination upon request. Failure to comply with this provision subjects the violator to a fine and jail term less than one year.[30]

The certificate of documentation serves as proof of vessel nationality for international law purposes and the certificate is also proof of qualification to engage in a specified trade, but does not serve as proof of ownership.[31] In any event, all U.S. documented vessels will be listed on the national registry of ships and the list will be periodically published by the Secretary of Transportation.[32]

Additional documentation that may be examined during a lawful document check includes checking the vessel's official number, which is required to be permanently affixed to a visible interior structural part of the hull. In older vessels this number is affixed to the keel beam or "main beam" of the vessel, thus the expression "main beam number."

Violation of the previously mentioned provisions may result in a variety of penalties including civil penalties, as well as seizure and forfeiture of the vessel.[33]

18.123 United States Undocumented Vessels

Undocumented vessels equipped with propulsion machinery of any kind must have a state issued number.[34] The number must be displayed on each side of the vessel[35] and the number will be part of a pocket-sized certificate of number issued to the applicant. This certificate of number must be available for

27 46 U.S.C. § 12114(c). *See also*, 46 U.S.C. § 60105 – vessels required to obtain clearance from CBP prior to departure from a United States port or place.
28 *See*, Office of Field Operations guidance, May 16, 2008; 19 U.S.C. 1441(4); 19 C.F.R. Part 4.60(b); and, Headquarters Ruling Letter 022252, January 28, 2008.
29 46 U.S.C. § 12131.
30 46 U.S.C. § 12133.
31 46 U.S.C. § 12134.
32 46 U.S.C. § 12138.
33 46 U.S.C. § 12151.
34 46 U.S.C. § 12301.
35 46 U.S.C. § 12305.

inspection upon request.[36] In addition, some states will issue a safety certificate along with the certificate of number.[37] All state registry information will be maintained by the issuing state authority and is available to law enforcement upon request.[38] Undocumented, along with documented, vessels will also have a serial number stamped on a plate attached to the transom or may be otherwise accessible without going below deck, thus limiting the scope of the authorized search to do the document check. Violations of the undocumented vessel rules subject the violator to fines and a prison term less than a year.[39]

18.124 Foreign Registered Vessels

Vessels must sail under the flag of one nation only. The vessel owner may register a vessel in any nation in which it is qualified to register. Likewise, each nation is authorized to grant its nationality to such vessels (to include the right to fly that nation's flag) and to establish the conditions for registration of those vessels in its nation.[40] Once registered in a nation, the vessel may fly the flag of registry only and should it sail under the flags of two or more nations, then the vessel may not claim any of the nationalities in question and will be assimilated to a vessel without nationality.[41] Although each nation's registration process is slightly different,[42] the process typically involves the issuance of some type of documentation similar to the United States system. At a minimum, the vessel will have a registry certificate from the flag nation.

The United States has adopted the Facilitation of International Maritime Traffic Convention of 1965, which in part describes some of the documents required on board all vessels engaged in international trade.[43] Such vessels must have the following: registry documentation, name of vessel master, name and address of the ship's agent, cargo manifest, crew lists, and voyage logs. Therefore, during the document check of a foreign registered vessel, the officer should look for something similar to a U.S. certificate of documentation, the serial number stamped on the vessel, crew lists (along with appropriate identification

36 46 U.S.C. § 12304.
37 46 U.S.C. § 12306.
38 46 U.S.C. § 12308.
39 46 U.S.C. § 12309.
40 U.N.T.S. Law of the Sea Annex 2 "Convention on the High Seas" – Article 5 and 13 U.S.T. 2312.
41 *Id.*, Article 6.
42 In fact, there is no unified registered system recognized in the international community. Some nations have signed the 1986 United Nations Convention on Conditions for Registration of Ships, but the United States has not signed the agreement. Unfortunately, this international convention only applies to vessels larger than 500 gross registered tons and continues to permit the unique registration practices of individual nations.
43 18 U.S.T. 410, (1967 date-in-force) – *Facilitation of International Maritime Traffic Convention* (1965).

documentation), and any logs or cargo manifests used by the vessel during that voyage.[44]

18.125 19 U.S.C. § 1581(c) – Presenting Forged, Altered, or False Documents

Submitting forged, false, or altered documents during a lawful document check subjects the master/operator to fines between $500 and $5,000.

18.126 19 U.S.C. § 1581(f) – Authority to Seize

Any vessel which engages in a violation of the revenue laws is subject to seizure and the master/operator is subject to arrest for the same.

18.127 19 U.S.C. § 1581(h) – Relationship to Treaties of the United States

This section provides that if we have a treaty with a foreign government, then the provisions of the treaty take precedence over the provisions of § 1581 unless special arrangements are made apart from the treaty. Consent from a flag state constitutes a "special arrangement" under this section.[45] For information concerning treaties currently in effect, contact the Associate Chief Counsel (Enforcement), (202) 344-2940.

18.130 Fourth Amendment and Document Checks Within U.S. Waters

Courts have held that there is no expectation of privacy in an area that is subject to access by Coast Guard and CBP officers who may board with zero suspicion and without permission to conduct a safety and/or document check. The officer may examine the master of the vessel and search for documents to the extent necessary to accomplish the document check. The scope of the search, of course, will vary with the type and size of the vessel concerned and the nature of the documentation. In addition, where the document check is accompanied by or produces a reasonable suspicion of a Customs violation (e.g., navigation offense, hidden compartment, etc.) then the officers may search all non-private areas of the vessel. These non-private (common) areas have been held to include the open deck, cargo holds, engine rooms, and ice holds.[46] A search of containers, crew quarters or personal items, however, would require probable cause or consent in the absence of a border nexus.

44 According to 46 U.S.C. 70111 note, Section 103 of the *Maritime Transportation Security Act of 2002*, 116 Stat. 2064 (2002), amending 46 U.S.C. §§ 70101-70117, the Coast Guard has been given the authority to negotiate agreements with foreign nations to implement an international seafarer identification card system. To date, such agreements do not seem to have been entered into.

45 Chief Counsel Memorandum, EN 97-0470; 45000; dated February 24, 1998.

46 *See United States v. Herrera*, 711 F.2d 1546 (11th Cir. 1983); *United States v. Lopez*, 761 F.2d 632 (11th Cir. 1985).

Observations made during a lawful boarding for a document check may lead to probable cause that would then permit a warrantless search of the vessel as a mobile conveyance. Similarly, facts might become known which would establish a border nexus sufficient to justify a border search.

As discussed in Chapter 2, protective sweeps essentially are "frisks" of a thing or place and require reasonable suspicion based on specific, articulable facts that someone may be present who poses a threat.[47] Critical to the availability of this authority, of course, is the lawful presence on or in the place to be "swept." Assuming lawful presence in accord with all that follows, the sweep must be brief and must not last longer than necessary to dispel suspicion of danger. Moreover, the inspection may only be made of places where people with weapons may be found. For example, if your suspicion is based upon the master's claim that a shotgun is in his cabin, then you should not be conducting a search in the engine room. Once lawfully conducting a protective sweep, however, you may seize items for which you have probable cause under the plain view doctrine.

18.200 United States Extraterritorial Authority

18.210 United States Jurisdiction to Prescribe
18.220 United States Jurisdiction to Proscribe
18.230 Specific Pronouncement of Extraterritorial Application
18.240 Extraterritorial Enforcement as Impacted by International Law

This section looks at United States authority to act beyond United States territory and territorial waters (Extraterritorial Authority). As mentioned at the beginning of this chapter, extraterritorial law enforcement connotes the process of:

(1) Identifying prohibited conduct that occurs outside the United States that has been deemed an offense against the United States

and

(2) Is punishable by United States courts.

There are several pre-requisites that must be met prior to satisfying the first part of the equation. Specifically, any extraterritorial enforcement action must be based upon a recognized law or rule that:

(A) Derives from a Constitutional authority to take such action. This concept is known as Jurisdiction to Prescribe;

(B) Prohibits such extraterritorial activity. This concept is known as Jurisdiction to Proscribe. (Such a provision will typically identify

[47] *Maryland v. Buie*, 494 U.S. 325 (1990).

that portion of law enforcement authorized to enforce the provision);

(C) Specifically permits the extraterritorial enforcement action; and,

(D) Complies with international standards.

Once these pre-requisites have been met, then the question becomes whether the listed extraterritorial violations are punishable in United States courts. To answer this question requires a look at the concepts of personal and subject matter jurisdiction.

Finally, we must look at the extent to which Constitutional limitations, like the Fourth, Fifth, and Sixth Amendments, impact law enforcement's efforts beyond the national boundary. Each of these questions will be addressed in order below.

18.210 United States Jurisdiction to Prescribe

There is no question that a sovereign nation may grant to its government an authority to regulate purely domestic matters and behavior, but it is also understood that a sovereign nation may grant such authority to all manner of matters that take place beyond the national boundary. The United States Constitution identifies the enumerated powers of the three branches of the federal government. In other words, the Constitution lists what each branch may and may not do. This concept is referred to as a Jurisdiction to Prescribe. If the power is not mentioned or listed in the Constitution, then the power rests with the states, the people, or does not exist at all. Proper jurisdiction to prescribe makes it possible for the federal government to create rules, by way of legislation, regulation, Presidential proclamation, or case law to regulate behavior within, as well as, beyond our nation's borders.

For instance, Congress has the power to regulate commerce with foreign nations and among the several states, and with the Indian tribes.[48] Such power provides Congress with a jurisdiction to prescribe laws regulating commerce with foreign nations. If commerce occurs purely within one state, and this is extremely rare at this point, then Congress may not make laws that regulate the activity.[49] On the other hand, it is this power to regulate commerce that allows Congress to regulate navigation and navigable waters and streams.[50] This is true even with domestic merchant ships on the high seas or in foreign waters (subject to permission of the foreign government).[51] More importantly, the

48 United States Constitution, Article I, § 8.
49 *Gibbons v. Ogden*, 22 U.S. 1 (1824).
50 *Manchester v. Massachusetts*, 139 U.S. 240 (1891).
51 *Lord v. Steamship*, 102 U.S. 541 (1881). According to the Supreme Court, commerce includes intercourse, navigation, and not traffic alone and commerce with foreign nations must signify commerce which, in some sense, is necessarily

Constitution has specifically authorized Congress to regulate such behavior beyond the nation's borders.

The following represent the Constitutional powers that bestow upon the various branches of government jurisdiction to prescribe rules meant to be enforced beyond the national boundaries:

Article I, § 8 – The Congress shall have the power:

> Clause 1 – "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense."
>
> Clause 3 – "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."
>
> Clause 4 – "to establish a uniform rule of naturalization."
>
> Clause 10 – "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations."[52]
>
> Clause 11 – "…make rules concerning captures on land and water."
>
> Clause 18 – "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers…"

Article II, § 2 – The President shall have the power:

> Clause 2 – "by and with the advice and consent of the Senate, to make treaties…"

Article III, § 2 – The Judicial power:

> Clause 1 – "…shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; - … to all cases of admiralty and maritime jurisdiction; … and between a state, or the citizens thereof, and foreign states, citizens or subjects."

connected with these nations, transactions which either immediately or at some stage of their progress must be extra-territorial. The mere fact of navigating in waters beyond the national boundary constitutes navigation which is connected with other nations, even if the vessel does not trade with other vessels on the seas. *See also*, *The Abby Dodge*, 223 U.S. 166, 176 (1912).

52 *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991).

Article IV, § 4: "The United States shall…protect each [state] against invasion."

Again, if not mentioned, then the states may have the authority to regulate the behavior, or the authority may simply not exist.

18.220 United States Jurisdiction to Proscribe

When the federal government exercises its jurisdiction to proscribe, it makes rules that prohibit certain behavior. This concept is known as Jurisdiction to Proscribe. For instance, Article I, § 8, Clause 5 of the Constitution empowers Congress to "coin money" (Jurisdiction to Prescribe). This provision merely gives Congress the authority to make laws regarding the coining of money. If law enforcement wanted to act in a situation where a private citizen tried to coin his own money, Congress would have to use its jurisdiction to prescribe as enumerated in Article I to write a law that prohibits such behavior and identify which portion of law enforcement could enforce violations of the law (Jurisdiction to Proscribe). Otherwise, law enforcement would not be permitted to act on such a violation.[53]

18.230 Specific Pronouncement of Extraterritorial Application

The law or rule created, according to existing United States law, must contain language expressly permitting extraterritorial enforcement, or the law must be interpreted by the courts as such.[54] The following statutes fit within either or both of these categories:

- 19 U.S.C. §§ 1581(a) and 1587.
- 19 USC § 1586(e).
- Controlled Substances Import-Export Act [21 USC §§ 952 and 959].[55]
- Money Laundering Act [18 USC § 1956].[56]
- Maritime Drug Law Enforcement Act [46 USC §§ 70501 - 70507 (previously, 46 USC § 1901)].
- Aviation Smuggling Act [19 USC § 1590].
- Alien Smuggling [8 USC §§ 1324(a)(i) and 1326].[57]
- Customs Fraud (Smuggling Goods) [18 USC § 545].

53 Based upon this, it has been determined by the Supreme Court that the criminal jurisdiction of the courts of the United States is wholly derived from the statutes of the United States. *Manchester v. Massachusetts*, 139 U.S. 240, 262-263 (1891).

54 *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) and *United States v. Bowman*, 260 U.S. 94 (1922).

55 *Chua Han Mow v. United States*, 730 F. 2d 1308 (9th Cir. 1984).

56 *United States v. Elfgeeh*, 515 F. 3d 100 (2d Cir. 2008).

57 *United States v. Delgado*, 374 F. 3d 1337 (D.C. Cir. 2004) and *United States v. De Leon*, 270 F. 3d 90 (1st Cir. 2001).

- International Terrorism [18 USC § 2331].
- Certain forfeitures under the USA PATRIOT Act [18 USC § 981(a)(1)(g) – civil and criminal forfeitures related to international terrorism under 18 USC § 2331].
- Importation, Manufacture, Distribution and Storage of Explosive Materials [18 USC § 844].[58]
- Unlawful Acts/Penalties/Firearms [18 USC §§ 922 and 924].
- The Torture Convention Implementation Act [18 USC §§ 2340 and 2340A].
- Piracy [18 U.S.C. § 1651].
- International Emergency Economic Powers Act [50 U.S.C. §§ 1701-1706].[59]
- Arms Export Control Act [22 U.S.C. §§ 2278 et. seq.].
- Export Administration Act [50 U.S.C. app. §§ 2401-2420].
- Special Maritime and Territorial Jurisdiction of the United States [18 U.S.C. § 7].[60]
- Maritime Transportation Security Act of 2002 [116 Stat. 2064].[61]
- Maritime navigation acts of violence [18 U.S.C. § 2280].[62]
- International Maritime and Port Security Act [46 U.S.C. § 70302].
- Chicago Convention on International Civil Aviation (December 7, 1944), 61 Stat. 1180, 15 U.N.T.S. 295. –must have permission to fly over territorial sea.
- ADIZ – Air Defense Identification Zones – 14 CFR 99.23
- DEWIZ – Distant Early Warning Identification Zone (for Alaska) – 14 CFR 99.23
- Executive Order 12323, September 29, 1981, 46 Fed. Reg. 48109 – high seas interdiction of illegal aliens by coast guard.
- Gambling ships – 18 U.S.C. §§ 1081-1083.
- Magnuson Act, 50 U.S.C. §§ 191-195.

Some statutes that do not apply extraterritorially:

- Title VII of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000e-2000e-17].[63]

58 *United States v. Reumayr*, 530 F. Supp. 2d 1210 (D.N.M. 2008).
59 *United States v. Groos*, 616 F. Supp. 2d 777 (N.D. Ill. 2008).
60 Extends enforcement authority over Title 18 United States Code violations to the 12-nautical mile line.
61 Amended Magnuson Act, 50 U.S.C. §§ 191-195, by extending United States seaward jurisdiction under the act consistent with Presidential Proclamation 5928 to 12-nautical miles.
62 *United States v. Lei Shi*, 525 F. 3d 709 (9th Cir. 2008).
63 *Equal Employment Opportunity Commission v. Arabian American Oil Company*, 499 U.S.244 (1991).

Note: There will be a more detailed discussion of several of these provisions at the conclusion of this section.

18.240 Extraterritorial Enforcement as Impacted by International Law

International law recognizes several situations in which a sovereign nation may enforce its laws in the international arena. The traditional international rule is that a nation cannot enforce its laws outside its territory unless the act has an effect within its territory (nexus).[64] If the United States can show that some connection or link exists between the nation and the activities the nation wants to take action against, then the United States would have complied with international standards. The internationally recognized methods[65] that justify a nation's intervention beyond national boundaries include the following:

> Territorial/Effects Principle – includes acts occurring outside a nation's borders that have effects within the nation's territory. [Drug Trafficking].[66]
>
> Protective Principle – extraterritorial jurisdiction can be asserted if the national interest or national security is threatened or injured by the conduct in question. [Terrorism against U.S. commercial interests overseas].[67]
>
> Universal Jurisdiction Principle – some crimes are so universally condemned that the perpetrators are the enemies of all people and all civilized nations are united in the prosecution of those that commit these crimes. Note: No nexus needed for stateless vessels. [Piracy].[68]
>
> Nationality Principle – applies to a country's own nationals, wherever located. A nation can legitimately proscribe (prohibit) the conduct of its nationals anywhere in the world. [USC/LPR committing a crime on board foreign vessels on the high seas].[69]

64 *Strassheim v. Daily*, 221 U.S. 280, 285 (1911).
65 *Lauritzen v. Larsen*, 345 U.S. 571 (1953).
66 *United States v. Bowman*, 260 U.S. 94 (1922); *Smith v. United States*, 137 U.S. 224 (1890); *Jones v. United States*, 137 U.S.202 (1890); *United States v. Kim*, 246 F. 3d 186 (2d Cir. 2001); *United States v. Neil*, 312 F. 3d 419 (9th Cir. 2002).
67 *United States v. Yousef*, 327 F. 3d 56 (2d Cir. 2003) and *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945).
68 *United States v. Lei Shi*, 525 F.3d 709 (9th Cir. 2008); *United States v. Ledesma-Cuesta*, 347 F. 3d 527 (3d Cir. 2003); *United States v. Yunis*, 924 F. 2d 1086 (D.C. Cir. 1991) and *Demjanuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985).
69 *United States v. Flores*, 289 U.S. 137 (1933); and *United States v. Plummer*, 221 F. 3d 1298 (11th Cir. 2000).

Passive Personality Principle – applies to those who commit crimes against nationals, wherever located. [USC is a victim of a crime on foreign soil as in the embassy bombings in Tanzania and Kenya].[70]

In other words, should United States law enforcement wish to enforce United States law beyond the national boundary, the enforcement provision must specifically permit extraterritorial application, the law enforcement officer must have specific authority to so act, and the prohibited behavior must impact the United States in one of the above-mentioned internationally recognized methods.

18.300 Extraterritorial Acts Punishable in United States Courts
18.310 Personal Jurisdiction
18.320 Subject Matter Jurisdiction
18.330 Constitutional Limitations on Extraterritorial Enforcement Actions

People and prohibited acts are punishable in United States courts as long as the federal government can show it has proper jurisdiction over the person (personal jurisdiction) and/or the act (subject matter jurisdiction). Personal jurisdiction means the lawful right to try the individual defendant in United States courts. Subject Matter jurisdiction means the right to litigate violations (criminal or civil) in United States courts.

18.310 Personal Jurisdiction

United States law is quite clear on this point: personal jurisdiction is acquired when the defendant appears before the trial judge either voluntarily or involuntarily. As a general rule, a defendant cannot defeat personal jurisdiction by asserting the illegality of the procurement of his or her presence.[71] The Supreme Court has long held that the power of a United States court is not impaired by the fact that a defendant's presence may have been procured by unlawful means.[72] This is sometimes called the "*Ker-Frisbie"* doctrine.[73] The rationale of the doctrine stems from the notion that there is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.

70 *United States v. Neil*, 312 F. 3d 419 (9th Cir. 2002); United States v. Roberts, 1 F. Supp. 2d 601 (E.D.La. 1998); *United States v. Ali Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998) (extraterritorial killing of U.S. national by Arab terrorist invokes passive personality principle of extraterritorial jurisdiction) and *United States v. Rodgers*, 150 U.S. 249 (1893).
71 *United States v. Darby*, 744 F.2d 1508, 1530 (11th Cir. 1984).
72 *Ker v. Illinois*, 119 U.S. 436, 444 (1886); *Frisbie v. Collins*, 342 U.S. 519, 522 (1952).
73 In *Ker*, a representative of the United States removed Ker from Peru against his will and returned him for criminal prosecution in Illinois. In *Frisbee*, Michigan law enforcement abducted Frisbee in Illinois against his will and returned him for criminal prosecution in Michigan.

Since *Ker* and *Frisbee*, three defenses have been raised in these types of cases:

(1) *The forcible removal of the suspect from one location to the presiding court constitutes a violation of Constitutional Due Process of Law.* The *Ker* Court determined that Ker received due process because he was properly indicted, properly tried, and deprived of no rights during the trial. The Court also stated that, "[W]e do not intend to say that there may not be proceedings previous to the trial, in regard to which the prisoner could invoke in some manner the provision of this clause of the Constitution (Amendment XIV), but, for mere irregularities in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment."[74] In other words, the Court seems to have stated that certain behavior engaged in during the abduction could be so outrageous to constitute a due process violation, but such was not the case here.

(2) *The forcible removal violated some provision of an existing treaty between the United States and the nation from which law enforcement abducts the subject.*[75]

(3) *United States law enforcement returns the subject pursuant to the terms of an extradition treaty, but does not properly comply with the terms of the treaty.* This occurs when, for instance, the giving country agrees to extradition as long as the subject is prosecuted for a particular crime, but the receiving country (i.e., the United States) prosecutes the accused for another crime. This is sometimes referred to as the Doctrine of Specialty.[76]

The leading international case to address the first two defenses mentioned above involved one Alvarez-Machain, a Mexican doctor, who was accused of participating in the torture/murder of a DEA special agent in Mexico. The defendant, with DEA assistance, was forcibly kidnapped from his home and flown by private plane to Texas, where he was formally arrested. The trial court dismissed the indictment, but the Supreme Court reversed. According to the Supreme Court, the abduction of the doctor did not violate the due process clause and did not directly violate any provision of the extradition treaty with Mexico. Hence, the abduction did not defeat personal jurisdiction.[77]

74 *Ker*, at p. 440.

75 *United States v. Rauscher*, 119 U.S. 407 (1886). *See also*, *Ford v. United States*, 273 U.S. 593 (1927); *Cook v. United States*, 288 U.S. 102 (1933). See also, 18 U.S.C. §§ 3183 and 3187.

76 *United States v. Rauscher*, 119 U.S. 407 (1886) and *United States v. Hamdi*, 356 F. 3d 564 (4th Cir. 2004). Generally, codified at 18 U.S.C. §§ 3183 and 3187.

77 *United States v. Alvarez-Machain*, 504 U.S. 655, 657 (1992); *See also United States v. Gonzalez*, 240 F. 3d 14 (1st Cir. 2001); *United States v. Yousef*, 327 F.

Relying on *Alvarez-Machain*, the 11th Circuit subsequently upheld personal jurisdiction over Panamanian ruler Manuel Noriega, who was removed from Panama in the course of a military invasion. "Under *Alvarez-Machain*, to prevail on an extradition treaty claim, a defendant must demonstrate, by reference to the express language of a treaty and/or the established practice thereunder, that the United States affirmatively agreed not to seize foreign nationals from the territory of its treaty partner."[78] Noriega attempted to distinguish *Alvarez-Machain* by arguing that the manner in which he was brought to the district court, through military invasion, was so unconscionable as to constitute a violation of the Fifth Amendment's due process clause, and also asked for relief based on the court's supervisory power. His due process claim drew support from some earlier cases.[79] However, the doctrine in the Second Circuit appears to be limited to situations in which the defendant proves torture, brutality or other outrageous conduct that "shocks the conscience of the court."[80] No court to date has adopted a differing position.

18.320 Subject Matter Jurisdiction

United States law bestows upon United States courts lawful subject matter jurisdiction over prohibited acts that occur beyond the United States national boundaries by demonstrating that the United States had jurisdiction to prescribe rules that regulate behavior engaged in beyond the nation's territorial boundary, that the United States proscribed such behavior, that such law complied with the international standard, and the law envisioned extraterritorial application by authorized United States law enforcement.

3d 56 (2d 2003); *United States v. Chapa-Garza*, 62 F. 3d 118 (5th Cir. 1995); *United States v. Marks*, 530 F. 3d 799 (9th Cir. 2008); *United States v. Valencia-Trujillo*, 573 F. 3d 1171 (11th Cir. 2009); *McKesson v. Islamic Republic of Iran*, 539 F. 3d 485 (D.C. Cir. 2008); and, *United States v. Ali Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998).

78 *United States v. Noriega*, 117 F.3d 1206, 1213 (11th Cir. 1997), *cert. denied*, 118 S.Ct. 1389 (1998).

79 *United States v. Russell*, 411 U.S. 423, 432 (1973)("we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles absolutely bar the Government from invoking the judicial process."); *United States v. Toscanino*, 500 F.2d 267, 275 (2d Cir. 1974)("we view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the Government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights.")

80 *United States v. Best*, 304 F. 308 (3rd Cir. 2002); *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); *United States v. Matta-Ballesteros*, 71 F. 3d 754, 763 (9th Cir. 1995); and, *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975).

18.330 Constitutional Limitations on Extraterritorial Enforcement Actions

18.331 Fourth Amendment Extraterritorial Application
18.332 Fifth and Sixth Amendment Extraterritorial Application

Once lawfully before the court, law enforcement's exercise of authority and collection of evidence will undergo Fourth, Fifth, and Sixth Amendment scrutiny. For instance, the enforcement of any extraterritorial statute (arrest) and collection of evidence (search and seizure) will be examined in light of the due process clause of the Fifth Amendment. If the government's extraterritorial conduct "shocks the conscience of the court," then, even if Congress authorizes the government conduct by statute, the criminal case is subject to dismissal in court.

18.331 Fourth Amendment Extraterritorial Application

The Fourth Amendment was meant to protect "the people" against arbitrary action by their own government,[81] it was not meant to apply to activities of the United States directed against aliens in foreign territory or in international waters.[82] *Verdugo* defined "the people" as United States citizens and non-citizens who "have come within the territory of the United States and developed substantial connections with the country." [83] *Verdugo* also specifically distinguished the Fourth Amendment from the Fifth and Sixth Amendments. The Court determined that the Fourth Amendment prohibits unreasonable searches and seizures, "whether or not the evidence is sought to be used in a criminal trial and a violation of the Amendment is 'fully accomplished' at the time of an unreasonable governmental intrusion."[84] Whereas, the Fifth and Sixth Amendments extend protections to the "person" and the "accused" amidst the criminal trial process, and therefore, sweep more broadly than the Fourth Amendment. Therefore, the defendant, in order to cloak himself with Fourth Amendment protections, will first need to demonstrate that he is a United States citizen or alien with the above mentioned contacts with the United States.

Next, the defendant must establish standing to contest the search. In boat cases standing is harder to establish than in most cases. First, all defendants must establish a legitimate expectation of privacy, i.e., an expectation of privacy society is willing to recognize and respect. The burden in establishing this right to contest the search is on each defendant challenging the search and subsequent seizure.[85] Crew members on a vessel have no legitimate expectation of privacy

81 *United States v. Verdugo* , 494 U.S. 259, 266 (1990).
82 *Id.*, p. 267.
83 *Id.*, p.271.
84 *Id.*, p. 264.
85 *United States v. Payner*, 477 U.S. 727 (1980); *Rakas v. Illinois*, 439 U.S. 128 (1978).

with respect to a cargo hold of a vessel.[86] Nor are hidden spaces (which are not accessible as a part of a safety or documentation inspection) generally places in which crew members have a reasonable expectation of privacy.[87] Plainly, mere presence upon a vessel is insufficient to confer standing.[88]

If standing is proper, then the defendant must establish that the Fourth Amendment search or seizure was conducted by a United States official. If United States officials conduct the search or seizure of a United States citizen or alien with substantial connections to the United States (or their possessions), then the Fourth Amendment protections apply. The Second Circuit has recently ruled that the warrant requirement need not be met; rather only the reasonableness component of the Fourth Amendment must be met.[89] This was, according to the Second Circuit, a matter of first impression for any court. As such, if adopted by other courts, the Fourth Amendment analysis would shift to a reasonableness totality of the circumstances approach wherein the court would balance the degree of intrusion versus the legitimate government interest.[90]

On the other hand, when the search or seizure is conducted without United States involvement, the Fourth Amendment does not serve to protect the individual, citizen or not.[91] In a situation in which the United States participates in a joint operation with foreign officials, then the focus becomes whether the United States directed or coordinated the search or seizure. If so, then the operation will be deemed a "joint venture" and the Fourth Amendment would apply to actions taken against the United States citizen and alien with substantial connections to the United States.[92]

86 *United States v. Aiken*, 923 F2d 650 (9th Cir. 1990); *United States v. Wright-Barker*, 784 F2d 161, 176 (3d Cir. 1986); *United States v. DeWeese*, 632 F2d 1267 (5th Cir. 1980).
87 *United States v. Williams*, 617 F2d 1063 (11th Cir. 1981).
88 *United States v. Sarda-Villa*, 760 F.2d 1232 (11th Cir. 1985). See also *Hudson v. Palmer*, 104 S.Ct. 3194, 3199 n. 7 (1984) ("Drug smugglers cannot assert standing solely on the basis that they hid the drugs well and hoped no one would find them").
89 *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F. 3d 157 (2d Cir. 2008). See also, *United States v. Bin Laden*, 126 F. Supp. 2d 264 (S.D.N.Y. 2000).
90 *Samson v. California*, 547 U.S. 843 (2006).
91 *United States v. Hashmi*, 621 F. Supp. 3d 76 (S.D.N.Y. 2008) *Rosado and Velez v. Civiletti*, 621 F. 2d 1179, 1189 (2d Cir. 1980).
92 *United States v. Yousef*, 327 F. 3d 56 (2d Cir. 2003).

4th Amendment as Applied Outside the United States

	United States Citizens	**Alien *with* substantial contacts to the United States**	**Alien *without* substantial contacts with the United States**
United States Officials Conduct, Direct and/or Coordinate Search or Seizure	Yes, but only the reasonableness requirement. No warrant is required. *Verdugo*, *In Re Terrorist Bombings*, *Bin Laden, Yousef* *	Yes, as long as the alien has developed substantial connections with the United States prior to the action. *Verdugo and Reid.*	No. *Verdugo.*
United States Officials **do not** Conduct, Direct and/or Coordinate	No *Hashmi and Rosado*	No *Hashmi and Rosado*	No *Hashmi and Rosado*

*Note: There is a slight distinction under the Foreign Intelligence Surveillance Act for conducting Electronic Surveillance.[93]

18.332 Fifth and Sixth Amendment Extraterritorial Application

United States citizens are entitled to Fifth and Sixth Amendment protections abroad.[94] In a similar fashion to the Fourth Amendment, aliens who develop substantial connections with the United States receive the benefits of the Fifth and Sixth Amendments.[95] Interrogations conducted, directed, and/or coordinated by foreign officials are not covered by the Fifth and Sixth Amendments.[96] However, the un-Mirandized statements must be voluntarily made.[97] Furthermore, all un-Mirandized, yet voluntary, statements made by anyone to foreign officials, acting independent of United States direction, are admissible in United States courts, unless:

> 1. Joint Venture Doctrine – Statements elicited during overseas interrogation by foreign officials without the benefit of Miranda warnings will be suppressed if United States officials actively participated in the questioning conducted by foreign officials. "Active Participation" generally means something more than mere presence or indirect

93 50 U.S.C. §§ 1801-1862.
94 *Reid v. Covert*, 354 U.S. 1 (1957).
95 *United States v. Verdugo*, 494 U.S. 259 (1990).
96 *United States v. Bin Laden*, 160 F. Supp. 2d 670 (S.D.N.Y. 2001) – Note: To date, there are at least 30 different "Bin Laden" and embassy bombing cases, so be sure to pay closer attention to the cites with these cases. *Rosado and Velez v. Civiletti*, 621 F. 2d 1179, 1189 (2d Cir. 1980) – Non-United States citizens questioned abroad by foreign officials; *Stonehill v. United States*, 405 F. 2d 738 (9th Cir. 1968); *United States v. Hashmi*, 621 F. Supp. 3d 76 (S.D.N.Y. 2008).
97 *United States v. Yousef*, 327 F. 3d 56 (2d Cir. 2003).

involvement (like action taken by foreign officials pursuant to a United States extradition request).[98] "Active Participation" requires United States coordination and direction of the investigation or interrogation.[99]

2. Shocks the Conscience – This term is not well defined, but would at least include interrogations conducted by foreign officials who engage in torturous methods to obtain a statement.[100] On the other hand, the concept stems from the notion that if foreign officials engage in such outrageous behavior to obtain the statement, then the statement can hardly be deemed voluntary (Fifth Amendment Due Process).[101]

Aliens with no connection to the United States are also entitled to Fifth and Sixth Amendment protections.[102]

	United States Citizen	**Alien *with* substantial contacts to the United States**	**Alien *without* substantial contacts with the United States**
United States Officials Conduct, Direct and/or Coordinate Questioning	Yes *Miranda*, Due Process, Right to Silence and Counsel	Yes *Miranda*, Due Process, Right to Silence and Counsel	Yes *Miranda*, Due Process, Right to Silence and Counsel
United States Officials **do not** Conduct, Direct and/or Coordinate Questioning	No, unless shocks the conscience *Rosado, Hashmi, Yousef*	No, unless shocks the conscience *Rosado, Hashmi, Yousef*	No, unless shocks the conscience *Rosado, Hashmi, Yousef*

18.340 Extraterritorial Authority Commonly Exercised by CBP
18.341 Vessel Boarding Authority Beyond the National Boundary
18.342 Vessels Without Nationality (Stateless Vessels)
18.343 Assimilated to a Ship Without Nationality (Assimilated Stateless)

98 *Id.* and *United States v. Lira*, 515 F. 2d 68, 71 (2d Cir. 1975).
99 *Id.* and *United States v. Abu Ali*, 528 F. 3d 210 (4th Cir. 2008).
100 *Id.* and *United States v. Hagelberg*, 434 F. 2d 585 (2d Cir. 1970).
101 *In Re Terrorist Bombings in East Africa v. Odeh*, 552 F. 3d 93 (2d Cir. 2008) and *United States v. Bin Laden*, 397 F. Supp. 2d 465 (S.D.N.Y. 2005).
102 *United States v. Lei Shi*, 525 F. 3d 709 (9th Cir. 2008); *United States v. Welch*, 455 F. 2d 211 (2d Cir. 1972) and *United States v. Bin Laden*, 160 F. Supp. 2d 670 (S.D.N.Y. 2001). *See also, Verdugo.*

18.344 Vessels Deemed Employed Within the United States – 19 U.S.C. § 1581(g)
18.345 Examination of Hovering Vessels – 19 U.S.C. § 1587
18.346 Boarding Subsequent to Hot Pursuit
18.347 Coast Guard Vessel Boarding
18.348 Special Boarding Circumstances Associated with Rough Seas

18.341 Vessel Boarding Authority Beyond the National Boundary

- Vessels without nationality (stateless vessels)
- Assimilated to a ship without nationality (assimilated stateless)
- Vessels deemed employed within the United States – 19 U.S.C. § 1581(g)
- Examination of Hovering Vessels – 19 U.S.C. § 1587
- Hot Pursuit
- Coast Guard Vessel Boarding
- Special Boarding Circumstances Associated with Rough Seas

It is important to note that any boarding of a foreign flag vessel beyond the national boundary requires adherence to a specific boarding protocol established in the Maritime Operational Threat Response (MOTR).[103] The Associate Chief Counsel (Enforcement), (202) 344-2940, coordinates such MOTR matters for CBP.

18.342 Vessels Without Nationality (Stateless Vessels)

Vessels without nationality are vessels that are not lawfully registered with any nation, and therefore, are referred to as stateless vessels. If they are not registered with a nation, they have no right under international law to fly the flag of any nation.[104] Such vessels are considered "international pariahs" that have no internationally recognized right to navigate freely on the high seas.[105] In addition, they are subject to any nation's jurisdiction,[106] including the jurisdiction of the United States.[107]

103 Maritime Operational Threat Response (MOTR) for the National Strategy for maritime Security, October 2006. *See* also *United States v. Lei Shi*, 525 F. 3d 709 (9th Cir. 2008).
104 13 U.S.T. 2312 and U.N.T.S. Law of the Sea, Annex 2, "Convention on the High Seas" – Article 6.
105 *United States v. Marino-Garcia*, 679 F. 2d 1373, 1380 (11th Cir. 1982); *United States v. Juda*, 46 F.3d 961 (9th Cir. 1994); *United States v. Caicedo*, 47 F.3d 370 (9th Cir. 1995) (a stateless vessel is an international pariah); see also *United States v. Victoria*, 876 F.2d 1009, 1011 (1st Cir. 1989).
106 *Id.*
107 46 U.S.C. § 70502.

18.343 Assimilated to a Ship Without Nationality (Assimilated Stateless)

According to the Convention on the High Seas, any vessel which sails under the flags of two or more nations may not claim any of the nationalities in question and may be assimilated stateless.[108] It is lawful to treat such vessels as stateless. In addition, any vessel aboard which the master or individual in charge makes a claim of registry that is denied by the nation whose registry is claimed, or any vessel aboard which the master or individual in charge fails, on request of an officer of the United States authorized to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel, or any vessel aboard which the master or individual in charge makes a claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality may be treated as assimilated to a vessel without nationality.[109] Typically, if the spokesperson of the vessel makes a false claim of nationality, or claims two different nationalities, the vessel is assimilated to stateless.[110]

18.344 Vessels Deemed Employed Within the United States – 19 U.S.C. § 1581(g)

Section 1581(g) states that any vessel beyond the 12 mile marginal belt (customs waters) from which any merchandise is being, or has been, unlawfully introduced into the United States by means of any boat belonging to, or owned, controlled, or managed in common with, said vessel, shall be deemed employed within the United States and, as such, is subject to each of the provisions found in § 1581 (document checks, false documents, failure to stop on command, and seizure). As such, this provision makes certain vessels located beyond the 12 mile line "constructively present" and subject to CBP boarding. If the vessel is a foreign flag vessel, boarding is subject to MOTR.

18.345 Examination of Hovering Vessels – 19 U.S.C. § 1587[111]

Hovering Vessels as defined in 19 U.S.C. § 1401(k)[112] are deemed employed within the United States which permits CBP to take action consistent with §

108 13 U.S.T. 2312 and U.N.T.S. Law of the Sea, Annex 2, "Convention on the High Seas" – Article 6.

109 46 U.S.C. § 70502(d).

110 *United States v. Garate-Vergara*, 942 F. 2d 1543, 1555 (11th Cir. 1991); *United States v. Piedrahita-Santiago*, 981 F. 2d 127 (1st Cir. 1991); and, *United States v. Matute*, 767 F. 2d 1511 (11th Cir. 1985).

111 Note: Forfeiture provisions under 19 U.S.C. § 1703 discussed in Chapter 15.

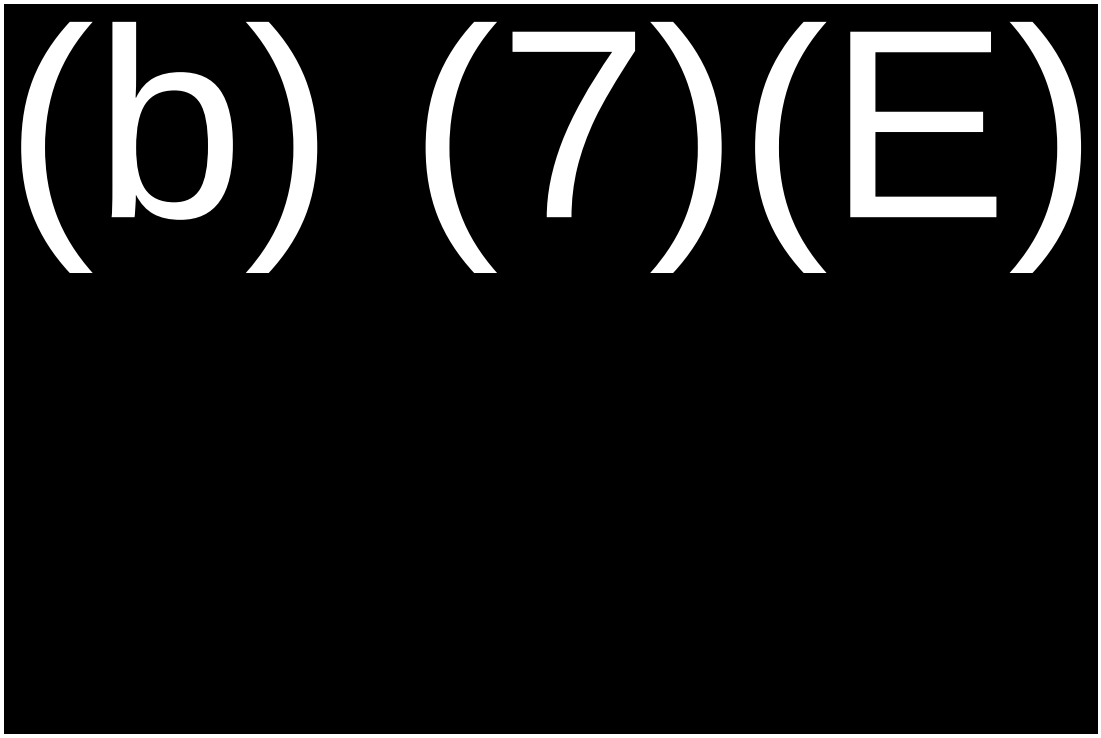
112 19 U.S.C. § 1401(k) - any vessel kept or found anywhere off the coast of the United States where it is reasonable to believe from the history, conduct, character or location that the vessel is being used or may be used to introduce or promote or facilitate the introduction or attempted introduction of merchandise into the United States contrary to law. The term also extends to any vessel that visits a hovering vessel.

1581(g). In addition, 19 U.S.C. § 1587 permits CBP to board and exam all hovering vessels, all vessels that fail (except for unavoidable cause) to display lights as required by law, and all vessels that become subject to hot pursuit. Note: Boarding any foreign flag vessel under this statute requires compliance with MOTR. Boarding under this statute may be authorized as part of a special agreement between the United States and another nation.

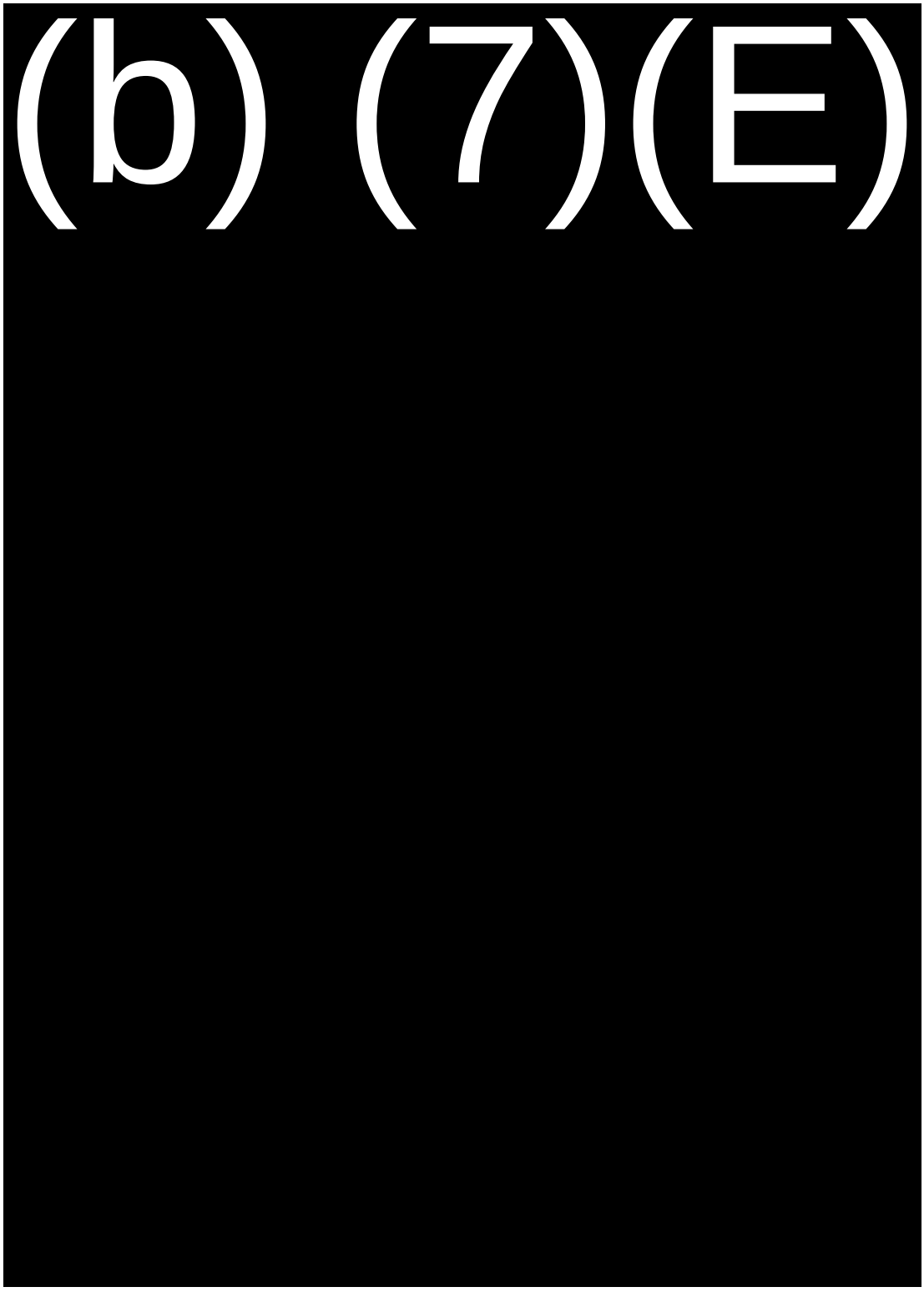
18.346 Boarding Subsequent to Hot Pursuit

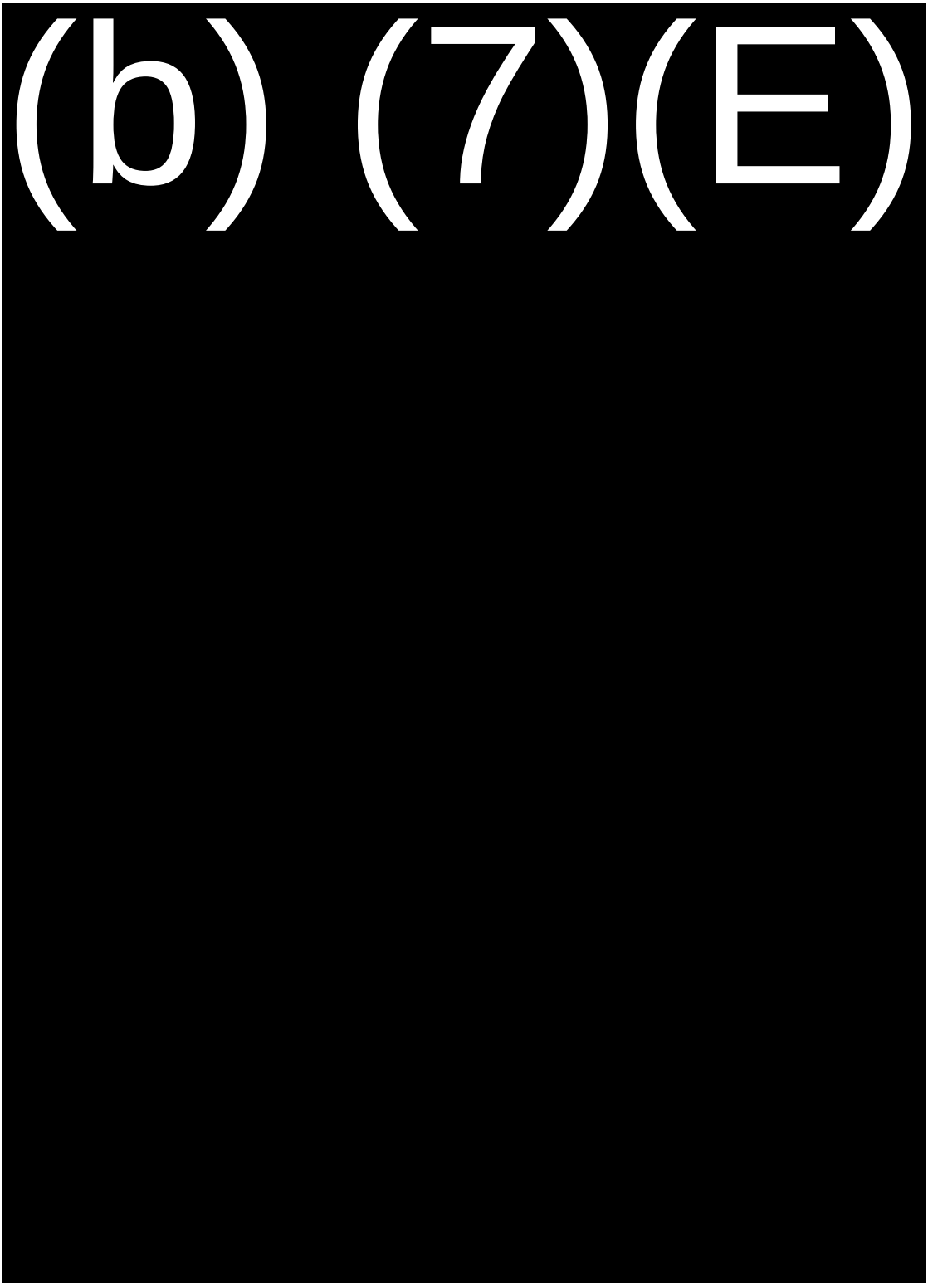
In a similar vein, United States law and international law permit CBP to follow vessels found within the 12 mile line in hot pursuit to a point beyond the nation's waters.[113] Of course, if the hot pursuit involves a foreign flag vessel, then the subsequent boarding must comply with MOTR. If contact is lost or the pursued vessel enters the territorial sea of another nation, then the pursuit must cease. Pursuit cannot be resumed even though contact is regained or the vessel returns to the high seas. Contact will be deemed to have been maintained uninterrupted despite short periods in which no visual or radar response is available provided that conditions are such that after such short interludes the pursuing unit is certain of the identity of the vessel being pursued. Contact may be maintained by more than one vessel or aircraft.

18.347 (b) (7)(E)



[113] 13 U.S.T. 2312 and U.N.T.S. Law of the Sea, Annex 2, "Convention on the High Seas" – Article 23.

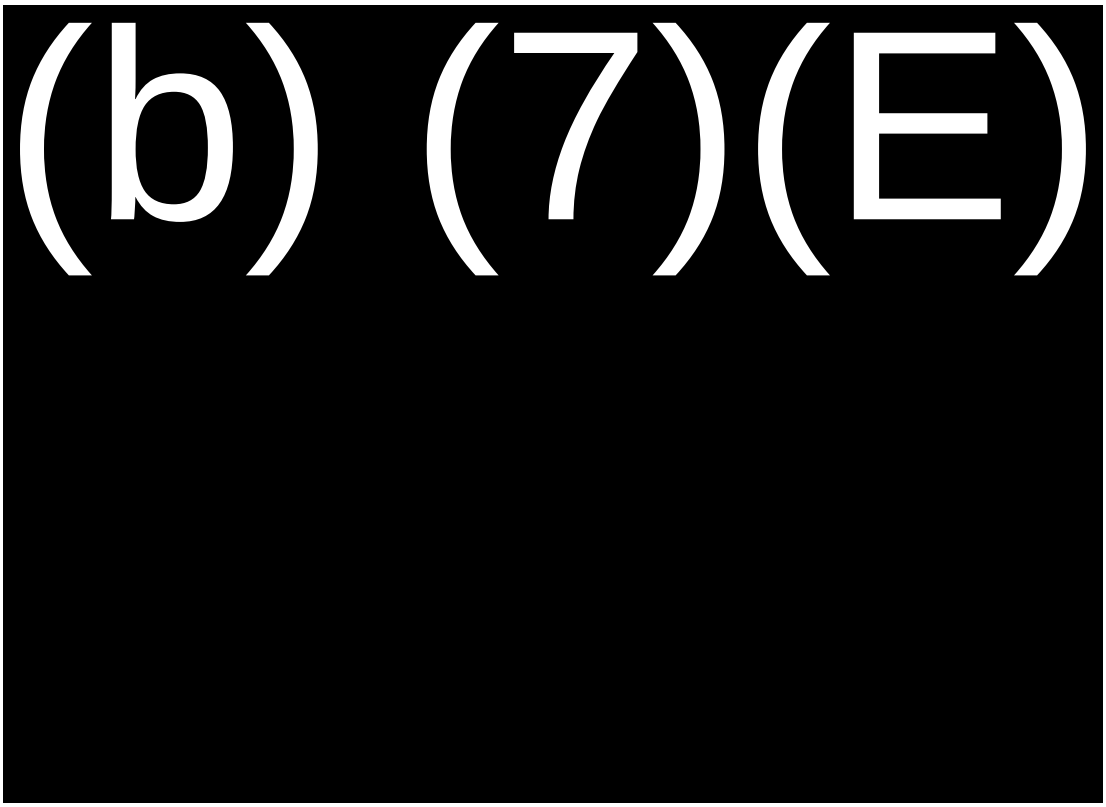

(b) (7)(E)


(b) (7)(E)

[redacted]

18.348 (b) (7)(E)

[redacted]



18.350 Discussion of Specific Extraterritorial Enforcement Provisions

18.351 Maritime Drug Law Enforcement Act – 46 U.S.C. §§ 70501-70508
18.352 Aviation Smuggling Act – 19 U.S.C. § 1590
18.353 Federal Aviation Act – Criminal Penalties – 49 U.S.C. §§ 1155, 46306-46316

18.351 Maritime Drug Law Enforcement Act – 46 U.S.C. 70501-70508 (MDLEA)

18.351a Subject Matter Jurisdiction and the MDLEA
18.351b (b) (7)(E)
18.351c
18.351d Evidence: Other Factors
18.351e Evidence: Preservation of Evidence

According to the MDLEA, it is unlawful for anyone to knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance on board a United States vessel, a vessel subject to United States jurisdiction, or any vessel (foreign or United States) if the individual is a

[114] (b) (7)(E)

United States citizen or resident alien.[115] Exceptions to this rule include common carriers, United States public vessels, and if the substance is actually invoiced.

Vessel of the United States – includes a United States "documented" vessel under 46 U.S.C. §§ 12101 et. seq. and an "undocumented" vessel under the *Federal Boat Safety Act*, 46 U.S.C. §§ 12301 et. seq. (see discussion above). This definition also includes any vessel owned in part by a United States citizen, the United States government, a state government, or United States corporation. Exception: If the vessel is foreign registered, the master/operator makes claim of nationality or registry, and registration or ownership has been improperly transferred from United States registry to a foreign registry.[116]

Vessel Subject to United States Jurisdiction – includes:

- Vessel without nationality
- Vessel assimilated to a vessel without nationality
- Flag nation consents or waives objection to United States law enforcement action
- Vessel found in United States customs waters
- Vessel in territorial waters of foreign nation, and that nation consents to the United States law enforcement action
- Vessel in the Contiguous Zone of the United States (24 miles) as long as the vessel is entering the United States, has departed the United States, or is deemed a hovering vessel as defined in 19 U.S.C. § 1401(k).[117]

The First Circuit has held that the burden of proof to establish that a vessel is without nationality is a preponderance of the evidence, not beyond a reasonable doubt.[118] Obtaining consent or waiver, sometimes referred to as a "statement of no objection" (SNO), may be made by radio, telephone, or similar oral or electronic means. MOTR will be employed in this effort.

18.351a Subject Matter Jurisdiction and the MDLEA

In the MDLEA context, nexus basically means proof that the drugs are destined for the United States.[119] There is a split of authority, however, on whether nexus must be shown in drug cases. The Ninth Circuit, for example, addressed the

115 46 U.S.C. § 70503. Note: The extraterritorial enforcement authority is found in this section at part (b).
116 46 U.S.C. § 70502(b). *See also, Singleton v. United States*, 789 F. Supp. 492 (D. P.R. 1981) and *United States v. Newball*, 524 F. Supp. 715 (E.D.N.Y. 1981).
117 46 U.S.C. § 70502(c).
118 *United States v. Matos-Luchi,* 2010 U.S. App. LEXIS 24553 (1st Cir. 2010).
119 *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998); *United States v. Mena*, 863 F.2d 1522, 1531 (11th Cir. 1989); *United States v. Zakharov*, 468 F.3d 1171, 1177-1178 (9th Cir. 2006).

issue in a case where Coast Guard authorities suspected that a boat of British registry, sailing just outside United States territorial waters off the coast of northern California, was transporting drugs. Permission to board was refused by the captain, who claimed he had come from Hong Kong and was headed for the Caribbean. After receiving telexed authorization from the United Kingdom, the vessel was boarded and a large quantity of marijuana was seized. At the subsequent trial the defense filed a pre-trial motion to dismiss, and a motion to suppress the evidence, claiming lack of jurisdiction.[120] The Ninth Circuit indicated that in "order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States ... so that such application would not be arbitrary or fundamentally unfair."[121] The court went on to observe that

> [t]his "nexus" issue is one of domestic, not international, law. Although international law principles may be useful as a rough guide of whether a sufficient nexus exists between the defendant and the United States so that application of the statute in question would not violate due process ... [the] danger exists that emphasis on international law principles will cause us to lose sight of the ultimate question: would application of the statute to the defendant be arbitrary or fundamentally unfair? [122]

Other circuits also have recognized a Fifth Amendment due process restraint on subject matter jurisdiction, at least in theory. The Second Circuit has said that as long as Congress has expressly indicated its intent to reach conduct outside the United States, "a United States court would be bound to follow the Congressional direction unless this would violate the due process clause of the Fifth Amendment."[123] The Fourth Circuit echoes this principle.[124]

On the other hand, the Third Circuit has rejected the nexus requirement in drug cases. On December 12, 1991, the USS Hercules, a navy vessel with four Coast Guard members on board, was on patrol 60 miles southwest of St. Croix, U.S. Virgin Islands, where it encountered a 26-foot boat that did not display a name, flag, or numbers. An officer on the Hercules contacted the boat's crew through a bull horn and asked their nationality, the place of origin of their voyage, and if they had documentation. The crew responded that they and their boat were Colombian, but that they had sailed from Venezuela without documentation. The Coast Guard then requested and received a "statement of no objection" (SNO) from the Colombian Government to board and check the 26-foot boat for documentation (ultimately Colombia concluded that the vessel was stateless). Upon boarding the vessel, the Hercules boarding party found that the boat's crew consisted of Martinez and two other Colombian nationals. The boarding party

120 *United States v. Davis*, 905 F.2d 245 (9th Cir. 1990).
121 *Id.* at 248-49.
122 *Id.* at 249.
123 *United States v. Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983); *Leasco Data v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972).
124 *United States v. Howard-Arias*, 679 F.2d 363, 371 (4th Cir. 1982).

observed in plain view several burlap bags that they suspected contained drugs. The boarding party tested the contents of one of the bags and determined that it was cocaine. The boarding party then arrested the crew and searched the boat. The defendants were taken to the nearest U.S. magistrate, who was located in the Virgin Islands, and they were prosecuted there for violations of 46 U.S.C. App. § 1903.[125]

Martinez-Hidalgo claimed that the Fifth Amendment due process clause prohibited his prosecution because he was a nonresident alien on a foreign vessel sailing outside the United States territorial waters, and that there was consequently an insufficient nexus between his activities and the United States. This was rejected, and he took his due process claim to the Third Circuit. The Government took the unusual position of conceding there was no nexus in order to force the Circuit to squarely consider the question of whether nexus is required at all.

The Government produced the *Single Convention on Narcotics Drugs*, 18 U.S.T. § 1407 (1962) to support the proposition that drug trafficking was uniformly condemned. Additionally, an ancient pirate case[126] was useful in drawing the obvious parallels between the problems to the international community caused by piracy in one era and drug trafficking in another. Finally, the Government argued that the independent constitutional grant of authority to punish felonies on the high seas in Article I, Section 8 of the U.S. Constitution was sufficient.

The Third Circuit, distinguishing an earlier opinion,[127] rejected any nexus requirement for § 1903 drug prosecutions, but cautioned that

> [w]e, of course, are not suggesting that there is no limitation on Congress' power to declare that conduct on the high seas is criminal and is thus subject to prosecution under United States law. To the contrary, we acknowledge that there might be a due process problem if Congress provided for the extraterritorial application of United States law to conduct on the high seas without regard for a domestic nexus if that conduct were generally lawful throughout the world. But that is not the situation here.[128]

Where proof of nexus is required (as in the Ninth Circuit), nexus is an issue for the court, not the jury.[129] This is true even for cases arising before the 1996

125 46 U.S.C. App. § 1903 was repealed in 2006 and codified under 46 U.S.C. § 70503.
126 *United States v. Smith*, 18 U.S. 153 (1820)
127 *United States v. Wright-Barker*, 784 F.2d 161 (3d Cir. 1986)
128 *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993).
129 *United States v. Zakharov*, 468 F.3d 1171, 1177 (9th Cir. 2006); 46 U.S.C. § 70504(a).

amendments to the MDLEA.[130] Nexus can be inferred from the location of the boat, the size of the boat, its course, proximity to the coast, suspicious movements, navigational charts, large amount of controlled substances, etc.[131] Expert testimony on patterns of drug smuggling into the United States in general, along with testimony that distinctive markings on the drugs match a DHS or DEA database, can also establish nexus.[132]

18.351b (b) (7)(E)

(b) (7)(E)

[130] *United States v. Klimavicius-Viloria*, 144 F.3d 1249 (9th Cir. 1998); Zakharov, id. at 1179.
[131] *Davis, id.* at 249; *Zakharov, id.* at 1179.
[132] *Klimavicius-Viloria*, id. at 1257.
[133]
[134] (b) (7)(E)

(b) (7)(E)

18.351c (b) (7)(E)

(b) (7)(E)

18.351d Evidence: Other Factors

Additional factors that courts have said establish knowledge include, but are not limited to, the following:

- ✓ Length of voyage;[135]
- ✓ Close relation and proximity of the crew;[136]
- ✓ Size and condition of vessel; Quantity of drugs on board;[137]
- ✓ Value of the contraband; Smell of drugs; Accessibility of drugs; Presence of the flags of two nations on board; Master's conflicting statements of nationality; Absence of valid vessel registration on board vessel; Master's refusal to permit boarding;[138]
- ✓ Failure to follow Coast Guard instructions;[139]
- ✓ Presence of recent entry into drug cargo hold;[140]
- ✓ Absence of supplies or equipment necessary for vessel's intended use;[141]
- ✓ Absence of legitimate purpose of trip; Vessel profile, colors, or markings; Drug packaging; Sophisticated radio equipment; Large fuel tanks; Number of crew in relation to commercial purpose of trip;[142]

While mere presence alone is not sufficient to sustain a conviction, it is significant evidence that the jury may use to convict. [143] The fact that drug trafficking is a clandestine activity performed by a tight group of trusted insiders suggests that it is "highly improbable that drug smugglers would allow an outsider on a vessel filled with millions of dollars worth of contraband." [144] Additionally, the burden on the Government to prove knowing participation when the evidence establishes that the crew was onboard a drug laden vessel is relatively light. [145]

135 *United States v. Corpus*, 882 F.2d 546 (1st. Cir. 1989); *United States v. Humphrey*, 759 F.2d 743 (9th Cir. 1985); *United States v. Bent*, 702 F.2d 210 (9th Cir. 1983).
136 *United States v. Corpus*, 882 F.2d 546 (1st. Cir. 1989); *United States v. Humphrey*, 759 F.2d 743 (9th Cir. 1985).
137 *United States v. Guerrero*, 114 F.3d 332 (1st Cir. 1997); *United States v.Cruz-Valdez*, 773 F.2d 1541 (11th Cir. 1985).
138 *United States v. Passos-Paternina*, 918 F.2d 979 (1st Cir. 1989).
139 Id., 918 F.2d 979 (1st Cir. 1989); *United States v. Cruz-Valdez*, 773 F.2d 1541 (11th Cir. 1985).
140 *United States v. Passos-Paternina*, 918 F.2d 979 (1st Cir. 1989).
141 *United States v.Cruz-Valdez*, 773 F.2d 1541 (11th Cir. 1985).
142 *United States v. Guerrero*, 114 F.3d 332 (1st Cir. 1997).
143 *United States v. Barbosa*, 906 F.2d 1366, 1368-69 (9th Cir. 1990); *United States v. Martinez-Mercado*, 888 F.2d 1484, 1491 (5th Cir. 1989); *United States v. Bain*, 736 F.2d 1480, 1485 (11th Cir. 1984).
144 *United States v. Cruz-Valdez*, 773 F.2d 1541, 1546 (11th Cir. 1985).
145 *United States v. Lee*, 694 F.2d 649, 652 (11th Cir. 1983).

18.351e Evidence: Preservation of Evidence

Some boat cases are logistical nightmares for the Government, because the Government finds itself in possession of huge amounts of controlled substances that it needs to destroy prior to trial. The Department of Justice requires the destruction of the contraband in these cases after a representative sample has been taken and the drugs have been properly weighed and photographed. Consult 28 C.F.R. 50.21 and USAM 100.100 to become familiar with the prescribed procedures. In addition, the vessels may be forfeited administratively, and during the pendency of the forfeiture proceedings, issues may arise concerning the Government's ability to control the "crime scene" and the preservation of evidence.

The Government is constitutionally obligated to preserve evidence if such evidence possesses immediately apparent exculpatory value that could not be obtained using comparable evidence.[146] A necessary prerequisite to such a due process claim, however, is bad faith by the prosecutor.[147]

18.352 The *Aviation Smuggling Act* - 19 U.S.C. § 1590

18.352a Criminal Penalties
18.352b Civil Penalties

As with the MDLEA, the *Aviation Smuggling Act* is designed to reach certain conduct outside the territory of the United States that has a deleterious impact on U.S. interests. This statute, however, reaches certain conduct with respect to both aircraft and vessels.

18.352a Criminal Penalties

Section 1590(a) makes it unlawful for the pilot of any aircraft to transport, or for any individual on board any aircraft to possess merchandise knowing or intending that the merchandise will be introduced into the United States contrary to law.

Subsection 1590(b) prohibits the unauthorized transfer of restricted or prohibited merchandise (e.g., controlled substances) between an aircraft and a vessel on the high seas or in the Customs waters of the United States, if either (1) the vessel or aircraft is of U.S. registry or owned by a U.S. citizen, or (2) such transfer is made under circumstances indicating the intent to make it possible to introduce the merchandise into the United States contrary to law.

A conviction for a violation of § 1590(a) or (b) can result in a maximum penalty of five years' imprisonment and/or a $10,000 fine if the merchandise involved was other than a controlled substance. In the case of controlled substances, the maximum penalty is twenty years' imprisonment and/or a fine of $250,000.

146 *California v. Trumbetta*, 467 U.S. 479 (1984).
147 *Arizona v. Youngblood*, 488 U.S. 517 (1988).

18.352b Civil Penalties

The particular "intent" elements stated in § 1590(a) and (b) and the ownership/registry elements of § 1590(b) are "U.S. nexus" elements. The presence of these U.S. nexus elements is essential to validly reach acts conducted beyond the territory of the United States. Although these elements *must* be present along with the particular conduct for *criminal* prosecution, lesser substitutes for U.S. nexus are available for *civil* purposes.

In other words, not only may a civil penalty be imposed in addition to any criminal penalty, but a civil penalty may be imposed in sea transfers in which the U.S. nexus element required for criminal prosecution is unable to be proved, but certain other facts are present.

The following prima facie acts, if committed within 250 miles of the territorial sea of the United States, are nexus substitutes for civil purposes only:

a. The operation of an aircraft or a vessel without lights during such times as lights are required to be displayed under applicable law;

b. The presence on an aircraft of an auxiliary fuel tank that is not installed in accordance with applicable law;

c. The failure to identify correctly -

 (1) The vessel by name or country of registration, or

 (2) The aircraft by registration number and country of registration, when requested to do so by a Customs officer or other government authority;

d. The external display of false registration numbers, false country of registration, or, in the case of a vessel, false vessel name;

e. The presence on board of unmanifested merchandise, the importation of which is prohibited or restricted;

f. The presence on board of controlled substances which are not manifested or which are not accompanied by the permits or licenses required under the Single Convention on Narcotic Drugs, or other international treaty;

g. The presence of any compartment or equipment that is built or fitted out for smuggling;

h. The failure of a vessel to stop when hailed by a Customs officer or other government authority.

The requirement that the above acts be found to exist within 250 miles of the territorial sea can be interpreted as meaning within 250 miles in *either* direction of the territorial sea—250 miles inland and/or 250 miles seaward. In effect, then, the existence of any of the above acts within a 503 mile band centered upon the territorial sea, coupled with evidence of the *actus* elements of 1590(a) or (b), will support imposition of a civil penalty upon any person committing the *actus* elements.

The amount of any civil penalty can be no less than $10,000 and up to twice the value of the merchandise involved.[148]

18.353 *Federal Aviation Act* – Criminal Penalties – 49 U.S.C. §§ 1155, 46306-46316

Although the *Federal Aviation Act* does not operate extraterritorially, as such, CBP's law enforcement activities under the *Aviation Smuggling Act* or other authorized out of CONUS operations can produce evidence of violations of this Act. Therefore, whether operating within or without the territory of the United States, one should be aware of conduct prohibited by the *Federal Aviation Act* and the circumstances under which an aircraft used in association with these violations can be seized for forfeiture.

The following are criminal violations of 49 U.S.C. §§ 46306 and 46315:

- ✓ Knowing use or possession with intent to use of a forged, altered, or falsely made FAA authorized certificate, e.g., Airman, Registration, etc. – 49 U.S.C. § 46306 (b)(2);

- ✓ Knowing and willful display on an aircraft of a mark that is false or misleading as to the nationality or registration of the aircraft – 49 U.S.C. § 46306(b)(3));

- ✓ Own an aircraft eligible for registration and knowingly and willfully operate it, or allow another to operate it, when the aircraft has not been registered or when the owner knows or has reason to know that the other person does not have proper authorization to operate the aircraft without first registering it – 49 U.S.C. § 46306(b)(5);

- ✓ Knowing and willful operation of an aircraft that has not been registered or while any registration has been suspended or revoked – 49 U.S.C. § 46306(b)(6);

148 *See* Chapter 15 for forfeiture discussion.

- ✓ Knowing and willful service as an airman without a valid airman's certificate authorizing service in such capacity[149] – 49 U.S.C. § 46306(b)(7);

- ✓ Knowing and willful employment for service as an airman one who is not authorized to serve in that capacity – 49 U.S.C. § 46306(b)(8);

- ✓ Operating an aircraft with an unauthorized fuel tank or system – 49 U.S.C. § 46306(b)(9); and

- ✓ Knowing and willful operation of an aircraft without displaying navigation or anti-collision lights as required by FAA regulations in connection with a felony drug offense. (49 U.S.C. § 46315 – 5 yrs and/or $250,000 fine).

Violations of 49 U.S.C. § 46306(b) authorize a maximum punishment of 3 years imprisonment and/or a fine not to exceed $250,000. If the violation involves a controlled substance felony, the maximum term of imprisonment is increased to 5 years and such imprisonment must be served consecutively to any other term of imprisonment imposed upon the individual.[150]

149 *United States v. Evinger*, 919 F.2d 381 (5th Cir. 1990) (operating a twin-engine aircraft while holding only a single-engine license and flying an aircraft with an expired medical certificate does not constitute serving as an airman without a valid airman's certificate within the meaning of the criminal statute).
150 49 U.S.C. § 46306(c). See Chapter 15 for forfeiture discussion.

Chapter Nineteen

Immigration Crimes

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19.000 Introduction

Immigration laws in the United States are enforced through a combination of legal measures. The *Immigration and Nationality Act* (INA) provides the procedures for the removal or deportation of aliens who are inadmissible, deportable, or removable from the United States. These proceedings are conducted with the participation of several executive branch agencies, including the Department of Homeland Security's U.S. Immigration and Customs Enforcement and the Department of Justice's Executive Office of Immigration Review.

This chapter focuses on the criminal charges which relate to immigration laws, with primary focus on those crimes most frequently charged. This chapter is not intended to be a comprehensive overview of CBP application of immigration law.[1] In addition to immigration proceedings which may result in physically removing an alien from the United States, the government may seek criminal prosecution of individuals who violate U.S. criminal laws, including those related to immigration. This chapter examines those criminal charges, many of which may be brought against any person, including United States citizens, nationals or aliens (whether or not legally present in the United States). Criminal charges are brought by United States Attorneys in U.S. District Court. Criminal prosecution of individuals who violate U.S. immigration law is an important element in the government's overall immigration enforcement efforts.

Immigration-related crimes can be found in Titles 8 and 18 of the U.S. Code. For the most commonly charged offenses, this chapter presents key language from the statute defining the elements of the crime, classification and sentencing information, as well as discussion of specific issues associated with the prosecution of such offenses, including judicial interpretation of the statutory language and other considerations for CBP officers and agents.

CBP officers and agents must understand that criminal prosecution of suspects who violate immigration laws requires the cooperation, support, and action by the appropriate U.S. Attorney's Office. The decision whether to seek a criminal indictment against any suspect belongs to the U.S. Attorney appointed for the District, and is based on his or her discretion, exercised in light of, among other considerations, the law enforcement priorities and prosecutorial resources available at the time. Developing a cooperative relationship with the Assistant U.S. Attorneys in the local District is important if CBP law enforcement officers and agents are to achieve success in the criminal enforcement of immigration laws. A solid grasp of the various immigration-related criminal statutes is an important first step for any officer or agent hoping to build such a relationship.

[1] To the extent that CBP policy regarding application of immigration law is sought, we recommend review of agency guidance such as the Inspector's Field Manual and the Border Patrol Handbook.

19.100 Title 8 Immigration Crimes

19.110 8 U.S.C. § 1324 - Alien Smuggling
19.120 8 U.S.C. § 1325 - Improper Entry by Alien
19.130 8 U.S.C. § 1326 - Reentry of Removed Aliens
19.140 Other Provisions in Title 8

19.110 Alien Smuggling - 8 U.S.C. § 1324

19.111 8 U.S.C. § 1324(a)(1)(A)(i) - Bringing in Aliens (Not at a Port of Entry)
19.112 8 U.S.C. § 1324(a)(1)(A)(ii) - Unlawfully Transporting Aliens
19.113 8 U.S.C. § 1324(a)(1)(A)(iii) - Concealing or Harboring Aliens
19.114 8 U.S.C. § 1324(a)(1)(A) (iv) - Encourage illegal entry or residence
19.115 8 U.S.C. § 1324(a)(1)(A)(v) - Conspiracy
19.116 8 U.S.C. § 1324(a)(2) - Bringing in Aliens (through a POE)
19.117 8 U.S.C. § 1234(b) – Forfeiture for Alien Smuggling

Smuggling aliens into the United States is a felony offense. The prohibition against alien smuggling is found in 8 U.S.C. § 1324, which sets forth seven distinct crimes. Each of the seven alien smuggling crimes has different, albeit related, elements that are addressed below.[2] When dealing with alien smuggling cases, officers and agents should carefully review all possible criminal charges because more than one crime may be applicable to a given set of facts.[3] In addition, law enforcement officers and agents should review the actions of the different suspects, since they may be chargeable with different crimes under § 1324. It is also important to remember that a determination to arrest should invoke all appropriate charges. The United States Attorney's Office will determine the charges upon which it will proceed. It is also useful to know the practice of your district regarding prosecution on multiple charges.

OTHER POTENTIAL CHARGES AND CONSIDERATIONS

While the focus may be on criminal immigration charges, there are frequently other crimes associated with alien smuggling operations, such as hostage taking (18 U.S.C. § 1203), kidnapping (18 U.S.C. §§ 1201-1204), identity theft (18 U.S.C. § 1028), and trafficking in persons (8 U.S.C. § 1328) among others.

[2] In addition, the alien smuggling statute includes a specific conspiracy and aiding/abetting provision in §1324(a)(1)(A)(v). This provision eliminates the need to charge conspiracy under the general provisions found in 18 U.S.C. § 371, or aiding and abetting under 18 U.S.C. § 2.

[3] For instance, violations of 8 U.S.C. § 1324, if committed under certain conditions may be predicate crimes for Racketeer Influenced and Corrupt Organizations prosecutions pursuant to 18 U.S.C. § 1961(a).

Aggravated Felony

A conviction for bringing in aliens is likely to be considered an aggravated felony for immigration purposes under INA 101(a)(43)(N).[4] An exception is likely for the first offense where the aliens smuggled are the smuggler's alien spouse, child, or parent.[5]

Crime Involving Moral Turpitude (CIMT)

A conviction under 8 U.S.C. § 1324(a) [INA 274(a)] may not constitute a crime involving moral turpitude (CIMT) for the purpose of a removal action against the convicted alien.[6] Please check with your local Associate/Assistant Chief Counsel Office for further advice.

Racketeer Influenced and Corrupt Organizations (RICO)

Violations of 8 U.S.C. § 1324, if committed for financial gain, are a RICO predicate crime pursuant to 18 U.S.C. § 1961(a).

Forfeiture

Section 1324 of Title 8 also contains a specific forfeiture provision in subsection (b). See section 19.118 for a discussion of forfeiture.

Wiretaps

Title 18, section 2516(m) authorizes the issuance of a Title III wiretap court order to investigate alien smuggling under 8 U.S.C. § 1324.

Witnesses

Section 1324(d) of Title 8 contains a specific provision to assist with the preservation of witness testimony from individuals who are removed from the United States. It provides that "[n]otwithstanding any provision of the Federal Rules of Evidence, the videotaped (or otherwise audiovisually preserved) deposition of a witness to a violation of subsection (a) who has been deported or otherwise expelled from the United States, or is otherwise unable to testify, may be admitted into evidence in an action brought for that violation if the witness was available for cross examination and the deposition otherwise complies with

[4] *Matter of Bertha Acuna-De La Bell*, 2008 WL 4335858 (BIA 2008) (unpublished decision).

[5] "Child" is defined in 8 U.S.C. § 1101(b)(1), INA 101(b)(1). "Spouse" is defined in 8 U.S.C. § 1101(a)(35), INA 101(a)(35).

[6] *Matter of Tiwari*, 19 I. & N. Dec. 875 (BIA 1989) (note that this case is before the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and may not remain good law for some points).

the Federal Rules of Evidence." The failure to detain witnesses, absent bad faith, does not necessitate dismissal of an indictment.[7]

DEFINITIONS

Fundamental to all of the alien smuggling crimes are the concepts of "alienage" and the "United States," which are addressed below along with other key terms relevant to the crime of alien smuggling.

Alien

An "alien" is defined as a person who is neither a citizen, nor a national of the United States.[8] This includes lawful permanent residents who, although they have some particular protections, are neither U.S. citizens, nor nationals. For immigration purposes, every individual bears the burden of demonstrating that he or she is a U.S. citizen.[9] Any individual who is unable to demonstrate to the satisfaction of an immigration officer that he or she is a U.S. citizen should be inspected as an alien.

Citizen

Citizenship is a reciprocal arrangement between the sovereign (the government) and a citizen in which the citizen "derives protection from, and consequently owes obedience or allegiance to the sovereign."[10] In the United States, citizenship rights include, among others, the right to vote,[11] the right to run for Congress,[12] and for natural born citizens the right to run for President.[13] United States citizenship can be conferred in several ways, including: (1) at birth, through birth in the United States (with limited exceptions);[14] (2) at birth, through birth outside of the United States to a U.S. citizen parent(s) under specified conditions;[15] (3) at some point after birth, derived from naturalized U.S. parent(s) under limited circumstances, or (4) through the legal process of naturalization.[16]

7 *United States v. Barajas-Chavez*, 358 F.3d 1263 (10th Cir. 2004).
8 8 U.S.C. § 1101(a)(3) (INA 101(a)(3)).
9 8 C.F.R. 235.1(b)
10 *United States* v. *Wong Kim Ark,* 169 U.S. 649 (1898).
11 U.S. Const. amend. XV, XIX, XXIV, and XXVI.
12 U.S. Const. art. I., sec. 2.
13 U.S. Const. art. II, sec. 1.
14 *Wong Kim Ark,* 169 U.S. at 675 ("It is sufficient, for everything we have now to consider, that all children, born of citizen parents within the jurisdiction, are themselves citizens.").
15 8 U.S.C. § 1401 *et seq.* (INA 301 et seq.); *Wong Kim Ark,* 169 U.S. at 688.
16 *Id.*

National

There are a limited set of people who are known as U.S. nationals, who are not citizens. The INA broadly defines "national" of the United States as a person who is either a citizen or "a person who, though not a citizen of the United States, owes permanent allegiance to the United States."[17] Despite this broad definition, the INA further limits non-citizen U.S. nationals to those persons who were born in an Outlying Possession of the U.S. (defined elsewhere as American Samoa and Swains Island)[18] on or after the date of formal acquisition of the Outlying Possession by the U.S. Questions as to whether an individual is a U.S. national (including claims regarding permanent allegiance) should be referred to your local Associate/Assistant Chief Counsel's Office.

United States

For purposes of the INA, the United States is defined as the continental United States, Alaska, Hawaii, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands.[19] Note that this differs from the definition of the United States under customs laws.[20]

COMMON ELEMENTS

Alienage

The government must establish that the individual who was smuggled was an alien, however, there is no need to establish the specific citizenship or nationality of the smuggled person.[21]

There are a variety of means to establish alienage. It is important to consult with your local Associate/Assistant Chief Counsel's Office, as well as the United States Attorney's Office, about what may be necessary in your particular case given practices in the local courts. With that said, there are some general guiding principles that may be helpful. Testimony of the smuggled alien(s), or a videotaped deposition may be admissible in certain circumstances.[22] Public

17 8 U.S.C. §§ 1101(a)(21), (22) (INA 101(a)(21), (22)).
18 8 U.S.C. § 1408 (INA 308); 8 U.S.C. § 1101(a)(29) (INA 101(a)(29)).
19 8 U.S.C. § 1101(a)(38) (INA 101(a)(38); 48 U.S.C. § 1801.
20 *See* 19 U.S.C. § 1401(h), defining the United States for purposes of the customs laws as "all Territories and possessions of the United States, except the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, and the Island of Guam."
21 *United States v. Hernandez*, 913 F.2d 568 (8th Cir. 1990).
22 Please note that the Supreme Court, in *Crawford v. Washington,* 541 U.S. 36 (2004), addressed the confrontation clause of the U.S. Constitution as it related to the use of testimonial evidence at trial. The Crawford decision may certainly have an impact on some of the ways alienage has traditionally been established. See generally 8 U.S.C. § 1324(d); *United States v. Aguilar-Tomayo*,

records, including a warrant of deportation or certain identity documents[23] may be admissible.[24] Note, however, that a previous finding of deportability or removability is not necessarily definitive proof of alienage, although the underlying evidence used in those proceedings may be useful.[25] It is possible, in most cases, to get tapes or transcripts from the Executive Office of Immigration Review (Immigration Court) of the hearing in which alienage was addressed. Records that may be helpful include computer records of prior removals and certificates of non-existence of a document or record.[26] Some smuggling operations are highly sophisticated and may involve multiple participants. Such operations may maintain lists of those involved and amounts due or provided. Such lists, known as "pollo" lists, may also be admissible in certain circumstances.[27]

In the Ninth Circuit, when the primary evidence of citizenship offered by the Government consists of defendant's own admissions, those admissions require "some independent corroborating evidence in order to serve as the basis for a conviction."[28] To satisfy the corroboration requirement, the Government must introduce independent evidence tending to establish the trustworthiness of the admissions.[29]

Practice Pointers:

In cases where proof of alienage comes from statements made by a subject in custody, the evidence must show that the proper rights advisement were given, administrative and *Miranda*, for the statements to be admissible in court.

300 F.3d 562 (5th Cir. 2002); *United States v. Wang*, 964 F.2d 811(8th Cir. 1992).

23 Some of those identity documents may be contained in the alien's A-file(s), such as birth certificate(s), military identification, cedula(s), or passport(s).

24 *See* Federal Rule of Evidence 803(8); *see also United States v. Loyola-Dominguez*, 125 F.3d 1315 (9th Cir. 1997); *United States v. Pluta*, 176 F.3d 43 (2d Cir. 1999).

25 *United States v. Ortiz-Lopez*, 24 F.3d 53 (9th Cir. 1994) (the burden of proof in immigration proceedings is clear and convincing and findings from such proceedings therefore "do not establish the alienage element in later criminal prosecutions" which requires proof beyond a reasonable doubt.)

26 *United States v. Lopez-Moreno*, 420 F.3d 420 (5th Cir. 2005) (computer records of prior removals of smuggled aliens are not testimonial and are admissible); *United States v. Cervantes-Flores*, 421 F.3d 825 (9th Cir. 2005) (certificate of non-existence admissible in a reentry case); *United States v. Bahena-Cardenas*, 411 F.3d 1067 (9th Cir. 2005) (warrant of deportation admissible in a reentry case); *United States v. Rueda-Rivera*, 396 F.3d 678, (5th Cir. 2005) (certificate of non-existence in a reentry case).

27 *United States v. de Gudino*, 722 F.2d 1351 (7th Cir. 1983).

28 *U.S. v. Lopez-Akvarexm,* 907 F.2d 583, 589 (9th Cir.) *cert. denied,* 506 U.S. 989 (1992).

29 *Id.* at 592.

If the subject has a prior U.S. criminal history, the conviction documents may be used to establish alienage if a determination of alienage was made in the prior proceedings.

Defendant's Knowledge of the Alien's Illegal Status

For most alien smuggling charges, the government must establish the defendant's knowledge of the fact that the person smuggled was an alien not legally authorized to come to, enter or reside in the United States.[30] It is important to understand that it is common for the defendants to claim ignorance of the illegal status of smuggled aliens. To undermine the lack of knowledge as a potential defense, a prudent officer or agent should inquire whether the smuggled alien(s) presented documents, or made misrepresentations to the defendant.

Generally there are two types of knowledge: actual knowledge and reckless disregard of the facts. If the government is unable to prove actual knowledge of illegal status, it may still proceed on a theory of reckless disregard of the facts, depending on the statutory language. The Model Jury Instructions define "knowingly" as an act done "purposely and deliberately, and not because of accident, mistake, negligence, or other innocent reason."

If the government is unable to prove actual knowledge of illegal status it may proceed on a theory of reckless disregard of the facts where proof of actual knowledge is not required by the statute.[31] Because reckless disregard is not defined in the statute, there have been several different approaches to its application that vary by circuit.[32] The Modern Federal Jury Instructions define "reckless disregard of the facts" as "deliberate indifference to facts which, if considered and weighed in a reasonable manner, indicate the highest probability that the alleged alien was in fact an alien and was in the United States

30 *United States v. Alvarado-Machado*, 867 F.2d 209 (5th Cir. 1989); *United States v. Diaz*, 936 F.2d 786 (5th Cir. 1991).

31 For instance, 8 U.S.C. § 1324(a)(1)(A)(i) requires proof of actual knowledge.

32 The legislative history of 8 U.S.C. §1324 refers to "willful blindness" but does clearly address reckless disregard. 1986 U.S. Code Cong. and Admin. News, p. 5649, 5669-70, House Report No. 99-682(I). The Modern Federal Jury Instructions consider whether the defendant was deliberately indifferent to facts, which if considered and weighed in a reasonable manner, indicate the highest probability that the alien is illegal. *2-33A Modern Federal Jury Instructions-Criminal § 33A.02.* Similarly, the jury instructions for the Ninth Circuit (S2-9thCirPJI Modern Federal Jury Instructions-Criminal § 9.2) indicate that: "[t]he legislative history of 8 U.S.C. § 1324 refers to 'willful blindness,' which raises the question of whether the 'reckless disregard' in the statute is intended to mean deliberate ignorance. Moreover, the Eighth Circuit defines reckless disregard as "to be aware of, but to consciously or deliberately ignore, facts and circumstances clearly indicating that the person being transported was an alien who had entered or remained in the United States in violation of law." *Garcia-Gonon*, 433 F.3d 587 (8th Cir. 2006).

unlawfully."[33] It is important to correctly identify the standard for proving reckless disregard used in your circuit. In order to determine what is sufficient in your particular case, please contact your local Associate/Assistant Chief Counsel Office.

To prove the defendant's knowledge of the illegal status of the smuggled alien(s), the government frequently relies on the testimony of the smuggled alien(s) in conjunction with the facts surrounding the smuggling. As a result, it is a good idea to have at least some of the smuggled aliens available for trial, however, there may be avenues available for using recorded testimony.[34] In addition to the testimony of the smuggled alien, evidence of prior harboring, or smuggling activity by the defendant may be relevant to establish knowledge, absence of mistake or accident, or common scheme or plan.[35] Evidence of the defendant's actions in attempting to conceal the aliens may also be relevant. The government may rely on direct evidence, circumstantial evidence or a combination of the two.[36]

Venue

Transportation cases may be brought in any district in which the crime, began, continued, or ended.[37] However, the transportation must have occurred within the United States.[38] The other alien smuggling crimes may be prosecuted in any District where the underlying conduct occurred.

33 *2-33A Modern Federal Jury Instructions-Criminal § 33A.03; United States v. Uresti-Hernandez*, 968 F.2d 1042 (10th Cir. 1992).

34 For instance, section 1324(d) contains a specific provision to assist with the preservation of witness testimony from aliens who are removed from the United States. It provides that "[n]otwithstanding any provision of the Federal Rules of Evidence, the videotaped (or otherwise audiovisually preserved) deposition of a witness to a violation of subsection (a) who has been deported or otherwise expelled from the United States, or is otherwise unable to testify, may be admitted into evidence in an action brought for that violation if the witness was available for cross examination and the deposition otherwise complies with the Federal Rules of Evidence." If the government does not have any live witnesses, the verdict may be challenged; however, in some circuits, the defendant must establish that the government acted in bad faith in removing the aliens, and that this conduct prejudiced the defendant's case. See 8 U.S.C. § 1324(d) (preservation of testimony and above discussion on alienage). *See also United States v. Agraz-Garcia*, No 98-50557 (9th Cir. 1999) (citing to *United States v. Dring,* 930 F.2d 687 (9th Cir. 1991)).

35 *United States v. Ramirez-Jiminez*, 967 F.2d 1321 (9th Cir. 1992).

36 *United States v. Cruz,* 59 F. Supp. 2d 340 (D.P.R. 1999) (holding that defendant's acts in attempting to conceal the fact that he was transporting aliens provided competent, circumstantial evidence that defendant knew that the aliens were illegal and that he knowingly transported illegal aliens.)

37 18 U.S.C. § 3237.

38 *United States v. Diaz*, 936 F.2d 786 (5th Cir. 1991).

19.111 Bringing in Aliens (Not at a Port of Entry) – 8 U.S.C. § 1324(a)(1)(A)(i)[39]

Section 1324(a)(1)(A)(i) of Title 8 provides that:

> (1) (A) Any person who-
> (i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien.

Thus, the elements necessary to establish the charge of illegally bringing, or attempting to bring, alien(s) into the U.S. are:

1. That [the person(s) brought in] was an alien.

2. That the defendant knew [the person(s)] was an alien.

3. That the defendant brought or attempt to bring in the alien, in any manner whatsoever, to the U.S. at a place not designated by the Commissioner, or a place other than a designated port of entry.

4. That the defendant acted willfully.[40]

Alienage

The first element of the crime requires the government to establish that the smuggled person is an alien. *See* Common Elements: Alienage. The government is not, however, required to prove that the smuggled person is an illegal alien because unlawful status is not an element of this particular offense. This offense occurs "regardless of whether the alien has received prior official authorization to come to, enter, or reside in, the United States, and regardless of any future official action that may be taken with respect to the alien."[41] For instance, an alien with existing legal status may try to enter the U.S. illegally because he has a criminal record that may render him inadmissible; he is a lawful permanent resident whose time

[39] Section 1324 was rewritten and renumber in 1986 as part of the Immigration Reform and Control Act, Pub. L. No 99-603, § 112(a), 100 Stat. 3381 (1986). Case law predating the changes should be reviewed carefully for applicability.

[40] *See 2-33A Modern Federal Jury Instructions-Criminal § 33A.01.* See also section 19.110.

[41] 8 U.S.C. § 1324(a)(1)(A)(i), (INA 274(a)(1)(A)(i)).

outside of the country raises concerns about potential abandonment; or he is an individual who has an outstanding warrant with a state or local authority.

Defendant's Knowledge of Alienage

The second element that the government must prove is that the defendant knew that the person brought to the U.S. was an alien. This is addressed in the common elements sections above. Unlike the other provisions in § 1324, this section requires *actual knowledge* of alienage and does not contain a "reckless disregard" element.

Brought or Attempted to Bring

The third element, "brought or attempted to bring," can be established by the testimony of the aliens smuggled, by the testimony of an officer or agent, by the defendant's confession, by circumstantial evidence, or by a combination of evidence.[42]

In some cases, proof of this element may include events that occurred outside of the United States.[43] For instance, in an attempt case, it is possible for all of the elements of the crime to occur elsewhere and, at times, continue into the United States.[44] If defendants are interdicted in the contiguous zone or in customs waters outside of U.S. territory, they may still be subject to the jurisdiction of the federal court.[45] It is not a defense that the smuggled alien subsequently received permission to stay in the United States.[46]

Other than a Port of Entry

The government must also establish that the bringing or attempted bringing of the alien to the United States was at a place other than a designated port of entry or place designated by the Commissioner. Of course, in some instances this is a relatively straightforward element. Ports of entry, for immigration purposes, are designated at 8 C.F.R. § 100.4. Testimony of the smuggled aliens and of the investigating and arresting officers and agents will generally establish this portion of the element. In some instances, testimony of neighbors and bystanders should be secured as they may have directly observed the crossing or attempted crossing

42 Providing a false ADIT stamp and advising the alien how to enter the country illegal does not constitute "fringing" an alien to the U.S. *United States v. Garcia-Paulin,* 627 F.3d 127 (5th Cir., 2010).

43 If all of the elements of the offense occurred outside of the United States, venue will be based on 18 U.S.C. §3238.

44 *United States v. Delgado-Garcia*, 374 F.3d 1337 (D.C. Cir. 2004); *United States v. Chen*, 2 F.3d 330 (9th Cir. 1993).

45 *United States v. Best*, 304 F.3d 308 (3d Cir. 2002); *United States v. Delgado-Garcia*, 374 F.3d 1337 (D.C. Cir. 2004).

46 *United States v. Rodriguez-Rodriguez*, 840 F.2d 697 (9th Cir. 1989).

of the border. Surveillance or other photographs taken during an undercover operation, or at the time of the arrest, may also supplement the testimony.

Criminal Intent

The final element is willfulness or, more generally, criminal intent. While the language of section 1324(a)(1)(A)(i) does not contain a willfulness element,[47] some circuits have nonetheless included it in their jury instructions.[48] Thus, in an abundance of caution, it should be considered an element of the charge as an initial matter. Officers and agents should check with their local Associate/Assistant Chief Counsel Office for guidance on what the appropriate circuits require for proof of willfulness.

Sentence

Title 8 U.S.C. § 1324(a)(1)(B)(i) provides for a penalty of imprisonment not to exceed 10 years, a fine, or both. In addition, 8 U.S.C. § 1324(a)(1)(B)(iii) and (iv) provide for enhanced penalties if the crime caused serious bodily injury, placed lives in jeopardy, or if the crime resulted in a death. The maximum penalty based upon aggravating circumstances is death. When a statute provides for enhancement penalties based upon additional facts, those facts must be established beyond a reasonable doubt in the same manner as the other elements of the crime.[49]

47 H.R. Rep. No. 99-682, *reprinted in* 1986 U.S. Code Cong. & Ad News 5649, 5716 explains that the law was amended after the decision in *United States v. Anaya*, 509 F. Supp. 289 (S.D. Fla. 1980)(en banc), affirmed by *United States v. Zayas-Morales*, 685 F.2d 1272 (11th Cir. 1982). The *Anaya* decision dismissed the indictments and the Eleventh Circuit affirmed the dismissal, holding that the facts showed that the defendants acted without the intent to commit an illegal act. "The Justice Department's official position on the legislative revision indicates that a principle purpose of section 1324(a)(1)(A) was to eliminate any requirement of surreptitious or evasive conduct to show intent, and to state clearly that knowledge of the alien's status is the only mens rea element of the offense." *See* 2-23A *Modern Federal Jury Instructions Criminal* § 33A.01.

48 *S1-5thCirPJI Modern Federal Jury Instructions-Criminal 2.02; see also United States v. Nguyen,* 73 F.3d 887 (9th Cir. 1995). In that case the vessel upon which Nguyen was a crewman was caught smuggling aliens. He claimed not to know about the smuggling operation until the vessel was on the water and the aliens were being boarded, at which point he was unable to avoid the smuggling activity. Based upon the language and legislative history of section 1324, the Ninth Circuit concluded that the 1986 revision had not eliminated the intent requirement.

49 *Apprendi v. New Jersey,* 530 U.S. 466 (2000).

Other

For issues concerning aggravated felonies, crimes involving moral turpitude (CIMT), racketeer influenced and corrupt organizations (RICO), forfeitures, and wiretaps, see the general discussion of Section 1324 at 19.110 above.

19.112 Unlawfully Transporting Aliens – 8 U.S.C. § 1324(a)(1)(A)(ii)[50]

Section 1324(a)(1)(A)(ii) of Title 8 provides that:

> *(1) (A) Any person who-*
> *(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;*

The elements necessary to establish that the defendant unlawfully transported aliens are:

1. [Name of alien] was an alien.

2. [Name of alien] entered or remained in the United States unlawfully.

3. The defendant knew, or recklessly disregarded the fact, that [name of alien] was not lawfully in the United States.

4. The defendant transported or moved, or attempted to transport or move, [name of alien],

5. That the defendant intended to help [him/her] remain in the United States illegally.[51]

Pursuant to § 1324(a)(1)(C), it is not a violation of this provision for a bona fide, non-profit, religious denomination to provide travel to an illegal alien who is an uncompensated minister or missionary if that person has been a member of the religious denomination for at least one year. However, the exception is not

50 This section was redesignated to (a)(1)(A)(ii) in 1994, previously it was section (a)(1)(B). The language was not changed. Pub. L. No. 103-322 section 60024(1), 108 Stat. 1981 (1994).

51 *See* Pattern Criminal Jury Instructions 2.03 (10th Cir. 2005 edition) available at http://www.ca10.uscourts.gov/downloads/pji10-cir-crim.pdf.

available where the defendant has encouraged or induced an alien to come to or enter the United States.[52]

Alienage

The first element of the crime requires the government to establish that the smuggled person is an alien. See Common Elements: Alienage.

Entered or Remained Unlawfully

The government must prove that the alien came to, entered,[53] or remained illegally in the United States.

Generally, this element arises in three different scenarios: (1) the alien entered and remained illegally; (2) the alien entered illegally but subsequently adjusted to a lawfully present status; or (3) the alien entered legally but lost their legal status within the United States.

While there have been claims raised that an alien who may be eligible for asylum or refugee status is not illegally present (even when that status has not been applied for or granted), that position has been rejected.[54] Based on those cases, it is unlikely that similar claims—for instance that eligibility to apply for relief from removal does not render the alien's presence illegal—would be successful.

Knowledge / Reckless Disregard

The government must prove that the defendant either knew of the alien's unlawful status or recklessly disregarded the status. The defendant's knowledge of the alien's status is frequently established with the alien's testimony in conjunction with the surrounding facts. See section 19.110 above.

Transported or Moved

A violation of this section includes transporting or moving the illegal alien by means of transportation or otherwise. It is possible to violate this section by

52 Transportation cases may be brought in any district in which the crime, began, continued, or ended. 18 U.S.C. § 3237. However, the transportation must have occurred within the United States. *United States v. Diaz*, 936 F.2d 786 (5th Cir. 1991).

53 Please note that the question of what qualifies as "entry" can be difficult to parse in particular circuits. If there is a question as to whether a person "entered" within the meaning of the statute please contact your local Associate/Assistant Chief Counsel office.

54 *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989) (superseded by statute on other grounds); *United States v. Pereira-Pineda,* 721 F.2d 137 (5th Cir. 1983) (eligibility to apply for asylum does not entitle alien to reside in U.S.).

guiding aliens on foot to a pick up point.[55] Actions such as an alien defendant who transports others in exchange for his own transportation would also be sufficient to establish a violation. For instance, an alien who drives the van with other illegal aliens aboard in exchange for free or reduced transportation for himself would violate this provision.[56] An individual who has transported illegal aliens may, upon discovery by law enforcement, attempt to blend in with the transported aliens. An agent's description of the transporter's clothing and face can be sufficient to identify the transportor where all individuals fled from the vehicle and all denied being the driver.[57]

The transportation does not have to be complete for a violation to occur since section 1324(a)(1)(A)(ii) also includes an attempt provision. At least one circuit has held, in another context, that an attempted violation of U.S. criminal law requires the intent to violate the statute and a substantial step toward doing so.[58]

With Intent To Help Remain In the U.S. Illegally; In Furtherance Of The Illegal Presence

The government must establish that the defendant transported the alien in furtherance of his or her unlawful presence. To date, this is the most litigated issue involving this charge. While the statute does not include the term "willful," several of the courts include it in their jury instructions, requiring proof that the defendant acted knowingly in furtherance of the aliens' illegal presence in the United States.[59] Transportation that is merely incidental to the aliens' presence is likely not a violation of this statute.[60] Helpful evidence in determining whether

55 *Carranza-Chaidez v. United States,* 414 F.2d 503 (9th Cir 1969).

56 *United States v. Juan-Manuel*, 222 F.3d 480 (8th Cir. 2000) (sentencing case that comments on payment in form of reduction of debt owned to the smuggler).

57 *United States v. Zamora-Hernandez*, 222 F.3d 1046 (9th Cir. 2000).

58 For example, in *United States v. Hernandez-Franco*, 189 F.3d 1151 (9th Cir. 1999) the defendant was found to have attempted a violation of this section. He was a commercial trucker who had request the night off from work. He drove his truck to a home where over 40 illegal aliens were waiting for transposition north. Twelve of the aliens had been loaded into the truck's trailer and were hiding in produce containers when authorities arrived. This was sufficient to establish attempted transportation of illegal aliens.

59 *United States v. Stonefish*, 402 F.3d 691 (6th Cir. 2005) (to find that a defendant has acted in furtherance of the alien's illegal presence, the transporter must have specific intent "to deliberately assist an alien in maintaining his or her illegal presence" this intent can be supported by significant circumstantial evidence); *United States v. Parmalee*, 42 F.3d 387 (7th Cir. 1994); *United States v. Barajas-Chavez,* 162 F.3d 1285 (10th Cir. 1999) (en banc) (the government must demonstrate that the defendant acted knowingly "in furtherance of" the aliens' illegal presence); *United States v. Williams*, 132 F.3d 1055 (5th Cir. 1998); *United States v. Velasquez-Cruz*, 929 F.2d 420 (8th Cir. 1991); *United States v. Medina-Garcia*, 918 F.2d 4 (1st Cir. 1990).

60 *2-33A Modern Federal Jury Instructions-Criminal § 33A.02.*

transportation is incidental or in furtherance includes the time of the trip, the place, distance covered, purpose, and the impact of the trip on the alien. For example, driving an alien to and from a grocery store may be incidental, but a longer trip for the purpose of moving and finding employment may be in furtherance of the illegal presence.[61] It is important to note that what evidence is sufficient to meet this element may differ among circuits. As such, it is important to contact your local Associate/Assistant Chief Counsel Office to determine how this element is treated in your area. [62]

Reasonable Suspicion and Probable Cause

Illegal transporting cases will frequently start with a traffic stop based on reasonable suspicion that develops into probable cause that the defendant is involved in illegally transporting aliens. See Chapter 2 for more information regarding this topic.

61 *United States v. Perez-Gonzalez,* 307 F.3d 443 (6th Cir. 2002) (defendant was driving 15 aliens from Texas to New York); *United States v. Hernandez-Guardado*, 228 F.3d 1017 (9th Cir. 2000) (employment as driver for company that regularly transported illegal aliens to other parts of California and other states was in furtherance of aliens' presence); *United States v. Barajas-Chavez*, 162 F.3d 1285 (10th Cir. 1999) (en banc) (trip from Arizona to Denver to look for work was in furtherance of aliens' presence); *United States v. Velasquez-Cruz*, 929 F.2d 420 (8th Cir. 1991) (trip from Los Angeles to New York was in furtherance of alien's presence).

62 The Eighth and Ninth Circuits use a "direct or substantial relationship" test. *See United States v. Velasquez-Cruz*, 929 F.2d 420 (8th Cir. 1991); *United States v. Moreno*, 561 F.2d 1321 (9th Cir. 1977). Thus, the "in furtherance" element if not satisfied if the transportation was only incidental to the illegal presence. The Sixth Circuit utilizes an "intent-based" approach, which considers all credible evidence about the defendant's intentions in transporting illegal aliens. *United States v. 1982 Ford Pick-Up*, 873 F.2d 947 (6th Cir. 1989) (forfeiture not sustained). The Fifth Circuit's more general approach encompasses the "direct or substantial relations" test, but also considers the defendant's intent when transporting illegal aliens. *United States v. Merkt*, 764 F.2d 266 (5th Cir. 1985). The Seventh Circuit utilizes a general approach examining the facts and circumstances surrounding each cases, examining "whether the defendant received compensation for his transportation activity, whether the defendant took precautionary efforts to conceal the illegal aliens, and whether the illegal aliens were the defendant's friends or co=workers or merely human cargo. *United States v. Parmalee*, 42 F.3d 387 (7th Cir. 1994). Finally, the Tenth Circuit examines whether the transportation will help advance or promote the alien's illegal presence, considering all relevant evidence including "time, place, distance, reason for trip, overall impact of trip, defendant's role in organization and/or carrying out the trip." *United States v. Barajas-Chavez*, 162 F.3d 1285 (10th Cir. 1999).

Sentence

Section § 1324(a)(1)(B)(ii) of Title 8 provides for a penalty of imprisonment not to exceed 5 years, a fine, or both. In addition, 8 U.S.C. § 1324(a)(1)(B)(i),(iii) and (iv) each provide for enhanced penalties if the crime was committed for the purpose of commercial advantage or private financial gain, if it caused serious bodily injury, placed lives in jeopardy, or if the crime resulted in a death. The maximum penalty based upon aggravating circumstances is death. When a statute provides for enhancement penalties based upon additional facts, those facts must be established beyond a reasonable doubt in the same manner as the other elements of the crime.[63]

Other

For issues concerning aggravated felonies, crimes involving moral turpitude (CIMT), racketeer influenced and corrupt organizations (RICO), forfeitures, and wiretaps, see general discussion of Section 1324 at 19.110 above.

19.113 Concealing or Harboring Aliens – 8 U.S.C. § 1324(a)(1)(A)(iii)[64]

Title 8 U.S.C. § 1324(a)(1)(A)(iii) provides that

> *(A) Any person who-*
> *(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation.*

The elements necessary to establish that the defendant unlawfully concealed or harbored illegal aliens are:

1. That [name of alien] is an alien

2. That [name of alien] was in the United States in violation of the law.

3. That the defendant knew, or acted in reckless disregard of the fact, that the person was an alien who had come to, entered, or remained in the United States in violation of the law.

4. That the defendant concealed, harbored, or shielded from detection, or attempted to do so, an

63 *Apprendi v. New Jersey,* 530 U.S. 466 (2000).
64 Redesignated as (a)(1)(A)(iii) in 1994, previously (a)(1)(C). Pub. L. No. 103-322, § 60024(1), 108 Stat. 1981 (1994).

alien who had come to, entered, or remained in the United States in violation of the law.[65]

As with "unlawfully transporting aliens" discussed in 19.112 above, pursuant to § 1324(a)(1)(C), it is not a violation of this provision for a bona fide, nonprofit, religious organization to provide room, board, travel, medical assistance, and other basic living expenses, to an illegal alien who is an uncompensated minister or missionary if that person has been a member of the religious organization for at least one year. This does not include a person encouraging or inducing an alien to come to or enter the United States.

Alien Present in Violation of Law

The first element of the crime requires the government to establish that the subject harbored alien is illegally present in the U.S. In general, an alien is present in violation of law if he entered without inspection,[66] or violated the terms of his admission, although there are other means by which an alien could be illegally present in the United States, to include failing to comply with a voluntary departure or voluntary return.[67] In addition to the testimony of the transported alien(s) or the alien's prior admissions, documents from the A-file(s), and identifying material, including birth certificate(s), military identification, cedula(s), passport(s), or other documents indicating citizenship of the smuggled alien(s) should be obtained.

Knowledge / Reckless Disregard

The second element requires the government to establish that the defendant knew, or acted in reckless disregard, of the fact that the person was an illegal alien.[68] See the discussion in section 19.110 above. For example, in one case the government established that a defendant hired aliens at a truck strop without obtaining a job application or any form of identification, treated the aliens differently than other employees, did not withhold federal income tax, and paid them at a rate below minimum wage. The court found that the defendant knew or recklessly disregarded the fact that the aliens were unlawfully in the country.[69]

Conceal / Harbor / Shield

The government must show that the defendant's conduct substantially facilitated the alien remaining in the U.S. illegally[70] by concealing, harboring, or

65 *See 2-33A Modern Federal Jury Instructions- Criminal § 33A.03.*
66 8 U.S.C. § 1182, (INA 212).
67 *See* 8 U.S.C. § 1227, (INA 237).
68 *United States v. Alvarado-Machado*, 867 F.2d 209 (5th Cir. 1989).
69 *United States v. Tipton,* 518 F.3d 591 (8th Cir. 2008).
70 *2-33A Modern Federal Jury Instructions-Criminal § 33A*.03; 8 U.S.C. 1324(a)(1)(A)(iii).

shielding the illegal alien. The government does not need to prove all three (conceal, harbor, or shield); it need only prove one.[71]

To harbor is "to afford shelter to."[72] This includes any conduct tending to substantially facilitate an alien's remaining in the U.S. illegally.[73] It may include providing illegal aliens with transportation, housing, sham marriage ceremonies, and employment.[74] Those who advise an alien on making false statements regarding U.S. citizenship are also harboring.[75] "Substantially facilitate" means to make an alien's illegal presence in the United States substantially "easier or less difficult."[76]

To shield from detection means "to act in a way that prevents the authorities from learning of the fact that an alien is in the United States illegally."[77] The government does not need to prove that the acts were done in secret or clandestinely.[78] Shielding someone can include warning or alerting illegal aliens of the presence of immigration authorities. There is no requirement that a physical barrier, trick, or artifice be utilized.[79]

Note however that there are some differences in how the courts approach the "harboring" provision. For instance, in the Second Circuit and some District

71 *Rubio-Gonzalez*, 674 F.2d 1067 (5th Cir. 1992) (*Rubio-Gonzalez* involved an earlier version of the statute but with similar relevant language); *United States v. Ozcelik*, 527 F.3d 88 (3d Cir. 2008), *cert. denied,* 129 S. Ct. 1037 (2009).

72 *2-33A Modern Federal Jury Instructions- Criminal § 33A.03.*

73 *United States v. Ozcelik*, 527 F.3d 88 (3d Cir. 2008), *cert. denied,* 129 S. Ct. 1037 (2009); *Rubio-Gonzalez*, 674 F.2d 1067 (5th Cir. 1992) (*Rubio-Gonzalez* involved an earlier version of the statute but with similar relevant language).

74 United States v. Lopez, 521 F.2d 437 (2d Cir. 1975) (construing predecessor section 8 U.S.C. § 1324(a)(3) (1970)).

75 *United States v. Smith*, 112 F.2d 83 (2d Cir. 1940) (construing predecessor section 8 U.S.C. § 144(1940)).

76 In *United States v. Shum,* 496 F.3d 390 (5th Cir. 2007) the defendant employed illegal aliens, made and provided false identification to them to facilitate cleaning government buildings, and failed to file social security paperwork on the illegal aliens. In sum, he took steps that would shield their identities from detection by the government and the court found that was sufficient to support a conviction for harboring. In *U.S. v. Tipton*, 518 F.3d 591 (8th Cir. 2008)defendants who provided six aliens a place to live, daily transportation, and money to purchase necessities, and who also maintained counterfeit immigration papers, "harbored" the aliens within the meaning of the statute.

77 *2-33A Modern Federal Jury Instructions- Criminal § 33A.03.*

78 *See United States v. Lopez*, 521 F.2d 437, 440 (2d Cir. 1975); *see also 2-33A Modern Federal Jury Instructions- Criminal § 33A.03.*

79 *U.S. v. Ozcelik,* 527 F.3d 88 (3rd Cir. 2008), *cet. denied,* 129 S. Ct. 1037 (2009); *Rubio-Gonzalez*, 674 F.2d 1067 (5th Cir. 1992) (*Rubio-Gonzalez* involved an earlier version of the statute but with similar relevant language).

Courts in the Sixth Circuit view "harboring" in a narrow fashion.[80] Check with your local Associate/Assistant Chief Counsel Office for specific requirements in your circuit.

Sentence

Title 8 U.S.C. § 1324(a)(1)(B)(ii) provides for a penalty of imprisonment not to exceed 5 years, a fine, or both. In addition, 8 U.S.C. § 1324(a)(1)(B)(i),(iii) and (iv) provide for enhanced penalties if the crime was committed for the purpose of commercial advantage or private financial gain, of it caused serious bodily injury, placed lives in jeopardy, or if the crime resulted in a death. The maximum penalty based upon aggravating circumstances is death. When a statute provides for enhancement penalties based upon additional facts, those facts must be established beyond a reasonable doubt in the same manner as the other elements of the crime.[81]

Other

For issues concerning aggravated felonies, crimes involving moral turpitude (CIMT), racketeer influenced and corrupt organizations (RICO), forfeitures, and wiretaps, see the general discussion of Section 1324 at 19.110 above.

19.114 Encourage illegal entry or residence – 8 U.S.C. § 1324(a)(1)(A)(iv)[82]

Section 1324(a)(1)(A)(iv) of Title 8 provides that:

> *(1) (A) Any person who-*
> *(iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law, shall be punished as provided in subparagraph (B).*

The elements necessary to establish that the defendant encouraged the illegal entry or residence of an alien are:

1. That [name of alien] is an alien

2. The defendant encouraged or induced [name of alien] to come to, enter or reside in the U.S.

80 *United States v. Belevin-Ramales*, 458 F. Supp. 2d 409 (E.D.Ky. 2006); *U.S. v. Kim*, 193 F.3d 567 (2d Cir. 1999).
81 *Apprendi v. New Jersey,* 530 U.S. 466 (2000).
82 This provision was redesignated as subsection (a)(1)(A)(iv) in 1994. Prior to that, it was designated as subsection (a)(1)(D). Pub. L. No. 103-322, § 60024(1), 108 Stat. 1981 (1994).

3. That [name of alien] entered or resides in the United States illegally.

4. That the defendant acted knowingly or in reckless disregard of the fact that such was in violation of the law. [83]

Alienage

The government must establish that the smuggled person is an alien. See section 19.110 above.

Encourage / Induce

The government must establish that the defendant encouraged, or induced an alien to come to, enter, or reside in the U.S. illegally. To "encourage" means to instigate, convince, help, or advise an alien to come to the United States or to stay in this country. To "induce" means to bring about, affect, cause or influence an alien to come to the United States or to stay in this country.

Providing false documents, transportation to the port, and presenting those documents on behalf of the alien is encouraging or inducing.[84] Assisting in obtaining a fraudulent social security card has qualified as encouragement.[85]

Alien Present in Violation of Law

The crime requires the government to establish that the subject alien is illegally present in the U.S. In general, an alien is present in violation of law if he entered without inspection or violated the terms of his admission, though there are other means by which an alien could be illegal present in the United States (including failing to comply with a voluntary departure or voluntary return).[86] In addition to the testimony of the transported alien(s) or the alien's prior admissions, documents from the A-file(s), and identifying material, including birth certificate(s), military identification, cedula(s), passport(s), or other documents indicating citizenship of the smuggled alien(s) should be obtained.

83 *See* generally *2-33A Modern Federal Jury Instructions-Criminal § 33A.04.*
84 *United States v. One 1989 Mercedes Benz*, 971 F. Supp. 124 (W.D.N.Y. 1997).
85 *United States v. Ndiaye*, 434 F.3d 1270, 1298 (11th Cir. 2006) (Ndiaye was involved in an extensive scheme with multiple players and multiple charges, one of which was a violation of 8 U.S.C. § 1324(a)(1)(A)(iv). The Court held that a jury could have found that the defendant's assistance in helping an illegal alien obtain a social security card to which he was not entitled was encouraging or inducing him to reside in this country in violation of the law.); *United States v. Oloyede*, 982 F.2d 133 (4th Cir. 1992) (affirming conviction for selling fraudulent documents to illegal aliens with assurance that it would assist them in remaining here).
86 8 U.S.C. § 1227, (INA 237).

Knowing or Reckless Disregard

The second element that the government must establish is that the defendant knew that the alien who was induced or encouraged would come to, enter in or remain in the U.S. in violation of law, or that the defendant acted with reckless disregard. See section 19.110 above for a complete discussion of the knowing or reckless disregard standards.

Sentence

Title 8 U.S.C. § 1324(a)(1)(B)(ii) provides for a penalty of imprisonment not to exceed 5 years, a fine, or both. In addition, 8 U.S.C. § 1324(a)(1)(B)(i),(iii), and (iv) provide for enhanced penalties if the crime was committed for the purpose of commercial advantage or private financial gain, of if it caused serious bodily injury, placed lives in jeopardy, or if the crime resulted in a death. The maximum penalty based upon aggravating circumstances is death. When a statute provides for enhanced penalties based upon additional facts, those facts must be established beyond a reasonable doubt in the same manner as the other elements of the crime.[87]

Other

For issues concerning aggravated felonies, crimes involving moral turpitude (CIMT), racketeer influenced and corrupt organizations (RICO), forfeitures, and wiretaps, see the general discussion of Section 1324 at 19.110 located above.

19.115 Conspiracy – 8 U.S.C. § 1324(a)(1)(A)(v)

It is a felony to conspire to commit, or to aid or abet the commission of, a violation of 8 U.S.C. § 1324(a)(1)(A)(i)-(iv), that is bringing in, transporting, concealing or encouraging the presence of illegal aliens in the United States. Title 8 U.S.C. § 1324(a)(1)(A)(v) of the United States Code provides that:

> *(1) (A) Any person who-*
>
> *(v) (I) engages in any conspiracy to commit any of the preceding acts, or*
>
> *(II) aids or abets the commission of any of the preceding acts.*

The elements of this crime depend on which of the four underlying alien smuggling crimes previously is the subject of the underlying conspiracy.

[87] *Apprendi v. New Jersey,* 530 U.S. 466 (2000).

Sentence

Title 8 U.S.C. § 1324(a)(1)(B)(i) provides for a penalty of imprisonment not to exceed 10 years, a fine or both for a violation of (v)(I) (conspiracy). Title 8 U.S.C. § 1324(a)(1)(B)(ii) provides for a penalty of imprisonment not to exceed 5 years, a fine, or both for a violation of (v)(II) (aiding or abetting). In addition, 8 U.S.C. § 1324(a)(1)(B)(iii) and (iv) provide for enhanced penalties, if the violation caused serious bodily injury, placed lives in jeopardy, or if the crime resulted in a death. The maximum penalty based upon aggravating circumstances is death. When a statute provides for enhanced penalties based upon additional facts, those facts must be established beyond a reasonable doubt in the same manner as the other elements of the crime.[88]

Other

For issues concerning aggravated felonies, crimes involving moral turpitude (CIMT), racketeer influenced and corrupt organizations (RICO), forfeitures, and wiretaps, see general discussion of Section 1324.

19.116 Bringing in Aliens (through a POE) – 8 U.S.C. § 1324(a)(2)

Title 8 U.S.C. § 1324(a)(2) provides:

> *(2) Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien shall, for each alien in respect to whom a violation of this paragraph occurs.*

This charge is generally used when someone tries to sneak an alien into the U.S. through a port of entry.[89]

The elements necessary to establish that the defendant brought an unauthorized alien into the United States are:

1. That the defendant, with knowledge or reckless disregard.

2. Brought or attempted to bring into the US in any manner.

3. That [name of alien] is an alien.

88 *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

89 Because §1324(a)(2) has, itself, not been the subject of much litigation, case law addressing related subsections of this statute may be helpful.

4. Who is without prior official authorization to enter, come into, or reside in the U.S.

Knowledge / Reckless Disregard

The government must prove that the defendant either knew of the alien's lack of authorization, or acted in recklessly disregard of the alien's status. The defendant's knowledge of the alien's status is frequently established with the alien's testimony in conjunction with the surrounding facts. See section 19.110 for a complete discussion of the knowledge and reckless disregard standards.

Brought Or Attempted To Bring Into The U.S. In Any Manner

"Bringing an alien to the U.S." includes guiding, leading, escorting or causing the alien to come to the U.S.[90] While not addressed in all circuits, the Ninth Circuit has held that the "bringing to" offense continues until the initial transporter delivers the aliens on the U.S. side of the border. The individual who then moves the aliens from the drop point to their next destination should be charged with transporting under § 1324(a)(1)(A)(ii).[91] Section 1324(a)(2) can support a conviction for events occurring outside of the U.S.[92]

It may be helpful to note that because of the wording of the statute, the issue of "entry" (and the corollary issue of "official restraint") are not applicable to § 1324(a)(2) charges.[93] See section 19.112 for a brief discussion of "entry."

Alienage

The first element of the crime requires the government to establish that the smuggled person is an alien. See section 19.110 for a discussion of alienage.

Without Prior Official Authorization

Prior official authorization is not defined, however certainly those individuals who have entered without inspection will have entered without prior authorization.

In addition, the Fifth Circuit has indicated that those who help aliens obtain entry to the U.S. with visas predicated on false information may be subject to charges pursuant to § 1324(a)(2).[94] The Fifth Circuit explains:

90 *2-33A Modern Federal Jury Instructions-Criminal § 33A.05*; *U.S. v. Yoshida,* 303 F.3d 1145 (9th Cir. 2002) (defendant assisted aliens onto airplane in China and accompanied them on flight).
91 *United States v. Lopez*, 484 F.3d 1186 (9th Cir. 2007).
92 *Villanueva v. United States*, 408 F.3d 193 (5th Cir. 2005).
93 *United States v. Gonzalez-Torres*, 309 F.3d 594 (9th Cir. 2002).
94 *United States v. Gasanova*, 332 F.3d 297 (5th Cir. 2003).

> *Section 1324(a)(2) does not define the term official authorization, and no court of which we are aware has construed the statute to meet our question. Section 1324(a)(2) originated in the Immigration Reform and Control Act ("IRCA"), the central purpose of which was to combat illegal immigration. To construe official authorization as including a document the defendant knows to be mistakenly-issued or fraudulently-obtained would thwart this objective. It would permit a defendant to bring to the United States an alien who the defendant knows is ineligible to enter so long as the defendant succeeds in purloining a visa from an official source. Because this interpretation would contravene the fundamental purpose of the legislation through which § 1324(a)(2) was enacted we reject it.*

United States v. Gasanova, 332 F.3d 297 (5th Cir. 2003) *(footnotes omitted).*

Consequently, in addition to those who entered without inspection, it appears that, at least in the Fifth Circuit, section 1324(a)(2) may be utilized in circumstances in which the alien entered the U.S. by utilizing documents that were issued based on fraudulent information.

Willfully

The statute does not contain an express willfulness element. See section 19.110 for a discussion of willfulness and check with your local Associate/Assistant Chief Counsel Office to determine if your circuit has created this element through case law.

Sentence

Title 8 U.S.C. § 1324(2)(A) provides for a penalty of imprisonment not to exceed 1 year, a fine or both. Pursuant to (2)(B)(i), (ii), and (iii), for a first or second conviction of this offense, if the offense was committed with the intent, or with reason to believe that the alien will commit a felony against the U.S. or any state, or the offense was done for the purpose of commercial advantage or private financial gain, then the penalty is 3 to 10 years. For a first or second conviction for this offense, if the alien was not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry, then the penalty is not more than 10 years. For all other violations the penalty is 5 to 15 years. When a statute provides for enhanced penalties based upon additional facts, those facts must be established beyond a reasonable doubt in the same manner as the other elements of the crime.[95]

95 *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Other

For issues concerning aggravated felonies, crimes involving moral turpitude (CIMT), racketeer influenced and corrupt organizations (RICO), forfeitures, and wiretaps, see general discussion of Section 1324 at 19.110 above.

19.117 Forfeiture for Alien Smuggling – 8 U.S.C. § 1324(b)

There are a number of forfeiture provisions in the U.S. Code. Chapter 15 of the Law Course discusses different legal theories and procedures for the forfeiture of property related to various forms of criminal activity. There are, in particular, specific forfeiture provisions in the U.S. Code related to certain immigration charges. Alien smuggling in section 1324 contains one of these forfeiture provisions. Title 8 U.S.C. § 1324(b)(1) provides that:

> *(b) Seizure and forfeiture*
> *(1) In general - Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of subsection (a) of this section, the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture.*

These seizures and forfeitures are governed by chapter 46 of Title 18 of the U.S. Code (18 U.S.C. § 981 *et seq.*) including section 981(d). An exception to the application of section 981(d), however, is that the duties imposed upon the Secretary of the Treasury regarding forfeiture of property shall be performed by persons designated by the Attorney General when pursuing a forfeiture under 8 U.S.C. § 1324(b).[96]

In establishing an alien smuggling violation for forfeiture purposes, 8 U.S.C. § 1324(b)(3) provides that 1) records of judicial or administrative proceedings reflecting that the alien had no prior authorization to be in the U.S., 2) official records of the State Department or the Service (legacy INS) showing a lack of authorization, or, 3) testimony by an immigration officer with personal knowledge of the alien's lack of authorization, are prima facia evidence of the alien's lack of prior official authorization to come to, enter, or reside in the U.S. as required in alien smuggling violations contained in subsection (a).

19.120 Improper Entry by Alien – 8 U.S.C. § 1325

19.121 8 U.S.C. § 1325(a) - Improper Entry by Alien
19.122 8 U.S.C. § 1325(c) - Improper Entry by Alien – Marriage
19.123 8 U.S.C. § 1325(d) - Improper Entry by Alien – Commercial Enterprise

[96] 8 U.S.C. § 1324(b)(2).

This section covers those situations in which an alien avoids the port of entry, slips though the port undetected, lies to get through the inspection process at the port, marries to evade provisions of immigration law, or establishes a commercial enterprise in order to evade provisions of immigration law. Each of these violations is contained in a separate subsection, addressed below.

Proper Venue for a Violation of 8 U.S.C. § 1325

For a violation of Section 1325(a), venue is proper in the district where the alien committed any one of the three prohibited acts described above, likely a border district. As such, the proper district would be the district in which the alien "enters or attempts to enter the United States," "eludes examination or inspection by immigration officers," or "attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact."

19.121 Improper Entry by Alien – 8 U.S.C. § 1325(a)

It is a Federal crime for an alien to improperly enter or attempt to enter the United States. This section covers those who avoid ports of entry, those who try to pass though the port undetected, and those who enter or attempt entry on the basis of false information. Section 1325(a) of Title 8 of the United States Code applies to any alien who:

(1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or

(2) eludes examination or inspection by immigration officers, or

(3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact.

To establish a violation of this section the government must prove that:[97]

1. The defendant is an alien.

2. He or she entered or attempted to enter the U.S.

3A. At a time or place other than as designated by immigration officers.

97 The government has the burden to prove each element beyond a reasonable doubt. Sufficient evidence, either testimonial or physical, must be presented on each element to the fact finder. Generally the fact finder will be the jury, occasionally it may be the Judge.

or

3B. Eluded examination or inspection by immigration officers.

or

3C. Attempted to enter, or obtained entry by willfully false or misleading representations, or concealment of a material fact.

Alienage

See section 19.110 for a complete discussion of alienage.

Entry/Attempted Entry

See the discussion in 19.130 regarding entry.

If the alien has NOT been "free from official restraint," then he or she may only be charged with an attempted entry. The term "official restraint" includes continuous and uninterrupted observation. Thus, if the subject has been under the direct and continuous observation of a field agent, or a remote camera operator, from entry to apprehension, the offense is only an attempt.

Circuit Note: In certain parts of the United States (Ninth Circuit), the court has added voluntariness to the element of entry (voluntarily entered). Take particular note of subjects claiming that they were "forced" to enter. The government will have to prove that the entry was voluntary in these cases.

Practice Pointer

The time and place of an entry (no official restraint) will usually come from statements made by the subject. Again, the apprehending officer or agent must carefully follow the administrative and Miranda rights advisory requirements to preserve the admissibility of the statements.

Statute of Limitations

Unlike 8 U.S.C. § 1326, unlawful entry under 8 U.S.C. § 1325 is not a continuing offense. The offense is committed at the time of the illegal entry. Per 18 U.S.C. § 3282, the statute of limitations is five (5) years. If the subject states that he/she entered more than five years prior, then the Government must have evidence to prove otherwise. This evidence may come from apprehension history, sworn statement after a Miranda waiver, evidence of recent entry such as border fence camera or testimony, or formal removal documentation.

Time and Place other than as designated

In practical effect, this means any non-POE entry into the United States.

Eluded examination or inspection

The subject did not present himself for inspection. While the alien may have actually transitted the POE, he or she was either concealed or moved through without inspection.

Entry by willfully false or misleading representations, or concealment of a material fact

The subject passed through inspection by presenting a forged or otherwise fraudulent document, or by making a false statement to the inspecting officer. This also includes the failure of the subject to disclose a material fact that would have excluded them from entry.

This would also include instances where the subject entered by means of a previously, properly issued visa which was invalid at the time of entry.

See also 18 U.S.C. § 1028, fraud in connection with identification documents.

Sentence

For a first violation, the penalty is imprisonment for not more then 6 months, a fine, or both. For subsequent commissions, the penalty is imprisonment for not more than 2 years, a fine, or both. In addition to the criminal penalty, an alien apprehended while entering or attempting to enter shall be subject to a civil penalty of $50 to $250 for the first offense and for subsequent offenses the penalty is twice that amount.[98] When a statute provides for enhanced penalties based upon additional facts, those facts must be established beyond a reasonable doubt in the same manner as the other elements of the crime.[99]

Note: The penalty for 1325(a) (first violation) classifies it as a petty offense. 18 U.S.C. § 19. This means that the charge is filed by the prosecuting attorney as an information or a complaint. See Federal Rules of Criminal Procedure 7 and 58. This offense will not go to a grand jury. Further, there is no right to a jury trial. The matter will be tried to the judge only.

19.122 Improper Entry by Alien – Marriage – 8 U.S.C. § 1325(c)

Section 1325(c) of Title 8 provides that:

98 8 U.S.C. § 1325(b).
99 *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

(c) An individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, or fined not more than $250,000, or both.

The elements necessary to establish this charge are:

1. That the defendant knowingly entered into the marriage.

2. That marriage was for the purpose of evading the immigration laws.

Sentence

The penalty for a violation of this provision is imprisonment for not more than 5 years, a fine of not more than $250,000, or both.

19.123 Improper Entry by Alien – Commercial Enterprise 8 U.S.C. § 1325(d)

It is a felony for an individual to knowingly establish a commercial enterprise for the purpose of evading the immigration laws. Section 1325(d) of Title 8 provides that:

(d) Any individual who knowingly establishes a commercial enterprise for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, fined in accordance with title 18, United States Code, or both.

The elements necessary to establish this charge are:

1. That the defendant knowingly established a commercial enterprise.

2. That he or she did so for the purpose of evading the immigration laws.

Sentence

The penalty for a violation of this provision is imprisonment for not more than 5 years, a fine, or both.

19.130 Reentry of Removed Aliens – 8 U.S.C. § 1326

Section 1326(a) of Title 8 of the United States Code provides that:

a) Subject to subsection (b) any alien who-

(1) has been denied admission, excluded, deported, or removed, or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless

(A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission;

or

(B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this or any prior Act, shall be fined under title 18, United States Code, or imprisoned not more than 2 years, or both.

The elements necessary to establish the charge of illegal reentry are:

1. That [name of alien] was an alien at the time of the offense.

2. That prior to the time of the offense, the defendant had been either:

 a. Deported from the United States;

 b. Removed [including expedited removal] from the United States or

 c. Departed the United States while an order of exclusion, deportation or removal was outstanding

3. That [name of alien]

 a. improperly entered, or

 b. attempted to enter, or

 c. was found in the United States.

4. That the defendant had not received the express permission of the Attorney General to apply for readmission. [100]

Alienage

See section 19.110 for a complete discussion of alienage.

Prior Deportation / Removal[101]

Orders of removal (of all types), deportation, and exclusion are generally issued by the Immigration Court, however, it is possible to have a U.S. District Court Judge order removal pursuant to 8 U.S.C. § 1228[(d)](c). Expedited removal proceedings would be memorialized by DHS documentation, not an Immigration Court. Some procedures, such as visa waiver refusal, are not considered removal orders because there is not order of removal.

The prior order of removal can be established with the Order of Removal from the immigration judge, or a warrant of deportation.[102] Remember that the statute requires a reentry so the government must establish that the alien actually departed or was physically removed from the United States.[103] In short, the government must prove that the defendant actually left the country. [104]

100 *See* generally *2-33A Modern Federal Jury Instructions-Criminal § 33A.06*.

101 The passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 substantially affected this element and, as a result, decisions from cases decided before its enactment should be carefully reviewed for applicability. There were two amendments, one effective with it the statute's passage (September 30, 1996) and one effective six months later (April 1, 1997).

102 These documents are admissible evidence under the public records exception to the hearsay rule. *United States v. Martinez-Rodriguez*, 472 F.3d 1087 (9th Cir. 2007); *United States v. Cantellano*, 430 F.3d 1142 (11th Cir. 2005); *United States v. Melendez-Torres,* 420 F.3d 45, 49-50 (1st Cir. 2005); *United States v. Landeros-Mendez*, 206 F.3d 1354 (10th Cir. 2000) (introduction of judicial order of deportation not required if warrant of deportation was admitted); *United States v. Quezada,* 754 F.2d 1190 (5th Cir. 1985). The courts are agreed that the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, (2004), does not affect the admissibility of the warrant of deportation because the warrant is a non-testimonial document analogous to a business record. *United States v. Garcia*, 452 F.3d 36 (1st Cir. 2006); *United States v. Valdez-Maltos*, 443 F.3d 910 (5th Cir. 2006); *United States v. Cantellano*, 430 F.3d 1142 (11th Cir. 2005); *United States v. Bahena-Cardenas*, 411 F.3d 1067 (9th Cir. 2005).

103 *United States v. Romo-Romo*, 246 F.3d 1272 (9th Cir. 2001) (jury instruction was inaccurate in advising that it is sufficient if defendant was brought to the border by immigration officers but through guile and deceit managed not to leave the U.S.).

104 In some instances, at the time of the alien's previous removal from the U.S., the alien's fingerprints and perhaps picture would have been taken by the

Section 1326(d) limits the extent to which an alien can challenge the underlying removal order as a defense to this charge. Specifically, section 1326(d) provides that an alien may not collaterally attack the underlying deportation order unless he demonstrates that administrative remedies have been exhausted, that the previous deportation proceedings improperly deprived the alien of the opportunity for judicial review, and that the order was fundamentally unfair.[105] Also, it is important to understand that there is a distinction between the periods of inadmissibility outlined in 8 U.S.C. § 1182 (five, ten, twenty years or life, depending on the specific circumstances) and the blanket criminal provision found in 8 U.S.C. § 1326. Section 1326 makes it a crime to enter, attempt to enter or be found in the United States at any point after being denied admission, excluded, deported or removed. The criminal provisions in section 1326 do not contain the time periods that are found in the inadmissibility provisions in section 1182.[106]

Improper Entry / Attempt / Found In

The third element that the government must establish is that the defendant entered, attempted to enter, or was found in the U.S. To enter means "to come into the United States from a foreign port or place while free from official restraint."[107] The term "free from official restraint" is defined in the Modern Federal Jury Instructions to mean "free from observation or surveillance by government officials for any period of time after one enters the United States until the time one is apprehended or placed in custody."[108] The circuits differ on

deportation officer and affixed to an I-205 Warrant of Deportation. In addition, the warrant would be signed by the Deportation Officer who observed the removal.

105 In at least one case, *United States v. Garcia*, 2008 U.S. Dist. Lexis 63804 (E.D.N.Y. 2008), the Court held that the deprivation of voluntary departure rights may be a fundamental flaw in a removal proceeding, which, assuming the other requirements are met, may be sufficient for a successful collateral attack of a previous removal order under § 1326(d). The court concluded that the defendant was denied the opportunity for judicial review of his deportation order and that the administrative exhaustion requirement of § 1326(d)(1) must be excused where an alien's failure to exhaust results from an invalid waiver of the right to an administrative appeal.

106 *See United States v. Aquino-Chacon*, 109 F.3d 936 (4th Cir. 1997) (held that the statement in the I-294 form relating to periods of inadmissibility cannot be used as a defense against a charge of criminal reentry after removal under 1326); but *see United States v. Idowu*, 105 F.3d 728 (D.C. Cir. 1997) (permitting a defendant charged under 1326 to withdraw his plea based on a similar argument). *See* also *United States v. Miranda-Ramirez,* 309 F.3d 1255 (10th Cir. 2002); *United States v. Thomas*, 70 F.3d 575 (4th Cir. 1995); *United States v. Cruz-Flores*, 56 F.3d 461 (2d Cir. 1995); *United States v. McCalla*, 38 F.3d 675 (3d Cir. 1994).

107 *2-33A Modern Federal Jury Instructions-Criminal § 33A.06*

108 *Id.*

this point, with the First and Ninth Circuits adding "with the purpose or conscious desire to reenter the United States without permission."[109]

The Modern Federal Jury Instructions indicate that "[t]o be found in the United States means to be located in the United States following reentry."[110] Generally, the "found in" offense is committed at the time of reentry and continues until the defendant is arrested for the offense. The location of the border crossing and the location where the defendant is ultimately apprehended may differ.[111] For example, an alien defendant was arrested by Texas state police for traffic violations. He was extradited to Wisconsin for charges pending there. Wisconsin alerted immigration officials, who then charged the alien with reentry after removal in federal court in Wisconsin. The Court held that the "found in" component of § 1326 is a continuing offense, stating that "[t]he crime is *being* in the United States and is not limited to the instant at which a federal agent lays hands on the person and a light bulb in the agent's head illuminates the mental sign "This guy's an illegal alien."[112] The Court sustained the federal prosecution in Wisconsin.

In addition, when and where the defendant is "found in" the U.S. may impact the statute of limitations. Defendants have claimed that the statute of limitations should run from the time when immigration official *should have* found them in the U.S., not when immigration officially *actually* found them. The courts have generally held that the statute of limitations will run from the time when immigration officials actually found the alien and knew his or her identity.[113]

For example, an alien who attempted to enter Canada from the U.S., but who was refused entry by Canada and thus returned to the U.S., was not "found in" the U.S. in violation of § 1326 while at the port of entry.[114]

Entry Issues

In some circuits, the government must establish that he defendant was in the U.S. free from official restraint.[115] "An alien is under 'official restraint' if, after

109 *Id. See also Gilbert v. United States,* 489 F. Supp. 2d 150 (N.D.N.Y. 2006).
110 *2-33A Modern Federal Jury Instructions-Criminal § 33A.06*
111 *United States v. Ruelas-Arreguin,* 219 F.3d 1056 (9th Cir. 2000); *United States v. Herrera-Ordones,* 190 F.3d 504 (7th Cir. 1999).
112 *United States v. Rodriguez-Rodriguez*, 453 F.3d 458 (7th Cir. 2006).
113 *United States v. Clarke*, 312 F.3d (11th Cir. 2002); *United States v. Soriano-Hernandez,* 310 F.3d 1099 (8th Cir. 2002); *United States v. Mercedes,* 287 F.3d 47 (2d Cir. 2002).
114 *United States v. Ayala-Ayala,* 470 F. Supp.2d 281 (W.D.N.Y. 2007).
115 *United States v. Lombera-Valdovinos*, 429 F.3d 927 (9th Cir. 2005) (defendant was never free from official restraint, as he crossed border in full view of Border Patrol officer, walking up to officer and asking to be taken to jail.)

crossing the border without authorization, he is 'deprived of [his] liberty and prevented from going at large within the United Sates."[116] The restraint may take the form of surveillance unknown to the alien. The issue is not the distance traveled between illegal entry and apprehension; instead the focus is on the alien's ability to exercise free will once in the U.S. The burden is on the government to establish a lack of official restraint. In *Cruz-Escoto* the defendant was observed by a Border Patrol Agent approximately 100 to 150 yards from the border, however he was not observed actually crossing the border. The court held that the jury could have concluded that he was already in the U.S. exercising his free will at time he was first observed. Consequently, he had "entered" for the purposes of § 1326.[117] In *United States v. Bello-Bahena,*[118] a border patrol agent testified that another agent with a night scope had the defendant under surveillance, but the agent did not know when the surveillance started. The Court held that under those circumstances, the trial court should have given the jury an "official restraint" instruction. CBP officers and agents should contact their local Associate/Assistant Chief Counsel for guidance on circuit specific standards on this issue.

How the defendant entered the U.S. is not relevant.[119] In one case, a court found that a previously deported alien who returned legally can be charged as "found in" when he overstayed.[120] Note, however, that in this unusual case the defendant was not admitted into the U.S., rather he was paroled in for one day. Generally, if the 1326 defendant enters without fraud as to his identity, he is chargeable at the time with entry or attempted entry. If he is admitted and the government subsequently discovers its error, the issue is more difficult and in most instances the defendant can only be charged with entering.[121] The courts

116 *United States v. Cruz-Escoto*, 476 F.3d 1081 (9th Cir. 2007).

117 *Id.*

118 *United States v. Bello-Bahena*, 411 F.3d 1083 (9th Cir. 2005).

119 *United States v. Dixon*, 327 F. 3d 257 (3d Cir. 2003); *United States v. Clarke*, 312 F. 3d 1343 (11th Cir. 2002); *United States v. Asibor*, 109 F.3d 1023 (5th Cir. 1997).

120 *United States v. Pina-Jaime*, 332 F.3d 609 (9th Cir. 2003) (defendant was paroled into the U.S. for one day to attend child custody hearing, but stayed several years).

121 "Note that there is some authority that one who presents himself to the authorities at an established border station, including an airport, and is immediately detained as a previous deportee may be charged only with an attempt to enter, and not with being found in the United States. *United States v. Zavala-Mendez*, 411 F.3d 1116, 1118-21 (9th Cir. 2005); *United States v. Angeles-Mascote*, 206 F.3d 529, 530-32 (5th Cir. 2000) . *United States v. Lennon*, 372 F.3d 535, 540-41 (3d Cir. 2004) ; *United States v. Serna-Villarreal*, 352 F.3d 225, 233-34 (5th Cir. 2003); *United States v. Clarke*, 312 F.3d 1343, 1346-1347 (11th Cir. 2002); *United States v. Mercedes*, 287 F.3d 47, 55 (2d Cir. 2002); *United States v. Herrera-Ordones*, 190 F.3d 504, 510-511 (7th Cir. 1999); *United States v. Hernandez*, 189 F.3d 785, 789-791 (9th Cir. 1999); *United States v. Bencomo-Castillo*, 176 F.3d 1300, 1303 (10th Cir. 1999); *United States v. Gomez*,

look to see if the government could have discovered the alien's unlawful reentry through the exercise of due diligence.[122]

Willfulness

It is important to note that some jury instructions contain a mens rea or willfulness element for violations of 1326. Some circuits have held that the government need not prove that the defendant knew it was illegal to enter, but only that the alien had the general intent to enter.[123] "To act with general intent, a defendant must know the facts that make his actions illegal, but not that the action itself is illegal. That is, the defendant need only intend to perform the underlying prohibited action, not to break the law."[124] The circuits are split as to whether the government needs to prove an alien's intent to violate § 1326.[125] Please contact your local Associate/Assistant Chief Counsel Office for guidance on the law in your area.

Proving Absence of Attorney General Permission

The government must prove that the defendant did not get permission to reapply for admission to the U.S. before attempting to enter the U.S. This is generally established by a Certificate of Non-existence of Record, which indicates that a search of the relevant records shows that no government consent to enter was ever granted.[126] The Certificate of Non-existence of Record can be acquired from U.S. Citizenship and Immigration Services (CIS).

38 F.3d 1031, 1036-1037 (8th Cir. 1994). *But cf. United States v. Jimenez-Borja*, 378 F.3d 853, 857-58 (9th Cir. 2004) (indictment accurately stated that defendant was found in U.S. on date arrested by local police)." *2-33A Modern Federal Jury Instructions-Criminal § 33A.06*

122 *Id.*

123 *United States v. Rea-Beltran,* 457 F.3d 695 (7th Cir. 2006); *United States v. Gutierrez-Gonzalez*, 184 F.3d 1160 (10th Cir. 1999); *United States v. Ortegon-Uvalde*, 179 F.3d 956 (5th Cir. 1999); *United States v. Torres-Echavarria*, 129 F.3d 692 (2d Cir. 1997); *United States v. Gonzales-Chavez*, 122 F.3d 15 (8th Cir. 1997); *United States v. Henry*, 111 F.3d 111 (11th Cir. 1997); *United States v. Soto*, 106 F.3d 1040 (1st Cir. 1997); *United States v. Espinoza-Leon*, 873 F.3d 743 (4th Cir. 1989); *United States v. Hussein*, 675 F.2d 114 (6th Cir. 1982); *United States v. Rodriguez*, 416 F.3d 123 (2d Cir. 2005).

124 *United States v. Salazar-Gonzalez*, 445 F.3d 1208 (9th Cir. 2006).

125 *United States v. Leal-Cruz*, 431 F.3d 667 (9th Cir. 2005); *United States v. Lombera-Valdovinos*, 429 F.3d 927 (9th Cir. 2005); *United States v. Morales-Palacios*, 369 F.3d 442 (5th Cir. 2004); *United States v. Gracidas-Ulibarry*, 231 F.3d 1188 (9th Cir. 2000); *United States v. Peralt-Reyes*, 131 F.3d 956 (11th Cir. 1997).

126 *United States v. Urqhart*, 469 F.3d 745 (8th Cir. 2006); *United States v. DeLeon*, 444 F.3d 41 (1st Cir. 2006); *United States v. Sanchez-Milan*, 305 F.3d 310 (5th Cir. 2002). Generally, the courts are in agreement that the Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36, (2004), does not affect

Affirmative Defense

There is a narrow affirmative defense in § 1326(a)(2)(B) for the small class of aliens who are not required to obtain advance consent to enter the U.S. One of the few cases to address this provision is *United States v. Curnew,* which looked at how the Government determines whether an individual has 51% American Indian blood.[127]

Proper Venue for a Violation of 8 U.S.C. § 1326

Section § 1326(a) of Title 8 describes an offense that is complete when any of three events occurs: when a previously deported alien (1) "enters," or (2) "attempts to enter," or (3) "is at any time found in" the United States. Therefore, venue is proper in the district where the alien entered or attempted to enter the United States or in the district where the alien was found. *U.S. v. Ruelas-Arreguin*, 219 F.3d 1056, 1061 (9th Cir. 2002). It is unlikely, however, that venue would be proper in any other district the alien passed through after entering the United States, but before being found. For example, the Ninth Circuit Court of Appeals declined to adopt the government's position that "the defendant's presence in a judicial district, for any reason, constitutes a violation of section 1326, permitting the government to prosecute in that venue." *Hernandez*, 189 F.3d at 788. In another case, a district court similarly stated that the previously deported alien "may be prosecuted in any district in which he was found, or discovered, but he may not be prosecuted in a district in which the government can arguably show he was present, but cannot show he was found." *United States v. Leto*, 991 F.Supp. 684, 687 (D. Vt. 1997).

The Section 1326 venue determination for a previously deported alien who entered or attempted to enter the United States is straightforward. As one court noted, "[t]he offense of illegal entry or illegal attempt is normally uncomplicated and is complete as soon as the entry or attempt is made." *U.S. v. Rivera-Ventura*, 72 F.3d 277, 281 (2nd Cir. 1995). Venue, therefore, is proper in the district where the alien illegally entered or attempted to enter the United States.

The venue determination for a previously deported alien found in the United States in a district other than that of entry requires further analysis. As a starting point, a previously deported alien is "found" in the United States when the alien is discovered by federal immigration authorities, not state law enforcement authorities. *U.S. v. Clarke*, 312 F.3d 1343, 1347-1348 (11th Cir. 2002).

To be discovered, authorities must "discover the physical presence of the deported alien" and must "ascertain the alien's identity (as an illegal alien) and

the admissibility of the certificate because it is a non-testimonial document analogous to a business record.

127 788 F.2d 1335 (8th Cir. 1986).

status (as one who has reentered after previous deportation)." *U.S. v. Herrera-Ordones*, 190 F.3d 504, 510 (7th Cir. 1999). An alien can also be considered found if, "with the exercise of diligence typical of law enforcement authorities, [authorities] could have discovered the illegality of the defendant's presence." *U.S. v. Clarke,* 312 F.3d 1343, 1346 (11th Cir. 2002).

An alien is not yet considered "found" if he "reenters the country by using an alias, or uses false identification" when arrested, and thus prevents authorities from ascertaining his true identity. *Herrera-Ordones*, 190 F.3d at 510. In *Herrera-Ordones*, upon arrest in the Northern District of Indiana for state felony charges, a previously deported alien provided a false name and immigration record to an INS agent. *Id* at 506. After Mr. Herrera-Ordones was convicted and transferred to another facility in the Southern District of Indiana, INS officials learned his true identity and immigration status. *Id.* at 507. The government then prosecuted Mr. Herrera-Ordones for violating Section 1326 and successfully argued that venue was proper in the Southern District, the location where Mr. Herrera-Ordones was found pursuant to Section 1326. *Id.*

A previously deported alien can only be "found" once for purposes of determining Section 1326 venue. As such, transporting an alien post-crime to a new district does not make venue proper in the new district. *Ruelas-Arreguin*, 219 F.3d at 1061. Otherwise, "a deported alien who was moved around the country to various penal institutions could be prosecuted, at the government's option, in any of the districts where the alien set foot." *Hernandez* 189 F.3d at 791.

The Impact of Apprehension in Determining Venue

As noted above, 8 U.S.C. § 1329 also states that venue is proper for "prosecutions or suits . . . at any place in the United States . . . at which the person charged with a violation under section 1325 or 1326 . . . may be apprehended." While it may be somewhat counterintuitive, an alien can be apprehended in a different district than where the alien was found. And, at least in relation to Section 1326 and Section 1329, venue would be improper in the district where the alien was apprehended if this district was different than where the alien was found.

For example, in *Hernandez,* a previously deported alien was arrested by INS agents in Oregon. *Hernandez* 189 F.3d at 786. The government conceded that Mr. Hernandez was "found in" Oregon and thus subject to prosecution under § 1326 in Oregon. *Id.* Nonetheless, the government recommended that he first be prosecuted in Washington on an outstanding Washington arrest warrant. *Id.* After serving a state prison term, the government transferred Mr. Hernandez to federal custody and argued that he was subject to prosecution under § 1326 in Washington because as he had been "apprehended" in Washington. *Id.* at 787. The court disagreed, however, stating that "being 'apprehended' is not the crime with which Hernandez was charged and the place of apprehension is not necessarily the district where the crime was committed." *Id.* at 791. Therefore, the court stated that it "decline[d] to read section 1329 to provide for venue in a

district other than where the crime of being 'found in' the United States was committed." *Id.* at 792.

As previously stated, venue is proper under Section 1329 in the district where the alien violated either Section 1325 or 1326. Venue for a violation of Section 1325 is proper where the alien committed one of three offenses. Venue under Section 1326 for a previously deported alien charged with entering or attempting to enter the United States is proper in the district where the alien took such prohibited action. For a previously deported alien found in the United States, venue is proper in the district where the alien entered the United States but also where federal immigration authorities discovered the alien.

Sentence

The penalty for a violation of this provision varies based upon a number of factors. The penalties are:

> A fine, imprisoned of up to 10 years, or both, if the alien was removed after a conviction for the commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony).
>
> A fine, imprisoned not more than 20 years, or both, if the alien's removal was after a conviction for the commission of an aggravated felony.
>
> A fine, and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence, if the alien had been excluded pursuant to 235(c) of the INA (security grounds), because the alien was excludable under section 212(a)(3)(B) (security grounds), or the alien has been removed from the United States pursuant to the provisions of title V (Alien Terrorist Removal Procedures, 8 U.S.C. 1531 *et seq.*, INA 501 *et seq.*), and who, without the permission of the Attorney General, entered the United States, or attempted to do so.
>
> A fine, imprisoned for not more than 10 years, or both, if the alien was removed from the United States pursuant to section 241(a)(4)(B) (non violent aliens removed prior to the completion of criminal sentence) and the alien thereafter, without the permission of the Attorney General, entered, attempted to enter, or was at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry).

When a statute provides for enhanced penalties based on additional facts, those facts must be established beyond a reasonable doubt in the same manner as the other elements of the crime.[128]

128 *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Finally, when the crime occurs can affect sentencing, as the sentencing provisions can change. Sentence enhancement for committing the crime while on parole or within a specified time period from a prior offense can be impacted by the date of the alien's reentry.[129]

19.140 Other Provisions in Title 8

Title 8 also provides for criminal sanctions for knowingly hiring at least ten individuals who are not authorized to be employed in the United States and that the individuals were brought into the United States in violation of section 1323(a) at 8 U.S.C. 1324(a)(3). Given that these charges are likely to be brought and prosecuted in conjunction with ICE, we recommend that you reach out to the appropriate contacts both within your Associate/Assistant Chief Counsel's Office and the ICE Special Agent in Charge of your area.

19.200 Title 18 Immigration Crimes

19.210 18 U.S.C. § 911 - False Claim to U.S. Citizenship
19.220 18 U.S.C. § 922(g) - Illegal or Nonimmigrant Alien in Possession of Firearm
19.230 Additional Immigration Crimes Found in Title 18

While most immigration crimes are found in Title 8 of the United States Code, some are contained in Title 18. Several of the most frequently encountered immigration crimes in Title 18 are discussed below.

19.210 False Claim to U.S. Citizenship – 18 U.S.C. § 911

It is a criminal violation to erroneously and willfully claim U.S. citizenship. Making a false claim to U.S. citizenship, even without a criminal prosecution, has significant consequences in immigration proceedings. It is both a charge of inadmissibility under 8 U.S.C. § 1182 (INA 212(a)(6)(C)(ii)) and a charge of removability under 8 U.S.C. § 1227(a)(3)(D)(i), (INA 237(a)(3)(D)(i)). There are exceptions to the removal charges if the parents of the claiming alien are U.S. citizens, the alien permanently resided in the U.S. prior to attaining the age of 16, and the alien reasonably believed, at the time the representation was made, that he or she was a U.S. citizen. An allegation of false claim to U.S. citizenship, once sustained in immigration court, even without a conviction, is a bar to

[129] *United States v. Lopez-Flores*, 275 F.3d 661 (7th Cir. 2001) (enhanced sentence based on parole status at time of reentry even though enhancement was no longer available at time defendant was found in U.S. and charged): *United States v. Coeur*, 196 F.3d 1344 (11th Cir. 1999) (criminal history points for offense committed while under sentence applies to defendant "found in" prison even though he was not under sentence at time of reentry); *United States v. Estrada-Quijas*, 183 F.3d 758 (8th Cir. 1999)(applicable sentencing guideline is one in effect at time defendant was "found in" the U.S.).

virtually all forms of relief in immigration proceedings, except those related to asylum.[130]

Section 911 of Title 18 provides that:

> *Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined under this title or imprisoned not more than three years, or both.*

The elements necessary to establish the charge of false claim to U.S. citizenship are:

1. That [name of alien] was not a citizen of the United States at the time alleged in the indictment.

2. That the defendant falsely represented himself to be a citizen of the United States, as charged.

3. That the defendant made such false representation knowingly and willfully.[131]

Sentence

The penalty for a conviction under this section is a fine, imprisonment of not more than three years, or both.

19.220 Illegal or Nonimmigrant Alien in Possession of Firearm - 18 U.S.C. § 922(g)

Chapter 44 of Title 18 (18 U.S.C. § 921 et seq.) contains extensive requirements and prohibitions on the possession and transfer of firearms. While most of the provisions are applicable to all persons, section 922(g) is specific to aliens. Section 922(g) of Title 18 of the United States Code makes it a felony for an illegal alien or a non-immigrant alien (with significant exceptions addressed below) to ship, transport, possess, or receive, in or affecting interstate or foreign commerce, any firearm or ammunition. The exceptions to this provision are lengthy and important, as are the definitions of the words and phrases used in this section. Both the exceptions and the definitions are addressed below. Section § 922(g)(5) of Title 18 provides:

> *(g) It shall be unlawful for any person—*
>
> *(5) who, being an alien—*

130 There are no waivers to removability provided for false claim to United States citizenship so the only forms of potential relief are asylum related.
131 See generally *2-33 Modern Federal Jury Instructions-Criminal § 33.01.*

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26))),to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The elements necessary to establish this charge are:

1. That the defendant is an alien.

2A. That the defendant is illegally or unlawfully in the U.S.

or

2B. That the defendant was admitted as a non immigrant alien but is not any of the following:

- admitted for lawful hunting or sporting, or
- in possession of a lawfully issued hunting license or permit, or
- an official representative of a foreign government who is either accredited to the U.S. government, or accredited to the U.S. government's mission to an international organization having its headquarters in the U.S., or en route to or from another country to which that alien is accredited, or
- an official of a foreign government or State Department designated distinguished foreign visitor, or
- a foreign law enforcement officer for a friendly foreign government the U.S. on official enforcement business, or
- a receipt of an Attorney General waiver.

3A. That the defendant shipped or transported in interstate commerce, any firearm, or ammunition.

or

3B. Possessed in or affecting interstate commerce any firearm or ammunition.

or

3C. Received any firearm or ammunition which has been shipped or transported in interstate commerce.

Definitions

While most of the definitions relevant to Federal firearms crimes are found in 18 U.S.C. § 921, subsection (y)(1) of 922(g) contains definitions that are relevant to aliens, in particular. Subsection (y)(1) provides that the term "alien" has the same meaning as that used at 8 U.S.C. § 1101(a)(3). In addition, the term "nonimmigrant visa" has the same meaning as in section 1101(a)(26). Moreover, 18 U.S.C. § 921 contains definitions for terms or expressions utilized in 18 U.S.C. § 922. When seeking to charge a violation of section 922(g), make sure to review all of the definitions in section 921 and seek advice from your local Associate/Assistant Chief Counsel Office where appropriate.

Sentence

Pursuant to 18 U.S.C. § 924(a)(1)(D) the penalty for a conviction under this section is a fine and imprisonment of not more than ten years or both. If the defendant has three previous violent felony convictions or serious drug felony convictions, not committed at the same time, the penalty is a fine and up to fifteen years imprisonment, which may not be suspended or probated.[132] When a statute provides for enhanced penalties based upon additional facts, those facts must be established beyond a reasonable doubt in the same manner as the other elements of the crime.

Aggravated Felony

Pursuant to 8 U.S.C. § 1101(a)(43)(E)(ii) possession of a firearm by an illegal or non immigrant alien is an aggravated felony.[133]

Forfeiture

Title 18 U.S.C. § 924(d)(1) is the applicable forfeiture provision for violations of this section.

Exceptions

Subsection (B) references exceptions to 922(g) for non-immigrant aliens. The exceptions are contained in subsection (y)(2). The exceptions apply to non-immigrant aliens who are admitted for hunting or sporting purposes, are in possession of a lawfully issued United States hunting license or permit, are certain official government representatives, are State Department designated "distinguished visitors," or are certain foreign law enforcement officials. In addition to the exceptions in subsection (y)(2), subsection (y)(3) includes a process to petition the Attorney General for a waiver of 922(g)(5). To the extent that questions arise regarding the exceptions or the waiver process we

132 18 U.S.C. § 924(e)(1).
133 *Matter of Powell*, 21 I. & N. Dec. 81 (BIA 1995).

recommend you reach out to your local Associate/Assistant Chief Counsel's Office.

19.230 Additional Immigration Crimes Found in Title 18

In addition to the immigration and immigration-related crimes detailed above, there are several other Title 18 crimes, which while infrequently prosecuted by CBP, are worthy of discussion. To the extent that you believe that any of these may be applicable to a situation that you encounter, please contact your local Associate/Assistant Chief Counsel Office.

Section § 1542 of Title 18 addresses two separate crimes. The first is a willful and knowing false statement in an application for a passport, if done with the intent to induce or secure the issuance of that U.S. passport. The second is the willful and knowing use, attempted use, or provision to another of a passport that was secured by way of a false statement.

Section 1543 of Title 18 makes it a felony to forge, counterfeit, mutilate, or alter a passport. In addition, it is a felony to willfully and knowingly use, attempt to use, or furnish another with a forged passport.

Similarly, 18 U.S.C. § 1544 addresses the misuse of a passport. There are three ways to violate section 1544. They are the use or attempted use of someone's else's passport, the use or attempted use of a passport in violation of the conditions, restrictions, or rules of that passport, or the furnishing, disposing or delivery a passport to another for use by someone other than the legally designated person.

Section 1546 of Title 18 contains prohibitions on fraud and misuse of visas, permits and certain other types of immigration-related documents. In essence, it makes it a felony to knowingly[134] falsify or possess documents used for entry or admission into the United States, as well as for authorization to remain in or work in the United States, when the individual knows that the documents were forged, counterfeited, altered, or falsely made. It further makes it a felony to possess, sell, or bring into the U.S. blank permits or paraphernalia used to create entry documents. It also makes establishes a felony to impersonate a deceased person, use a fictitious name, or dispose of documents to other than an authorized person. Section 1546 also makes it a felony to use an identification document, knowing or having reason to know that the document was not lawfully issued for the use of the possessor, or that it is false. Finally, Note that subsection (c) provides that the section does not prohibit any lawfully.

134 *United States v. Polar*, 369 F.3d 1248 (11th Cir. 2004). 18 U.S.C. § 1546(a) only requires that the defendant acted knowingly; the government does not need to prove the defendant acted willfully, thus this section of the statute is not a specific intent crime. While the jury instruction in the Eleventh Circuit does include the word "willfully" the court makes it clear that the jury instruction does not override the plain meaning of the statute.

Identity theft involving government-issued identity documents is addressed in 18 U.S.C. § 1028. Given the right set of facts, this charge may be brought in addition to those previously discussed in this section. Section 1028 contains eight separate charges. These charges include knowingly producing an identification document, transferring a false or stolen identification document, knowingly possessing (with the intent to use unlawfully) five or more identification documents, knowingly possessing (or transferring) the mechanisms to create false identification documents, and knowingly trafficking in false identification documents.[135] This section covers a range of criminal activity, however, the threshold inquiry is: (1) whether the activity involved identification documents, or authentication features appearing to by issued by the United States government, or sponsoring entity, (2) whether it was intended to defraud the United States, and (3) whether it affected interstate or foreign commerce or was transported in the mail.[136] Be aware that there are other identity document fraud charges which may be applicable in various situations.[137]

Forfeiture

Section 1028 specifically authorizes forfeiture of any personal property used or intended to be used in the commission of an offense in this section. In addition, subsection 1028(g) provides that forfeiture of the property shall be governed by the provisions of 18 U.S.C. § 413 (other than subsection (d) of that section) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 853). Upon conviction a violation of subsection (a), the court shall order, in addition to the penalty prescribed, the forfeiture and destruction or other disposition of all illicit authentication features, identification documents, document-making implements, or means of identification.[138]

Crime Involving Moral Turpitude (CIMT)

Violations of 18 U.S.C. § 1028 have been considered by the Board of Immigration Appeals (BIA) to be CIMTs.[139]

135 It is helpful to keep in mind the very specific definitions used in this section which are contained in subsection (d). Subsection (d) provided definitions of: "authentication feature," "document-making implement," "identification document," "false identification document," "false authentication feature," "issuing authority," "means of identification," "personal identification card," "produce," "transfer," "State," and "traffic." Those definitions can significantly impact the applicability of any of these sections. Note that section 1028(e) contains an exception for activity authorized under 18 U.S.C. §§ 3521 et seq. (witness protection).

136 18 U.S.C. § 1028(c).

137 For example: 18 U.S.C. § 1028, 18 U.S.C. § 1426, 18 U.S.C. § 1427, 18 U.S.C. § 1543, 18 U.S.C. § 1544, and 18 U.S.C. § 1546.

138 18 U.S.C. § 1028(h).

139 *Matter of Omoregbee*, 2008 WL 2517558 (BIA, 2008).

19.300 Special Issues in Prosecuting Immigration Crimes

19.310 18 U.S.C. § 371 - Conspiracy
19.320 18 U.S.C. § 1001 - False Statements

19.310 Conspiracy - 18 U.S.C. § 371

Conspiracy is frequently an issue in immigration crimes, particularly those related to document fraud and alien smuggling. For a detailed discussion on conspiracy see chapter eleven of the Law Course. The United States Code contains a number of conspiracy provisions. For example, 21 U.S.C. § 963 involves controlled substance conspiracies, 18 U.S.C. § 1349 involves mail fraud conspiracies. 18 U.S.C. § 371 *et seq*. addresses several types of conspiracy. Specifically section 371 addresses conspiracy to commit an offense against the U.S. government or to defraud the U.S. or any agency. Many immigration crimes are offenses against the U.S. government or are attempts to defraud the U.S. Title 18 U.S.C. § 371 provides that:

> *If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.*
>
> *If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.*

To establish a conspiracy the elements the government must prove beyond a reasonable doubt are:

1. That the defendant and at least one other person made an agreement to commit the crime of _____ (describe) as charged in the indictment;

2. That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose; and

3. That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the indictment, in order to accomplish some object or purpose of the conspiracy.

Sentence

Upon conviction of the charge of conspiracy, a person may be fined, sentenced to up to 5 years imprisonment or both. If the object of the conspiracy was a misdemeanor, then the maximum punishment cannot exceed the punishment for the substantive misdemeanor.

19.320 False Statements – 18 U.S.C. § 1001(a)

It is a crime to falsify, conceal, or cover up by any trick, scheme, or device a material fact; to makes any materially false, fictitious, or fraudulent statement or representation, or to make or use any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry. This section does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.[140] In addition it has limited application before the legislative branch.[141] For additional information on § 1001 see section 3.1351.

[140] 18 U.S.C. § 1001(b).
[141] 18 U.S.C. § 1001(c).

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Chapter 20

Agriculture Enforcement Operations

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20.000 Introduction

Agriculture Sector Overview

The agriculture industry generates more than a trillion dollars in economic activity annually, but there are concerns about its vulnerability to foreign pests and diseases.[1] This is a major concern to the economy.

As background, the United States encompasses two billion acres, half of which is potential farmland. The agriculture industry has been valued at $230 billion and accounts for over 15 percent of our gross domestic product. Since Agriculture generates over one trillion dollars each year in economic activity, this sector accounts for the largest area of employment in the country.

Also, the United States is the world's largest exporter of agricultural products, and has the most efficient and productive agricultural system in the world. For example, the United States produces 16 percent of the world's meat and is the world's largest food donor. Agriculture is also the only sector of commerce that generates a trade surplus.

In evaluating imported pest and animal risks in 2007, the United States Department of Agriculture (USDA) estimated that detected agriculture infestations have had annual costs to the U.S. agriculture industry of approximately $41 billion dollars.

Abbreviations, Terms, and Definitions

To assist in understanding the material, there are some common acronyms and definitions in Agriculture law. For easy reference, some of the abbreviations, terms, and definitions contain citations to legal and policy material, and references to related informational resources.[2]

- AHPA – Animal Health Protection Act (May 13, 2002, P.L. 107-171, Title X, Subtitle E, § 10402, 116 Stat. 494, *codified as* 7 U.S.C. § 8301 *et seq.*).

- Animal – Any member of the animal kingdom (except a human). See 7 U.S.C. § 8302(1); 9 C.F.R. 92.1 and 93.100 (defining animal as cattle, sheep, goats, other ruminants, swine, horses, asses, mules, zebras, dogs, poultry, and birds that are susceptible to communicable diseases of livestock and poultry or capable of being carriers of those diseases).

[1] See Agricultural Quarantine Inspection Program, Management Problems May Increase Vulnerability of U.S. Agriculture to Foreign Pests and Diseases, Statement of Lisa Shames, Director, Natural Resources and Environment, GAO-08-96T, United States Government Accountability Office, October 3, 2007.
[2] The page citations to policy material were obtained from electronic information contained on current Internet resources, which are subject to change.

- Animal Products – Defined by policy as edible products, including casings, birds' nests, eggs, meat, and processed meat products.

- Animal By-Products – Defined by policy as non-edible products, including manufacturing, research, biological, pharmaceutical, and recreation products such as hides and trophies.

- APHIS - Animal and Plant Health Inspection Service, an Agency within USDA.

- APTL – Agricultural Programs and Trade Liaison, the Executive Director Office within CBP OFO Headquarters that oversees the CBP Agriculture Specialist program.

- Article – The term "article" means any pest, noxious weed, or disease or any material or tangible object that could harbor a pest or disease. See 7 U.S.C. §§ 7702(1) and 8302(2).

- Back-Catering – The practice of allowing unconsumed food and meals, which were loaded onto the airplane at the foreign port of origin, to remain onboard the airplane during the airplane's layover at an U.S. airport for consumption by passengers during the return trip to the foreign port. See 7 C.F.R. § 330.400; 9 C.F.R. § 94.5; February 14, 2008 APHIS-PPQ Policy Memorandum.

- CITES – The Convention on International Trade in Endangered Species of Wild Fauna and Flora, first entered into in 1974 by more than 160 countries, regulates the commercial trade of over 30,000 endangered species and monitors the trade of a wide variety of species that are at risk of becoming endangered (e.g., mahogany trees, insectivorous plants, Madonna lilies, cacti, sea turtles, bald eagles, and African gorillas). See 50 C.F.R. Parts 17, 23 and 24.

- Compliance Agreement – A written agreement on PPQ Form 519 in which a private party agrees to follow APHIS-PPQ procedures. Compliance agreements form the basis for standard operating procedures for handling and processing regulated garbage. CBP is responsible for issuing, monitoring, and maintaining the compliance agreements, approved by APHIS, for airports, caterers, cleaners, cruise ships, fixed base operators, hauling/cartage firms, marinas, military facilities, storage facilities, and transfer stations. APHIS-PPQ is responsible for issuing, monitoring, and maintaining the compliance agreements for processing facilities, excluding caterers and military facilities that process regulated garbage. *Manual for Agricultural Clearance*, APHIS-PPQ, Appendix B; CITES I-II-III Timber Species Manual, APHIS-PPQ; See 7 C.F.R. § 330.403; 7 C.F.R. Parts 301 and 319.

- Courtesy of the Port – A CBP Agriculture Specialist determination that specific passengers or conveyances, frequently associated with diplomatic passengers or cargo, may be exempt from inspection upon arrival based upon a prior agreement or status of the passenger. *Manual for Agricultural Clearance*, APHIS-PPQ, 3-3-14.

- Decatering – Process of removing all garbage from an aircraft including all meats, meal scraps, galley refuse, and quarters refuse. See *Manual for Agricultural Clearance*, APHIS-PPQ, 3-1-15.

- Deferred Ship – Category of vessel that does not require boarding on arrival. *Manual for Agricultural Clearance*, APHIS-PPQ, Glossary-2.

- Dunnage – Loose packing material, generally wood, protecting a shipment from damage during transport. *Manual for Agricultural Clearance*, APHIS-PPQ, Glossary-3.

- EAN – Emergency Action Notification (CBP Form AI-523A): This CBP form provides notification of non-compliance and sets out immediate safeguard measures that must be enforced in order to prevent the introduction of quarantine-significant pests. See 7 C.F.R. §§ 319.37.

- ePermits – A Web-based tool that allows for permit applicants to file an application, to check on the status of an application, and to view it on the Internet. It also allows oversight by Federal agencies involved in the permit process.

- FAVIR – Fruits and Vegetables Import Requirements Database: The FAVIR database allows users to search for authorized fruits and vegetables by commodity or country, and quickly and easily determine the general requirements for their importation into the United States. This database includes emergency pest notifications to alert users if there is a change in the import status of a commodity or country. It also allows APHIS officials and CBP to quickly determine whether or not a commodity is authorized entry into the United States, as well as the general requirements for importation.

- FSIS - Food Safety and Inspection Service, USDA. FSIS has the responsibility to provide safe, wholesome, unadulterated meat, meat products, and egg products for human consumption.

- Fumigant – A chemical treatment for contaminated agriculture merchandise, e.g., the chemical, methyl bromide, which is the most common. It is a gaseous chemical that easily diffuses and disperses in air and is toxic to the target organism. See 7 C.F.R. 305.1; 7 C.F.R. § 330.106(d)(4); *Manual for Agricultural Clearance*, APHIS-PPQ, 6-1-4.

- FWS - U.S. Fish and Wildlife Service, Department of the Interior. This Agency regulates and enforces compliance regarding imported endangered species and has an interest in all imported flora and fauna and their products.

- Garbage – All regulated waste material derived in whole or in part from fruits, vegetables, meats, or other plant or animal (including poultry) material, and any other refuse of any character whatsoever that has been associated with any such material aboard any means of conveyance and includes food scraps, table refuse, galley refuse, food wrappers or packaging materials, and other waste material from stores, food preparation areas, passenger or crew quarters, dining rooms, or any other areas on vessels, aircraft, or other means of conveyances. See generally 7 C.F.R. 330.400 et seq.; *Manual for Agricultural Clearance*, APHIS-PPQ, 3-1-1.

- High Risk Pest – A pest requiring quarantine action and believed to have the potential for serious damage to economically important plant and animal resources in the United States. *Manual for Agricultural Clearance*, APHIS-PPQ, 2-2-16.

- IES – Investigative and Enforcement Services, an office within APHIS that investigates violations of the Agriculture laws and prepares cases for prosecution.

- Insect – A type of pest that includes the Asian Longhorn Beetle, the Cactus Moth, Cotton Pests (Boil Weevil, Pink Bollworm), Emerald Ash Borer, Fruit Flies, Grasshopper/ Mormon Cricket, Gypsy Moth, Imported Fire Ant, Japanese Beetle, Light Brown Apple Moth, Panicle Rice Mite, Pine Shoot Beetle, Pink Hibiscus Mealybug, Sirex Woodwasp. See 7 C.F.R. Parts 301 and 319.

- Inspector – A definition under the Agriculture regulations that includes a properly identified employee of the U.S. Department of Agriculture or other person authorized by the Department to enforce the provisions of the Plant Protection Act and related legislation, quarantines, and regulations. 7 C.F.R. 330.100.

- Incineration – Commonly used to explain the process by which garbage is reduced to ash by burning. See 7 C.F.R. § 330.400.

- IPPC – The International Plant Protection Convention, an international treaty and organization created in 1952, which has 172 signatory countries. It seeks to prevent the spread of pests that harm cultivated and wild plants.

- Live Animals – Defined by policy to include pet birds, semen, embryos and organisms.

- MAC – *Manual for Agricultural Clearance*, APHIS-PPQ, which is a policy resource for the CBP Agriculture Specialist.

- MARPOL – International Convention for the Prevention of Pollution from Ships. The Agreement governs all aspects of potential marine pollution including oil, chemicals, garbage, sewage, and plastics, and it mandates proper disposal and/or discharge. See *Manual for Agricultural Clearance*, APHIS-PPQ, Glossery-5;

- Memorandum of Agreement – The abbreviated name for the February 28, 2003 Memorandum of Agreement between the Department of Homeland Security and the United States Department of Agriculture, which was required by 6 U.S.C. § 231(e), the statutory authority for the transfer of functions from USDA to DHS. The Agreement, also called the "Transfer Agreement," addresses the agriculture-related functions transferred to DHS and those retained by USDA as well as other matters concerning the transfer. The Agreement also sets out areas of mutual interest and responsibilities.

- NPPO – The National Plant Protection Organization of a foreign country issues certification and documents that may be necessary for importation of items of agricultural interest into the United States and is the governmental entity in a country that discharges the functions specified by the International Plant Protection Convention. See 7 C.F.R. § 319.56-2. The Department of Agriculture is the NPPO for the United States.

- Noxious Weed – The term under the Plant Protection Act includes any plant or plant product that can directly or indirectly injure or cause damage to crops (including nursery stock or plant products), livestock, poultry, or other interests of agriculture, irrigation, navigation, the natural resources of the United States, the public health, or the environment. 7 U.S.C. 7702(10).

- OGC – Office of General Counsel, USDA. USDA-OGC prosecutes cases for APHIS and provides legal advice to APHIS.

- Permit – The term under the Plant Protection Act includes a written or oral authorization, including by electronic methods, by the Secretary of Agriculture to move plants, plant products, biological control organisms, plant pests, noxious weeds, or articles into or through the United States or interstate. See 7 U.S.C. § 7702(11); 7 C.F.R. § 330.100. APHIS can issue import and transit permits for the entry and movement of foreign regulated plant and animal material. Transit permits are issued in accordance with 7 C.F.R. Part 352. Permits are generally required for regulated agricultural shipments of foreign plant material moving for Transportation and Exportation or Immediate Export. Various permits can be found at APHIS-PPQ permits website. APHIS can issue permits

for organism and soil permits and plant and plant product permits. APHIS also regulates animal and animal by-product permits. See 9 C.F.R. Part 93.

- Pest – The term "pest" means any of the following that can directly or indirectly injure, cause economic damage to, or cause disease in plants or animals. Pest can include a protozoan; plant; bacteria; fungus; a virus or viroid; an infections agent or other pathogen; an arthropod; a parasite; a prion; a vector; any organism similar to or allied with any of the organisms described above. See 7 U.S.C. § 8302(13); 7 U.S.C. § 7702(14).

- Phytosanitary Certificate – An international document required for the importation of minimally processed plant products. The purpose of the certification process is to facilitate the entry of foreign origin plant or plant products into the country of destination. The international document certifies that the imported agricultural product complies with import standards and addresses plant health requirements for storage pests, plant diseases, chemical treatments, and weeds. Some countries may require an inspection of the foreign field in which a plant is harvested before a certificate may be issued, especially if the product is a seed that will be planted. APHIS-PPQ maintains a tracking system for phytosanitary certificates issued in the United States for exported U.S. plants and plant products.

- Plant – The term “plant” means any plant (including any plant part) for or capable of propagation, including a tree, tissue culture, plantlet culture, pollen, shrub, vine, cutting, graft, scion, bud, bulb, root, and seed. 7 U.S.C. § 7702(13).

- Plant Pest – The term “plant pest” means any living stage of any of the following that can directly or indirectly injure, cause damage to, or cause a disease in any plant or plant product: a protozoan; a nonhuman animal; a parasitic plant; a bacterium; a fungus; a virus or viroid; an infectious agent or other pathogen; any article similar to or allied with any of the articles specified in the preceding subparagraphs. 7 U.S.C. § 7702(14); 7 C.F.R. § 330.100 (also defining the term to include any living stage of any insects, mites, nematodes, slugs, snails, protozoa or other invertebrate animals, bacteria, fungi, other parasitic plants or reproductive parts thereof, viruses or any organisms similar to or allied with any of the foregoing).

- Plant Product – The term “plant product” means any flower, fruit, vegetable, root, bulb, seed, or other plant part that is not included in the definition of a plant; or any manufactured or processed plant or plant product. 7 U.S.C. § 7702(15).

- Plant Inspection Station – APHIS-PPQ operates these facilities located at ports of entry, where APHIS staff perform inspections of plants, cuttings, and seeds and review all associated permits and documentation to ensure that a shipment complies with import regulations and that any pest or disease risk is eliminated or sufficiently mitigated. At these facilities, APHIS also enforces the rules and regulations applicable to the import and export of plant species protected by the Endangered Species Act (ESA) and CITES, and processes Federal phytosanitary certificates for exported plants, seeds, and plant products.

- PPA – The Plant Protection Act of 2000, Pub. Law. 106-224, 114 Stat. 438 (June 20, 2000) became law on June 20, 2000 and consolidates all or part of ten existing USDA plant health laws. The Act contains the authority to regulate plants, plant products, certain biological control organisms, noxious weeds, and plant pests.

- PPQ – Plant, Protection and Quarantine, a program within APHIS, USDA. APHIS-PPQ safeguards agriculture and natural resources from the risks associated with the entry, establishment, or spread of animal and plant pests and noxious weeds to ensure an abundant, high quality, and varied food supply.

- Ruminants – Animals that chew cud, such as cattle, buffalo, sheep, goats, deer, antelope, camels, llamas, and giraffes. See 9 C.F.R. § 93.400.

- Safeguard - Procedure for handling, maintaining, or disposing of prohibited or restricted products or articles subject to safeguard regulations so as to eliminate the risk of agricultural pest dissemination or animal disease which the prohibited or restricted products or articles may present. 7 C.F.R. § 352.1.

- SITC – Smuggling Interdiction Trade Compliance is an office within APHIS that through anti-smuggling operations detects and prevents the unlawful entry and distribution of prohibited and/or non-compliant products that may harbor exotic plant and animal pests, diseases, or invasive species.

- Sterilization – Cooking garbage at an internal temperature of 212 degrees Fahrenheit for 30 minutes. See 7 C.F.R. § 330.400.

- Stores – The food, supplies, and other provisions carried for the day-to-day operation of a conveyance and the care and feeding of its operators. 7 C.F.R. § 330.400.

- Transit Corridors – Permitted movement of regulated cargo into or through the United States and its territories without establishing the final disposition at the first port of arrival. Depending upon the pest or

disease risk of the specific agriculture merchandise, transit of regulated agricultural items may be prohibited in specific areas. For example, there are specific transit corridors through the United States for the transit of avocados, mangos, cotton, okra, or untreated citrus from Mexico. See 7 C.F.R. Part 352.

- Transloading – The manipulation of an article in transit through the United States, such as a breakdown of pallets, transfer of boxes from container to container, or transfer of pallets from one conveyance to another. "Monitoring a transload" means being physically present to mitigate pest risks that may occur while the shipment is broken down and re-assembled into the out-going conveyance. A valid compliance agreement and subsequent monitoring of the transload facility can substitute for the physical presence of a CBP Agriculture Specialist, if the compliance agreement specifies appropriate safeguards designed to mitigate pest risk and prevent cross-contamination with shipments for entry. See 7 C.F.R. § 94.0.

- Trash – Term for unregulated garbage that neither contains nor is visually contaminated with food waste (e.g., clear plastic bags, water bottles, cigarette wrappers, potato chip bags).

- USDA – United States Department of Agriculture.

- VRS – Veterinary Regulatory Support Program, an office within APHIS-PPQ, USDA that regulates the importation of foreign regulated garbage.

- VS – Veterinary Services, an office within APHIS, USDA, which regulates the commerce of animals, poultry, and their by-products, both within the United States and for import and export. It seeks to prevent, control and/or eliminate animal diseases, and to monitor and promote animal health and productivity.

- Wood Packaging Material ("WPM") – Wood or wood products (excluding paper products) that support, protect, or carry a commodity (including crates, pallets, or dunnage). WPM may harbor plant pests, including the Asian Longhorned Beetle and Emerald Ash Borer. To be regulated as WPM, the wood structure must have a thickness of at least six millimeters. See 7 C.F.R. § 319.40-1.

20.100 History of the CBP Agriculture Specialist Position

History of USDA

The United States Department of Agriculture (USDA) was created in 1862. When created, the department established relationships with consular offices abroad and obtained rare and valuable bulbs, seeds, vines, and cuttings from foreign sources. Along with these new, experimental plants, new pests and diseases started to enter the country. The expansion of railroads and introduction of refrigerated railcars resulted in a year-round meat packing industry and imported livestock, some of which was diseased, had to be quarantined. The Treasury Department was placed in charge of quarantine stations.

In 1884, the Bureau of Animal Industry was established (the predecessor to USDA's Food Safety and Inspection Service). Later, in 1912, the Plant Quarantine Act was passed to address growing concern over pest outbreaks in nursery stock in the United States. It allowed the USDA to declare plant quarantines. At this time, the United States was the only remaining major country without protection against the importation of infested plants. In reaction to this growing concern, the USDA established several plant regulatory programs. The Plant Quarantine and Control Administration was then established, bringing exclusion (safeguarding) and plant health programs under one federal umbrella.

History of APHIS

The Animal and Plant Health Inspection Service ("APHIS") is an Agency with a broad mission to assist the U.S. Department of Agriculture ("USDA") in protecting and promoting food, agriculture, natural resources and related issues. APHIS is involved in protecting animal and plant domestic resources from imported pests and diseases such as the Mediterranean fruit fly and the Asian Longhorn Beetle, among other foreign threats. If these pests and diseases are not contained and eradicated, they have the potential to cause billions of dollars in agricultural production and marketing losses.

APHIS was created in 1971 within the USDA to consolidate many of the functions it performs today and enhance USDA's protective resources. Since its creation, the Agency has addressed a number of recurring and persistent challenges. For example, shortly after APHIS was created, APHIS had to address several animal health emergencies, which included an outbreak of Exotic Newcastle Disease in California in 1972 and a Hog Cholera outbreak in the Midwest and southern United States. At that time, these two outbreaks alone cost upwards of $56 million and took years to eradicate. The Agency has also handled various plant pest infestations occurring to the present day, such as the Mediterranean Fruit Fly in 1980-1982 and 1989-1990, which cost approximately $165 million to eradicate. There have also been outbreaks of Foot-and-Mouth disease and Bovine Spongiform Encephalopathy ("mad cow

disease"). The outbreaks are continuing and require substantial economic resources to control them.

In 1984, APHIS started its "beagle brigade" detector dog program with the assistance of the U.S. Customs Service to enhance its enforcement efforts at the ports of entry. APHIS established the program at Los Angeles International Airport with one team consisting of a beagle and a canine handler. After selecting beagles as the Agency's detector dogs, APHIS worked with the military at Lackland Air Force Base in Texas to train Beagle Brigade teams. APHIS also expanded the program to train canines for cargo inspection.

Prior to the Department of Homeland Security, the Plant Protection and Quarantine ("APHIS-PPQ") program in APHIS employed APHIS-PPQ Inspectors at the ports of entry, as well as other locations, to handle imported, interstate, and exported plant and animal issues associated with cargo, conveyances, and passengers. These import, export, interstate, domestic, and trapping functions were commonly known as the Agriculture Quarantine Inspection ("AQI") program. These functions were later divided between CBP and APHIS, which resulted in CBP Agriculture Specialists focusing solely on imported pests and disease threats at ports of entry.

Creation of the Department of Homeland Security

Following the creation of DHS under the Homeland Security Act of 2002, Pub. Law 107-296, Congress passed legislation to transfer the agriculture import and entry functions from USDA to DHS. See Section 421 of the Homeland Security Act of 2002, Pub. Law 107-296, 116 Stat. 2182 (passed on November 25, 2002) (codified as 6 U.S.C. § 231) (transferring certain agriculture inspection functions of the Department of Agriculture); For related authority with the transfer, see also 6 U.S.C. §§ 542 (presidential reorganization plan); 551(d)(discussing the transfer of personnel, assets, obligations and functions); 552(d)(savings provision authorities that apply to transferred personnel); and 557 (references to the transferred functions). Many of the APHIS-PPQ Inspectors who were formerly employed by APHIS at the ports-of-entry were transferred to CBP.

Under 6 U.S.C. § 231(b), CBP was authorized to enforce various legal authority including, the Plant Protection Act (7 U.S.C. 7701 et seq.) and the Animal Health Protection Act (7 U.S.C. 8301 et seq.), and the Lacey Act Amendments of 1981 (16 U.S.C. 3371 et seq.)(relating to endangered animals) and Section 11 of the Endangered Species Act of 1973 (16 U.S.C. § 1540).

February 28, 2003 Memorandum of Agreement Between the Department of Homeland Security and the Department of Agriculture.

Under the Homeland Security Act, the Secretaries of DHS and USDA were required to agree on various transfer-related matters within a specified time following the Act's passage. See 6 U.S.C. § 231(e). Both Agencies then entered into the February 28, 2003, Memorandum of Agreement between the Department of Homeland Security and the Department of Agriculture, which is

also known as the "Transfer Agreement." Article 2 of the Transfer Agreement addresses APHIS functions transferred to CBP; the functions retained by APHIS are discussed under Article 3. Generally, the APHIS staff at the ports of entry and those involved in importation functions were transferred to DHS. The surveillance, infrastructure, and plant inspection station assets remained with USDA.

The Transfer Agreement also addresses the issues of Personnel Training (Article 4), Transfer of Funds (Article 5), Cooperation and Reciprocity (Article 6), Regulations, Policies and Procedures (Article 7), and Agreement Revisions, Amendments, and Appendices in Article 10. More discussion of the Transfer Agreement is provided below.[3]

20.200 CBP Agriculture Operations Structure

Agriculture Programs and Trade Liaison under the Office of Field Operations.

Within CBP, the Office of Agriculture Programs and Trade Liaison ("APTL") in OFO oversees the Agency's CBP agriculture-related functions at Headquarters and is led by an Executive Director. APTL is the CBP Headquarters liaison with USDA since CBP enforces USDA rules and regulations and is guided by the Transfer Agreement.

There are five divisions in APTL, and each division is led by a director:

- Agriculture Safeguarding provides agriculture operations oversight and direction regarding agriculture inspections and safeguarding procedures for maritime cargo, air cargo, land border, passenger, and related operations. The division handles complex operational agricultural issues

[3] Article I (Purpose and Authorities) of the Transfer Agreement summarizes the purpose of the Agreement:

Historically, the USDA [APHIS] Agricultural Quarantine Inspection (AQI) program has focused mainly on preventing the introduction of harmful agricultural pests and diseases into the United States. Now, the threat of intentional introductions of these pests or pathogens as a means of biological warfare or terrorism is an emerging concern that the United States must be prepared to deal with effectively. Guarding against such an eventuality is important to the security of the Nation. Failure to do so could disrupt American agricultural production, erode confidence in the U.S. food supply, and destabilize the U.S. economy. The transfer of USDA agricultural inspectors, with their extensive training and experience in biology and agricultural inspection, provides DHS the capability to recognize and prevent the entry of organisms that might be used for biological warfare or terrorism.

Transfer Agreement at p. 1.

of national importance, coordinates with USDA concerning permits and export/transit safeguarding issues, facilitates anti-smuggling operations, oversees cargo release programs and agriculture related initiatives, and develops national selectivity criteria or user defined rules for agriculture-related targeting.

- Agriculture Policy and Planning oversees agriculture policy, planning, and guidance related to the CBP agriculture mission. This includes working with USDA and providing guidance to the CBP Agriculture Specialists.

- Agriculture Operational Oversight improves oversight functions to ensure consistency in agriculture inspection policy. This division serves as the point of contact for other Federal agencies, State agencies, and agriculture stakeholders. It also oversees the joint CBP/APHIS Quality Assurance Program, ensures compliance with agricultural directives and policies, and is involved in providing resources to CBP Agriculture Specialists and monitoring staffing and budgeting for agriculture programs.[4]

- The Fines, Penalties and Forfeitures Division oversees and works on policy for all aspects of the FP&F process. This division establishes national policy for seized property management, provides information for case processing, trains seized property and paralegal specialists, and surveys and assesses FP&F offices.

- The Agricultural/Biological - Terror Countermeasures Division is responsible for measures to prevent the entry of agriculture-related threats (people, equipment, bio-agents) from entering the country. This division is involved in creating partnerships, developing policies and procedures, conducting risk assessments, developing and using actionable intelligence, issuing bio-detection devices and providing special training to CBP.

[4] This office was created in response to concerns from Congress that DHS was not focusing enough on agriculture-related inspections. Some members of Congress proposed in March 14, 2007 to transfer DHS agriculture inspection functions at the ports of entry back to USDA, but that proposal was not pursued following discussions with DHS. See Farm, Nutrition, and Bioenergy Act of 2007, 153 Cong. Rec. S. 15622 (December 14, 2007)(statements by Senator Diane Feinstein); December 13, 2007 letter from Michael Chertoff, Secretary, Department of Homeland Security to Senator Diane Feinstein (announcing the creation of a new Deputy Executive Director for Agriculture Operation Oversight).

CBP Agriculture Field Structure

At the non-supervisory level, CBP Agriculture Specialists perform agriculture-related inspections at ports of entry on arriving passengers, conveyances, and cargo. At the management level, there is a Supervisory Agriculture Specialist and a Chief Agriculture Specialist position.

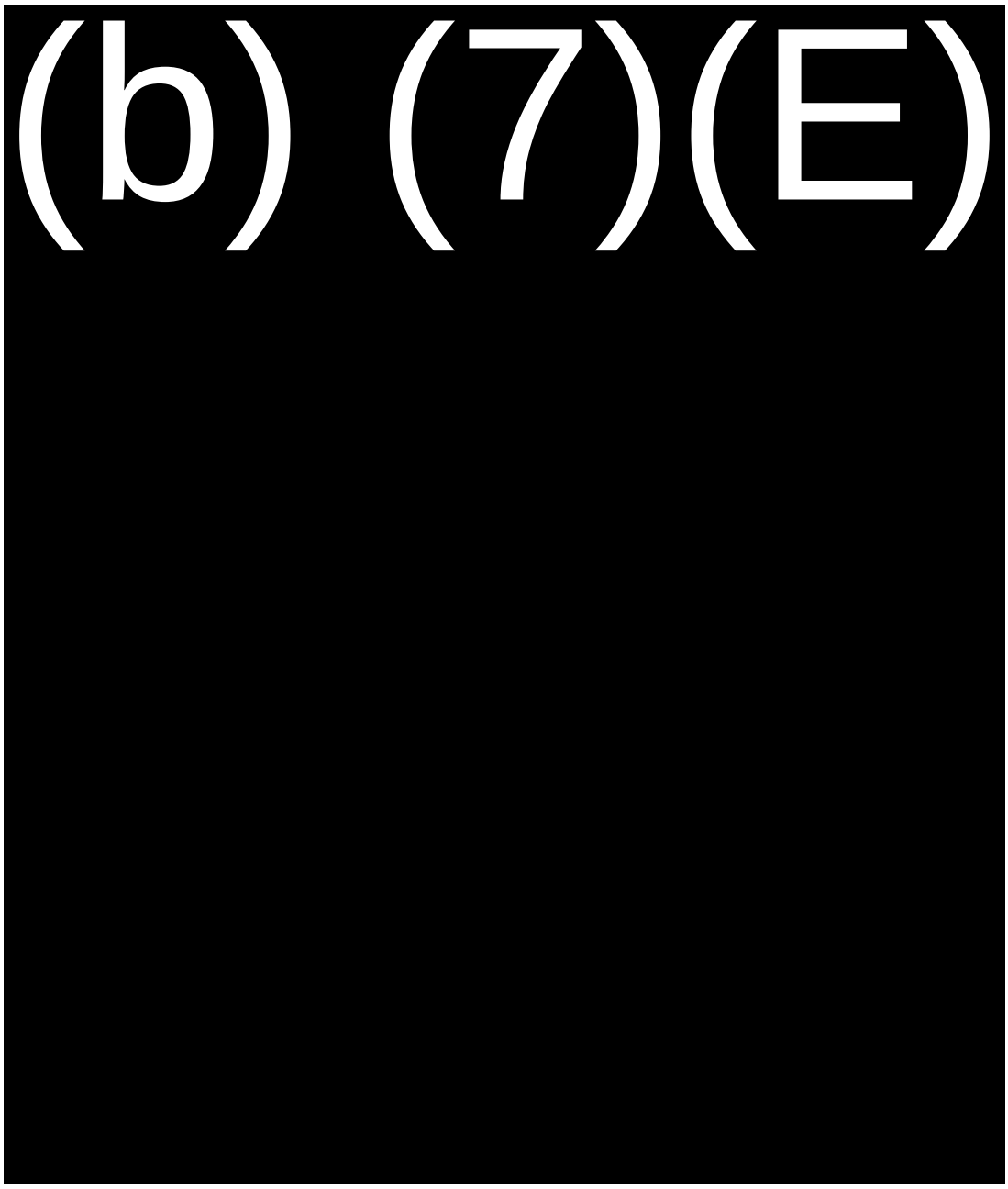
Each field office has an Agriculture program manager, also known as an operations specialist, who ensures uniformity, communicates with Headquarters on field agriculture programs, operations, and incidents, oversees agriculture data reporting for the ports, fixes problems if necessary, works with state agriculture departments and USDA in the field office region, and coordinates with counterparts in other field offices. The program manager typically reports to the Assistant Director of Field Operations (Trade).

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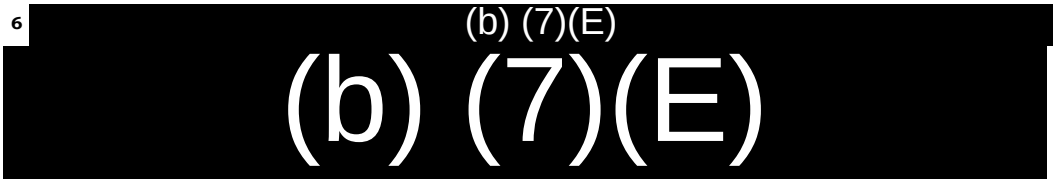
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20.400 Agriculture Specialist Legal Authority and Related Issues[7]

The authority of an Agriculture Specialist generally derives from the Plant Protection Act (7 U.S.C. § 7701 *et seq.*) and the Animal Health Protection Act (7 U.S.C. § 8301 *et seq.*).

The Plant Protection Act was enacted in 2000 to replace ten existing USDA plant health laws, including the Plant Quarantine Act, the Federal Pest Act, and the Noxious Weed Act. The Act contains the authority to regulate the importation, interstate movement, and exportation of plants, plant products, certain biological control organisms, noxious weeds, and plant pests.

The Animal Health Protection Act was enacted in 2002 and consolidated all of the animal quarantine and related laws, some dating back more than a century. The AHPA contains authority to enforce restrictions and prohibitions on the importation, entry, exportation or interstate movement of any animal, article or conveyance to prevent the dissemination of any pest or disease. See 7 U.S.C. §§ 8303-8305.

There are regulations that contain additional authority in various sections of Titles 7 and 9, Code of Federal Regulations. Under the above authority regarding the transfer of functions to DHS, CBP Agriculture Specialists enforce this USDA authority.

Operational Authority

Under 7 U.S.C. § 7731(b)(1), the Secretary of Agriculture may stop and inspect, without a warrant, any person or means of conveyance moving into the United States to determine whether the person or means of conveyance is carrying any plant, plant product, biological control organism, plant pest, noxious weed, or article subject to the Act. See also 7 U.S.C. 8307 (authorizing warrantless inspections of any person or conveyance moving into the United States or in interstate commerce to enforce animal health requirements). See Transfer Agreement, Article 2 and related appendices (listing the agriculture import and entry inspection functions transferred to DHS). Under Article 7 of the Transfer

[7] The authority in this section is separate from any Title 19 inspection, search, and seizure delegated authority that the Agriculture Specialists may have or receive. See Dept. of Homeland Security Delegated Authority to the CBP Commissioner, Delegation 7010.3; CBP Delegation 09-007 (December 21, 2009) (delegating authority from the Commissioner to various officials, including the Assistant Commissioner (Field Operations), to designate individuals or classes of individuals as Customs Officers under 19 U.S.C. § 1401(i); CBP Delegation Order 05-003, Inspection Functions by U.S. Customs and Border Protection Officers (June 17, 2005).

Agreement and related appendices, USDA retains responsibility for developing and issuing regulations, policies, and procedures covering agriculture functions transferred to DHS. DHS will also enforce agriculture requirements in consultation with USDA.

As part of their authority, CBP Agriculture Specialists are authorized to inspect and clear passengers, baggage, cargo, mail, foreign regulated garbage, and conveyances (cars, trucks, aircraft, vessels) for agriculture-related articles. See Transfer Agreement Articles 2 and 3 and related appendices; 7 C.F.R. Part 330 (containing agriculture inspection requirements to prevent the dissemination of plant pests into the United States); 7 C.F.R. § 330.105(a)(specific inspection authority); 7 C.F.R. §§ 330.212 and 352.12 (baggage inspection); 7 U.S.C. 7711(d) and 7 C.F.R. Part 351 (postal mail); 7 C.F.R. § 352.11 (mail transiting the United States).

Enforcing Import Requirements for Specific Agriculture Articles

Generally, agriculture articles should be cleared at the first port of arrival. See 7 C.F.R. § 352.10 and 330.105(a). Under 7 C.F.R. Part 319 (Foreign Quarantine Notices), there are specific import requirements and restrictions for a broad range of agriculture-related articles in order to prevent the introduction or dissemination of a plant pest or disease.[8] Some examples of the articles covered under this section include cotton, sugarcane, fruits and vegetables, corn, plants, logs, lumber, unmanufactured wood, and rice. Id. CBP enforces these requirements at ports of entry. See Transfer Agreement at Article 2 and related appendices.

APHIS Import and Transit Permits

In general, an import permit from APHIS may be required to import certain plants, plant products, animal products, and other articles covered under the Plant Protection Act. The permit may be a specific permit for the merchandise or a general permit or authorization. See 7 U.S.C. §§ 7701(7) and 7711(a)("no person shall import . . . any plant pest, unless the importation, entry, exportation, or movement is authorized under general or specific permit…."); 7 C.F.R. §§ 330.200-204(discussing permit application requirements, APHIS permit review, and the standards for denial for denial and cancellation of permits and reconsideration); 7 C.F.R. §§ 352.5 and 352.6 (additional permit requirements for imported agriculture-related articles). Specific permit requirements for an article are located under various legal and policy resources. For example 7 C.F.R. § 319.8-2 and 319.37-3 discusses permit requirements for

[8] In addition to foreign quarantine requirements, there are also regulations addressing domestic quarantine requirements and restrictions for the interstate movement of agriculture-related articles under 7 C.F.R. Part 301, but CBP does not enforce these requirements. See Articles 2 and 3 of the Transfer Agreement and related appendices; *Manual for Agricultural Clearance*, 1-1-4.

cotton, covers, bulbs, seeds, and other articles and 9 C.F.R. Part 93 discusses animal and animal products. See Article 2, Transfer Agreement. Some permits involve plant pests or noxious weeds (PPQ 526), imported soil (PPQ Form 525a), imported terrestrial plants (PPQ Form 621), imported plants for experimental purposes (PPQ 588), imported plants (PPQ 587), and imported timber or timber products (PPQ 585).

There are also specific labeling requirements for agriculture articles that require a permit. See 7 C.F.R. §§ 330.211(b) and 352.8. The permit may also require importation at a specific port because of specific pest-risk concerns associated with the article. See generally 7 C.F.R. §§ 352.9 and 352.10. There is authority to exempt articles from the permit requirements under 7 U.S.C. § 7711(c).

APHIS also issues transit permits for regulated agriculture articles moving through the United States to address concerns with pest dissemination during transportation. See 7 C.F.R. § 352.10(b); Transfer Agreement, Article 3 and related appendices. Transit permits can be used for agriculture articles moving in-bond through the United States under a Transportation and Exportation Entry (shipments that make entry through one port and then transit overland to exit through another port) or an Immediate Transportation Entry (shipments that enter the United States without clearance at the first port of arrival and then move to another port for final disposition). The transit permit will state the conditions of transit, which need to be followed to minimize prohibited plant pest dissemination. The transit permit is typically issued under PPQ Forms 586 or 597. Carriers of transiting merchandise may need to maintain a seal, provide refrigerated transport, observe the required transit routing, and provide export or import documentation. See Article 2, Transfer Agreement.

International Mail

The regulations for clearing international mail for agriculture purposes are located at 7 C.F.R. Part 351. Mail transiting the United States for delivery to another country is addressed in 7 C.F.R. § 352.11. Under this provision, inspection will not be required unless safeguard actions are required, and the inspection will be done under the authority of 7 C.F.R. Part 330 and consistent with applicable postal regulations.

Safeguard and Quarantine Actions

Many types of agriculture articles are either prohibited or restricted based upon the pest-risk associated with the merchandise. See 7 C.F.R. Part 319. To eliminate or reduce the risk of the importation of prohibited pests or plant or animal diseases, the regulations contain various authorities to implement safeguard measures. For example, there are treatments for agriculture articles, including methyl bromide, cold, heat, freezing, and irradiation. See 7 C.F.R. Part 305 (containing a listing of specific treatment procedures); 9 C.F.R. § 95.26 (authority for cleaning and disinfecting conveyances which have been used in the transportation, handling, or storage of restricted import products or materials).

Safeguarding involves the handling, monitoring, or disposing of prohibited or restricted products and articles to eliminate the risk of plant pest and disease dissemination. Safeguarding can include supervising transloading to ensure pests are not present in or around the shipment, applying physical barriers around the shipment to prevent the escape of a pest (e.g., salt barrier to prevent snail escape), ensuring that in-bond shipments are physically separated from domestic consignments, and using compliance agreements with storage and transload facilities.

Safeguards for imported or transiting agriculture articles is authorized under 7 C.F.R. § 352.10(b). This provisions states, "[t]he unloading, landing, retention on board as stores and furnishings or cargo, transshipment and exportation, transportation and exportation, onward movement to the port of entry as residue cargo or under a Customs entry for immediate transportation, and other movement or possession within the United States of prohibited or restricted products and articles under this part shall be subject to such safeguards as may be prescribed in the permits and this part and any others, which in the opinion of the inspector, are necessary and are specified by him to prevent plant dissemination." See also 7 U.S.C. § 7712(c)(3)(authority for the Secretary to issue regulations to require that any imported or exported plant, plant product, noxious weed, or conveyance be subject to remedial measures necessary to prevent the spread of plant pests or noxious weeds); 7 U.S.C. § 8303(c)(2)(A) ("[T]he Secretary may require the disinfection of a means of conveyance used in connection with the importation of an animal, an individual involved in the importation of an animal and personal articles of the individual, and any article used in the importation of an animal.").

Any safeguard measures directed by the inspector should be communicated to the owner in writing unless it is determined that the circumstances and related Customs procedures do not require written notice. See 7 C.F.R. § 352.10(b)(2). The safeguard measures should be the minimum necessary to prevent pest dissemination, and only approved insecticides should be used. *Id.*

Seals

As a safeguard measure to prevent the dissemination of plant pests, packages containing agriculture articles may need to be sealed during importation or transit movements through the United States. There are special requirements for the placement and the removal of the seals. See 7 C.F.R. § 330.110(a) ("[w]henever, in the opinion of the inspector, it is necessary, as a safeguard in order to prevent the dissemination of plant pests into the United States, or interstate, seals may be applied to openings, packages, or articles requiring the security provided by such seals."). The seals have specific markings, warnings, and special notice must be provided to the owner when attaching the seal.
7 C.F.R. §§ 330.110(a) and (b).

Compliance Agreements

CBP also enforces "compliance agreements" with entities that handle regulated foreign garbage, which may harbor exotic animal and plant pests and diseases. See 7 C.F.R. § 300.400. These agreements are contained in PPQ Form 519 and issued by APHIS. See Transfer Agreement, Article 2 and related appendices. This type of garbage is required to be destroyed as explained in further detail below. Any person engaged in the handling or disposing of foreign regulated garbage must first enter into a compliance agreement or PPQ Form 519 with APHIS, which sets out the obligations and requirements for maintaining requirements with the applicable APHIS regulations. APHIS can deny or cancel a compliance agreement. Should the entity not have a valid compliance agreement, the regulated garbage must be destroyed under direct CBP supervision. See 7 C.F.R. § 330.403.

Enforcement Actions

If an exotic animal or plant pest or disease is found, there is authority to withhold release from CBP Agriculture custody, treat, quarantine, or destroy the agriculture-related article. See 7 U.S.C. § 7714(a)("Authority to hold, treat, or destroy items . . . If the Secretary considers it necessary in order to prevent the dissemination of a plant pest or noxious weed that is new to or not known to be widely prevalent or distributed within and throughout the United States, the Secretary may hold, seize, quarantine, apply other remedial measures to, destroy, or otherwise dispose of them"); 7 U.S.C. § 7719 (authority to use methyl bromide as a treatment); 7 U.S.C. § 80303(c)(1) ("The Secretary may order the destruction or removal from the United States of any animal, article, or means of conveyance that has been imported . . . to prevent the introduction into or dissemination within the United States of any plant pest or disease of livestock. . . . "); 7 U.S.C. § 8306 (allows any animal, article or conveyance to be held, seized, quarantined, treated, disposed of, or destroyed in routine or emergency situations if there is reason to believe that it may have been carrying or exposed to a pest or disease); 7 C.F.R. § 330.106 (authority to take emergency measures); 7 C.F.R. § 352.3(a) ("Plants, plant products, plant pests, soil, and other products and articles subject to the regulations in this part that are unloaded, landed, or otherwise brought or moved into or through the United States in violation of this part may be seized, destroyed or otherwise disposed of in accordance with 7 U.S.C. § 7714").

To initiate these enforcement actions, the CBP Agriculture Specialist can issue Form CBP AI-523A (Emergency Action Notification).

The CBP Agriculture Specialist can use CBP Form AI-212 (Agricultural Inspection Hold) or send the information to the importer, broker, or freight forwarder electronically to advise that articles of agriculture interest are being held. If a shipment does not have an APHIS permit or phytosanitary certificate, CBP may refuse entry.

The owner of the article is responsible for paying the cost of the above enforcement measures. See 7 U.S.C. 7714(b)("[T]he Secretary may . . . recover from the owner the costs of any care, handling, application of remedial measures, or disposal incurred by the Secretary."); 7 C.F.R. § 330.107 ("All costs . . . incident to the inspection, handling, cleaning, safeguarding, treating, or other disposal of means of conveyance or products, articles, or plant pests under this part shall be borne by the owner"); See also *7 C.F.R. §§ 319.40-10; 352.14.*

Advance Notification of Arrival

The USDA regulations require advance arrival notification provisions, similar to 19 U.S.C. § 1433 and 19 C.F.R. Part 122 and 123. See 7 C.F.R. § 330.111 (advance notification of arrival of aircraft and watercraft); 7 C.F.R. 352.7 ("Immediately upon arrival of any shipment of plants or plant products subject to this part and covered by a specific permit shall submit . . . [a notice of arrival].").

20.500 Specific Plant, Plant Product, and Plant Pest Issues

Below are examples of plant-related issues that CBP Agriculture Specialists may encounter during inspection.

Regulated Wood Packing Material

The requirements for wood packing material ("WPM") are under 7 C.F.R. § 319.40-3, which discuss the requirements for pre-importation treatment and marking requirements as set by international standards for phytosanitary measures. WPM that is illegally imported can be subject to reexportation or other types of enforcement actions under 7 C.F.R. §§ 319.40-3(b)((3) and 319.40-9. The International Plant Protection Convention adopted international standards for WPM, which is called ISPM 15 and is being adopted by signatory countries in their import regulations

Noxious Weeds

The importation and permit requirements for noxious weeds is addressed in 7 C.F.R. Part 360. See 7 U.S.C. 7712(f) ("[T]he Secretary may publish, by regulation, a list of noxious weeds that are prohibited or restricted from entering the United States"); see also *Int'l Ctr. for Tech. Assessment v. Johannes*, 473 F. Supp. 2d 9 (D.D.C. 2007)(action challenging APHIS petition denial regarding the addition of a certain type of grass to the noxious weed list).

Avocados and Fruit from Mexico

The APHIS regulations impose conditions on the importation of avocados and fruit from Mexico because of historic concerns with infestations of various pests, including weevils, moths, and the Mexican fruit fly. See 7 C.F.R. 352.29 and

352.30; see also Avocados Transiting the United States to Foreign Countries, 52 Fed Reg. 27669 (July 23, 1987).

Various Plant Pests

- Emerald Ash Borer: The Emerald Ash Borer ("EAB") is a plant pest from Asia that destroys trees. See 7 C.F.R. § 319.40-5.

- Khapra Beetle: The Khapra Beetle, originally from India, is a resilient and very destructive pest that is easily transported shipping containers containing agriculture products. It feeds on and destroys various types of food including grains, seeds, fruits, and animal products. The beetle can live for several years without eating. The mere presence of the discarded Khapra Beetle shell is enough to cause CBP Agriculture Specialists concern. See 7 C.F.R. §§ 319.75 (quarantine measures); 330.106(d)(discussing emergency measures for this pest).

- Africanized Honey Bee: CBP Agriculture Specialists are vigilant for the Africanized honey bee ("AHB") on arriving vessels. AHB can be an aggressive bee compared to the European honey bee. See Manual for Agriculture Clearance, APHIS-PPQ, Section 3-3-8.

- Asian Gypsy Moth: CBP Agriculture Specialists are also vigilant for the Asian Gypsy Moth ("AGM"), a highly destructive tree insect, on arriving vessels, especially from ports in the Russian Far East and Japan, which are infested with the pest. See 7 C.F.R. § 319.77-1 (requirements for gypsy moth host material); Manual for Agriculture Clearance, APHIS-PPQ, Section 3-3-25.

- Mediterranean Fruit Fly: The Mediterranean Fruit Fly (or "Medfly") is also an invasive pest that destroys fruit crops. The agriculture regulations address quarantine measures to prevent additional infestations in the United States. See generally 7 C.F.R. §§ 319.28 and 319.56-1; Cf. Cactus Corner, LLC v. United States Dep't of Agric., 346 F. Supp. 2d 1075 (E.D. Cal. 2004)(action relating to the Mediterranean Fruit Fly, which challenges APHIS's partial authorization allowing the importation of the Spanish Clementine).

Foreign Regulated Garbage

Importation of foreign garbage is generally prohibited in order to prevent the entry and dissemination of plant pests and animal diseases, including livestock or poultry diseases. All foreign imported garbage, except from Canada, is generally covered under this prohibition. Other garbage that is commingled with foreign regulated garbage is also covered under this prohibition. See 7 C.F.R. §§ 330.400(a)(2) and 330.401(a)(2); accord 9 C.F.R. § 94.5(a)(2). There are exceptions to this prohibition for garbage imported by various conveyances. See 7 C.F.R. § 330.401(b) and (c); 9 C.F.R. § 94.5(c).

Once garbage arrives in the United States, it is either disposed of under the direct supervision of CBP or by an entity approved through a compliance agreement to dispose of the prohibited garbage. CBP is responsible for monitoring compliance agreements approved by APHIS and inspecting facilities operating under these agreements. See 7 C.F.R. § 330.403; 9 C.F.R. § 94.5(e) Under these agreements, the regulated party agrees to certain provisions concerning access to records, receptacles for removing garbage, and the transportation and disposal by APHIS-approved entities. See 7 C.F.R. § 330.403(b).

Common entities approved by APHIS to handle foreign garbage include airports, caterers, cleaners, cruise ships, fixed base operators, hauling/cartage firms, marinas, military facilities, and transfer stations.

Garbage is destroyed using one of several approved methods: incineration to ash; sterilization; or grinding and discharge into an approved sewer system. See 7 C.F.R. § 330.400(b)(defining the above disposal procedures); accord 9 C.F.R. § 94.5((b); *Manual for Agricultural Clearance*, p. 3-1-8.

In connection with this oversight function, APHIS has recently prohibited back-catering, which is explained above.

APHIS and CBP share the regulatory oversight for foreign garbage as agreed to in Articles 2 and 3 of the Transfer Agreement and related appendices.

20.600 Animal, Animal Product, and Animal By-Product Issues

CBP Agriculture Specialists enforce laws and procedures governing the importation of animals, animal products, and animal by-products to reduce the risk of introducing exotic animal pests and diseases into the United States.

There have been multiple legal authorities that address the importation of animal-related articles. For example, importation was prohibited of any fresh (frozen or chilled) meat of ruminant or swine from any country affected with foot-and-mouth disease or rinderpest. 19 U.S.C. § 1306(a)(repealed 2002). The following regulations are also applicable: 9 C.F.R. Part 93 (regulates the importation of live animals and birds); Part 94 (edible animal products such as meat, milk and milk products and eggs in addition to listing the disease status of foreign countries); Part 95 (inedible animal by-products, including bones, hides and skins, and also addresses the clearing and disinfection of carriers); and Part 96 (animal products that are imported to make casings). APHIS also issues policy guidance in this area under Veterinary Services ("VS") memos. Importation of these agriculture articles may require various VS importation or transit permits, depending upon the type of intended entry. A Foreign Meat Inspection Certificate under 9 C.F.R. § 327.4 may also be required.

The CBP Agriculture Specialist, who maintains primary control of the agriculture merchandise during importation, cooperates with other federal

agencies at ports of entry regarding the importation of animals, animal products, and animal by-products.

- The Agriculture Marketing Service regulates the commercial importation of shell eggs.

- The Fish and Wildlife Service regulates all non-farm animals and endangered animals.

- The Food and Drug Administration regulates medication or food intended for animals and certain meats.

- The USDA Food Safety and Inspection Service regulates meat, meat products, and shell eggs for breaking to make sure the products are safe, wholesome, and suitable for human consumption.

- The Public Health Service regulates non-human primates (dogs, cats, and monkeys), human tissues, serum, blood, secretions and excretions.

- APHIS Veterinary Services also regulates the foreign commerce of live animals.

CBP Agriculture Specialists are vigilant for various types of foreign animal diseases ("FADs"), which would cause an outbreak of disease, affect the health of animals, affect the quantity and quality of the food supply, and adversely affect international trade. Below are some common and well-known FADs, which can spread through ticks or contaminated tools, boots, clothing, or untreated garbage.

- Bovine Spongiform Encephalopathy ("BSE") is a neurological disease of ruminants that can affect humans if consumed through meat, commonly known as "mad cow disease." See *Ranchers Cattleman Action Legal Fund United Stock Growers of Am. v. USDA*, 499 F.3d 1108 (9th Cir. 2007)(challenging USDA decision to allow imported cattle products from Canada after a previous BSE outbreak).

- Classical Swine Fever ("CSF") is cholera that affects swine.

- Exotic Newcastle Disease ("END") is a viral disease of poultry. See 9 C.F.R. 94.6(c); (Cf. *United States v. 8,800 Pounds*, 551 F.3d 759 (8th Cir. 2008)(affirming judgment authorizing the destruction of egg whites related to END concerns).

- Foot-and-Mouth Disease ("FMD") is viral infection that affects ruminants and swine.

- H5N1 Avian Influenza Virus is an extremely infectious viral disease of poultry, including chickens, ducks, turkeys, and wild birds.

Endangered Species

CBP Agriculture Specialists may become involved in inspecting and enforcing requirements concerning the Convention on the International Trade in Endangered Species of Wild Fauna and Flora ("CITES"). See 19 C.F.R. § 12.26.

Many agencies enforce CITES import requirements, including the U.S. Fish & Wildlife Service, APHIS, and CBP. CBP typically handles the inspection of non-living CITES imports such as lumber, medicinal products and other related items at U.S. ports of entry. The illegal trade in traditional Asian medicines is one of the biggest threats to endangered species all over the world and is a major area of international crime.

20.700 Penalty and Forfeiture Authority

Plant Protection Act Penalties

The PPA provides for criminal penalties under 7 U.S.C. § 7734(a)(1), which contain both misdemeanor and felony provisions. Under 7 U.S.C. § 7734(a)(1)(A), "a person that knowingly violates [the Plant Protection Act], or knowingly forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided for in this title shall be fined under Title 18, imprisoned not more than 1 year, or both." Under 7 U.S.C. § 7734(a)(1)(B), "a person that knowingly imports, enters, exports, or moves any plant, plant product, biological control organism, plant pest, noxious weed, or article, for distribution or sale, in violation of [the Plant Protection Act], shall be fined under Title 18, imprisoned not more than 5 years, or both." "On the second and any subsequent conviction…, the person shall be fined under Title 18, imprisoned not more than 10 years, or both." 7 U.S.C. § 7734(a)(2).

The PPA also contains civil penalty authority. Pursuant to 7 U.S.C. § 7734(b)(1), "any person that violates [the Plant Protection Act], or that forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided for in [the Plant Protection Act] may, after notice and opportunity for a hearing on the record, be assessed a civil penalty by the Secretary."

The notice required by the statute is either the CBP Form AI-591 or the CBP Form AI-592. The CBP Form AI-591 is used for passenger and crew violations, and the CBP Form AI-592 is used for all other violations.

The hearing required by the statute is held before an Administrative Law Judge appointed by the Department of Agriculture pursuant to 5 U.S.C. § 3105.

The regulations at 7 C.F.R. Part 1, Subpart H set forth the rules of practice governing adjudicatory proceedings by the Secretary of Agriculture under various statutes, to include civil penalty proceedings instituted under the Plant Protection Act (7 U.S.C. § 7734).

The civil penalty assessed under § 7734 cannot exceed the greater of:

- $50,000 in the case of any individual (but no more than $1,000 in the case of an initial violation by an individual moving regulated articles not for monetary gain), $250,000 in the case of any other person for each violation, and $500,000 for all violations adjudicated in a single proceeding; or

- twice the gross gain or gross loss for any violation, forgery, counterfeiting, unauthorized use, defacing, or destruction of a certificate, permit, or other document provided for in this title that results in the person deriving pecuniary gain or causing pecuniary loss.

This is a strict liability statute. Culpable conduct is not needed to assess a civil penalty; however, the violator's level of culpability is a factor to be used in determining the amount of the penalty, as is the violator's ability to pay, the violator's ability to stay in business, prior violations, and any other factors the Secretary deems appropriate. 7 U.S.C. § 7734(b)(2). The Secretary shall also take into account the nature, circumstance, extent, and gravity of the violation. Id.

A person can be held liable under the statute for acts or omissions of an agent. 7 U.S.C. § 7734(c).

The Secretary may compromise, modify, or remit, with or without condition, any civil penalty assessed under this provision. 7 U.S.C. § 7734(b)(3). The Secretary's order assessing a civil penalty is to be treated as a final order reviewable under chapter 158 of Title 28, *i.e.,* 28 U.S.C. § 2342. 7 U.S.C. § 7734(b)(4).

Pursuant to 7 C.F.R. § 1.142(c)(4), the Administrative Law Judge's decision shall become final and effective without further proceedings 35 days after the decision is issued or served, unless there is an appeal to the Judicial Officer; *provided, however,* that no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

A "Judicial Officer", as defined in 7 C.F.R. § 1.132, is an official of the Department of Agriculture with authority delegated by the Secretary to perform the functions of the Secretary.

Under 28 U.S.C. § 2342, the court of appeals (other than the Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend, or determine the validity of all final orders of the Secretary of Agriculture under

Title 7, with a few exceptions. However, as set forth in 7 U.S.C. § 7734(b)(4), the validity of the Secretary's order may not be reviewed in an action to collect the penalty.

Pursuant to 28 U.S.C. § 2347(a), unless determined on a motion to dismiss, orders reviewable under chapter 158 of Title 28 are reviewed on the record of the pleadings, evidence adduced, and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.

The scope of judicial review by the court of appeals "is limited to the correction of errors of law and to an examination of the sufficiency of the evidence supporting the factual conclusions. The findings and order of the Judicial Officer [*i.e.,* Secretary] must be sustained if not contrary to law and if supported by substantial evidence." See *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 189 (1973).

Any civil penalty that is not paid pursuant to a final order shall accrue interest from the date due until the date paid. The interest rate is the rate applicable to civil judgments of the courts of the United States. 7 U.S.C. § 7734(b)(4).

The statute at 7 U.S.C. § 7734(d) provides that the Secretary shall coordinate with the Attorney General to establish guidelines to determine under what circumstances the Secretary may issue a civil penalty or suitable notice of warning in lieu of prosecution by the Attorney General.

Animal Health Protection Act Penalties

The AHPA contains criminal and civil penalty authority similar to the PPA. Under 7 U.S.C. § 8313(a)(1)(A), "a person that knowingly violates [the Animal Health Protection Act], or knowingly forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided for in this chapter shall be fined under Title 18, imprisoned not more than 1 year, or both."

Pursuant to 7 U.S.C. § 8313(a)(1)(B), "a person that knowingly imports, enters, exports, or moves any animal or article, for distribution or sale, in violation of [the Animal Health Protection Act], shall be fined under Title 18, imprisoned not more than 5 years, or both."

"On the second and any subsequent conviction…, the person shall be fined under Title 18, imprisoned not more than 10 years, or both." 7 U.S.C. § 8313(a)(2).

Regarding civil penalties, subsection 8313(b)(1) provides that with the exception of violations of 7 U.S.C. § 8309(d), "any person that violates [the Animal Health Protection Act] or that forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided for under [the Animal Health Protection Act] may, after

notice and opportunity for a hearing on the record, be assessed a civil penalty by the Secretary."

The notice required in the statute is either the CBP Form AI-591 or the CBP Form AI-592. The CBP Form AI-591 is used for passenger and crew violations, and the CBP Form AI-592 is used for all other violations.

The statutorily required hearing is held before an Administrative Law Judge appointed by the Department of Agriculture pursuant to 5 U.S.C. § 3105.

The regulations at 7 C.F.R. Part 1, Subpart H set forth the rules of practice governing adjudicatory proceedings by the Secretary of Agriculture under various statutes, to include civil penalty proceedings instituted under the Animal Health Protection Act (7 U.S.C. § 8313).

The civil penalty assessed under § 8313 cannot exceed the greater of:

- $50,000 in the case of any individual (but no more than $1,000 in the case of an initial violation by an individual moving regulated articles not for monetary gain), $250,000 in the case of any other person for each violation, and $500,000 for all violations adjudicated in a single proceeding; or

- twice the gross gain or gross loss for any violation, forgery, counterfeiting, unauthorized use, defacing, or destruction of a certificate, permit, or other document provided for in this chapter that results in the person deriving pecuniary gain or causing pecuniary loss.

Like 7 U.S.C. § 7734, this is a strict liability statute. Culpable conduct is not needed to assess a civil penalty. However, the violator's level of culpability is a factor to be used in determining the amount of the penalty, as is the violator's ability to pay, the violator's ability to stay in business, prior violations, and any other factors the Secretary deems appropriate. 7 U.S.C. § 8313(b)(2). When determining the amount of the penalty, the Secretary shall also take into account the nature, circumstance, extent, and gravity of the violation. Id.

A person can be held liable under the statute for acts or omissions of an agent. 7 U.S.C. § 8313(c).

The Secretary may compromise, modify, or remit, with or without condition, any civil penalty assessed under this provision. 7 U.S.C. § 8313(b)(3). The Secretary's order assessing a civil penalty is to be treated as a final order reviewable under chapter 158 of Title 28, *i.e.,* 28 U.S.C. § 2342. 7 U.S.C. § 8313(b)(4)(A).

Pursuant to 7 C.F.R. § 1.142(c)(4), the Administrative Law Judge's decision shall become final and effective without further proceedings 35 days after the decision is issued or served, unless there is an appeal to the Judicial Officer; *provided,*

however, that no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

Under 28 U.S.C. § 2342, the court of appeals (other than the Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend, or determine the validity of all final orders of the Secretary of Agriculture under title 7, with a few exceptions. However, 7 U.S.C. § 8313(b)(4)(B) provides that the validity of the Secretary's order may not be reviewed in an action to collect the penalty.

Pursuant to 28 U.S.C. § 2347(a), unless determined on a motion to dismiss, orders reviewable under chapter 158 of Title 28 are reviewed on the record of the pleadings, evidence adduced, and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.

The scope of judicial review by the court of appeals "is limited to the correction of errors of law and to an examination of the sufficiency of the evidence supporting the factual conclusions. The findings and order of the Judicial Officer [i.e., Secretary] must be sustained if not contrary to law and if supported by substantial evidence." See *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 189 (1973).

Any civil penalty that is not paid pursuant to a final order shall accrue interest from the date due until the date paid. The interest rate is the rate applicable to civil judgments of the courts of the United States. 7 U.S.C. § 8313(b)(4)(C).

The statute at 7 U.S.C. § 8313(d) provides that the Secretary shall coordinate with the Attorney General to establish guidelines to determine under what circumstances the Secretary may issue a civil penalty or suitable notice of warning in lieu of prosecution by the Attorney General.

Agriculture Civil Penalty Process

CBP Agriculture Specialists can assess civil penalties under 7 U.S.C. § 7734 and/or 7 U.S.C. § 8313 for various types of violations, to include the following:

- Regulated cargo that is moved without the proper treatment, inspection, or release;

- Transit Violations (regulated cargo that does not exit the country, deviates from approved transit corridor, or is exported outside the time allowed by the transfer permit);

- Foreign Garbage Violations (violations of the garbage regulations or a compliance agreement, e.g., caterer takes an in-flight meal home);

- Broken Seal Violations (broken APHIS-applied seal together with evidence that the seal was intentionally broken or tampered with during transit);

- Advance Notification of Arrival Violations (aircraft or vessel operator does not provide advance notification of arrival);

- Mail Violations (generally U.S. military mail together with a false declaration); and

- Passenger and Crew Violations.[9]

Upon discovery of a violation, CBP Agriculture Specialists provide notice of the violation and penalty to the violator using the appropriate CBP form. The CBP Form AI-591 is used for passenger and crew violations, and the CBP Form AI-592 is used for all other violations. CBP Agriculture Specialists have authority to settle certain penalties on the spot ("spot settlement"). This generally involves first-time violations. The amount of the spot settlement varies based upon the type and circumstance of the violation, but typically ranges between $500 and $2,000 for each violation. See *Manual for Agricultural Clearance*, Chapter 8 ("Violations"). In certain limited circumstances, CBP Agricultural Specialists, by policy, have authority to mitigate the penalty. If, for example, a passenger can demonstrate an inability to pay the penalty or that such penalty would cause undue hardship, the CBP Agriculture Specialist has authority to mitigate the penalty to between $75 and $175, depending upon the type and circumstances of the violation.

[9] A civil penalty can be assessed against passengers and crew members for smuggling, i.e., failing to declare certain regulated agricultural articles. A civil penalty can be assessed in this circumstance if the article is prohibited, requires treatment as a condition of entry, requires post-entry growing, requires a foreign certification and the passenger or crew member does not have the required certification, or if the article requires a written permit and the passenger or crew member lacks the requisite permit.

CBP, by policy, has determined that before a civil penalty can be issued to a passenger or crew member, three conditions must be met: (1) the person must have been given an opportunity to declare the article; (2) the person must have been given an opportunity to amend the declaration; and (3) there must be legal authority to assess the penalty. See Memorandum from the Executive Director, APTL, Office of Field Operations, Agricultural Civil Penalties Policy, dated October 4, 2007. CBP, by policy, has also determined that the agency can penalize the violator using the agriculture penalty authorities and CBP, in addition to such penalty, can penalize the violator under 19 U.S.C. § 1497 (failure to declare). See Memorandum from the Assistant Commissioner, Office of Field Operations, Seizure of Agricultural Importations, dated May 11, 2006. Certain individuals may be exempt from receiving an administrative penalty, including diplomats holding certain visas and minors not accompanied by an adult. See *Manual for Agricultural Clearance*, Chapter 8.

As part of the spot settlement process, the CBP Agriculture Specialist informs the violator that they have a right to a hearing. However, the violator is further advised that if they are found to be in violation at the hearing, the penalty amount pursued is typically higher than the spot settlement amount. The CBP Agriculture Specialist is to also inform the violator that spot settlement in the instant case has no bearing on future penalties and that the failure to pay the full amount of the spot settlement will result in the penalty case being forwarded to Investigative Enforcement Services, where collection of a potentially higher penalty will be initiated. If the violator elects to pay the spot settlement amount, the CBP Agriculture Specialist must have the violator sign the penalty notice (either the CBP Form IA-591 or CBP Form IA-592). By signing the form, the violator agrees to waive its right to the statutorily required hearing and pay the penalty.

Monies received for civil penalties under 7 U.S.C. § 7734 and & U.S.C. § 8313 are not controlled by any part of the CBP Fines, Penalties and Forfeitures collection process. Payment is to be made to the "Treasury of the United States" and deposited by CBP into the appropriate account. The CBP Fines, Penalties and Forfeitures Officer is NOT involved in the issuance, processing, or collection of agriculture penalties assessed under 7 U.S.C. § 7734 or 7 U.S.C. § 8313. But it can be involved if CBP decides to address the violation as a failure to declare violation under 19 U.S.C. § 1497. CBP policy memorandum, Seizure of Agriculture Importations, dated May 11, 2006.

If the violator refuses to pay or if CBP decides not to offer a spot settlement, CBP can refer the agriculture violation to APHIS-IES, which may refer the case to the USDA Office of General Counsel for collection action.

APHIS-IES can investigate the violations, using its administrative subpoena authority. See 7 U.S.C. § 7733 (PPA administrative subpoena authority); 8 U.S.C. § 8314(a)(2)(AHPA administrative subpoena authority). Evidence of a violation that may be collected can include samples from a garbage container, general declaration, a compliance agreement, warning letters and statements, airway bills, CBP entry documents, permits, and phytosanitary certificates.

APHIS-IES can decide to conclude the investigation by issuing an official warning under APHIS Form 7060, which states that future violations can result in criminal or civil penalty action. In the alternative, APHIS-IES can also refer the case to the USDA Office of General Counsel ("OGC") for administrative penalty action that would involve a hearing. OGC would receive a Report of Violation from APHIS-IES that could include a CBP Agriculture Specialist statement and would then decide whether to accept the case for collection. See Transfer Agreement, Articles 2 and 3 and related appendices; If accepted, OGC would use the above legal authorities and procedures to collect the penalty.

Forfeiture Authority

CBP policy memorandum, Seizure of Agriculture Importations, dated May 11, 2006, discusses forfeiture authority pertinent to CBP, which is discussed below.

See Seized Asset Management and Enforcement Procedures Handbook, CIS HB 4400-01A (January 2002).

According to this policy memorandum, CBP will seize smuggled agriculture merchandise pursuant to 19 U.S.C. § 1595a(c), citing the appropriate underlying law prohibiting or restricting the importation.

Unlike agriculture civil penalties, FP&F is involved in the seizure and forfeiture of agriculture articles. The FP&F Officer will issue the seizure notice and proceed with the destruction of the merchandise pursuant to 19 C.F.R. § 162.48. This provision allows for immediate destruction of perishable property. All such merchandise is to be destroyed at an APHIS-approved compliance facility.

Seizures involving smuggled agriculture merchandise must be referred to USDA's Investigative and Enforcement Services (IES). Also, all enforcement actions relating to smuggled agriculture merchandise should be referred to the Trade Enforcement Coordinator (TEC) for ICE's involvement.

A vehicle or conveyance used to facilitate smuggling of agriculture merchandise may be seized under 19 U.S.C. § 1595a(a), and common carriers used to facilitate smuggling of prohibited merchandise may be seized under 19 U.S.C. § 1594(c). However, prior to the seizure of a conveyance used to smuggle agriculture merchandise, the Office of International Trade, Seizures and Penalties Division, must approve the seizure of the conveyance.

For shipments involving commingled merchandise containing smuggled agriculture (violative) merchandise and non-violative merchandise, the seizing officer will exercise discretion to determine if the agriculture violative merchandise may be segregated from the non-violative merchandise. If the seizing officer has probable cause to believe that the non-violative merchandise was used to facilitate the smuggling of the agriculture violative merchandise (e.g., by concealing it), the officer may seize the non-violative merchandise under 19 U.S.C. § 1595a(a).

In cases involving prohibited but manifested or declared agriculture merchandise, the importer will be advised of the option to re-export or destroy the merchandise. The importer must advise CBP of the option chosen within a set timeframe. However, according to the memorandum, CBP will not allow the re-exportation of specific poultry products. Such products must be destroyed.

If the importer fails to comply within the established timeframe (including any extensions), or if the importer abandons the shipment, CBP will seize the merchandise pursuant to 19 U.S.C. § 1595a(c), citing the appropriate underlying law prohibiting or restricting the importation.

In addition to seizure of the property, CBP may also impose penalties under 7 U.S.C. § 7734 and/or § 8313.

Although the May 11, 2006 policy memorandum does not discuss CBP's seizure and forfeiture authority under 19 U.S.C. § 1497 for failure to declare, this statute provides another legal basis for forfeiture of agriculture merchandise. Under 19 U.S.C. § 1497, CBP has authority to seize the property and penalize the violator.

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